

**HIGH COURT OF DELHI: NEW DELHI**

**+ CRL. APPEAL NO. 234/2008**

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NITISH KUMAR @ PINKU @ BABLU ..... Appellant  
Through: Mr.S.M.Chopra,Adv.

Versus

STATE .....Respondent  
Through: Mr. M.P. Singh, Adv.

**Coram:**

**HON'BLE MR. JUSTICE A.K. PATHAK**

1. Whether the Reporters of local papers may be allowed to see the judgment? Not Necessary
2. To be referred to Reporter or not? Not Necessary
3. Whether the judgment should be reported in the Digest? Not Necessary

**A.K. PATHAK, J. (ORAL)**

1. Appellant has been convicted under Section 376 of the Indian Penal Code (IPC) by the learned Additional Sessions Judge, New Delhi; sentenced to face rigorous imprisonment for a period of seven years and pay fine of Rs.5,000/-; in default of payment of fine to further undergo rigorous imprisonment for a period of three months.

2. Briefly stated, prosecution case is that on the night intervening 22<sup>nd</sup> and 23<sup>rd</sup> September, 2004 Sub Inspector Ram

Babu Singh was on patrolling duty along with Constable Ram Kishore and when he reached near Patel Chowk at about 2:30 AM he found prosecutrix; a minor girl, along with appellant, in suspicious circumstances; On making enquiry she disclosed that appellant had raped her. Even, prior thereto she was raped by the appellant and his other friends. Prosecutrix could not give details of other boys, thus, they could not be apprehended.

3. On the statement of prosecutrix, FIR No. 238/2004 was registered at police station Parliament Street. Prosecutrix was medically examined at Lady Hardinge Medical College, New Delhi. As per the MLC hymen was found torn; doctor opined that recent sexual intercourse cannot be ruled out. There was no documentary evidence to indicate the exact age of the prosecutrix. As per radiological examination she was between 10 to 12 years of age.

4. Medical examination of the appellant was conducted at R.M.L. Hospital, wherein it was found that he was capable of performing sexual intercourse. Blood and semen samples of appellant were taken by the doctor.

5. Statement of prosecutrix under Section 164 of the Code of Criminal Procedure (Cr.P.C.) was got **recorded** before the

learned Metropolitan Magistrate, wherein prosecutrix corroborated her version, as contained in the FIR. Prosecutrix stated that she was resident of Utter Pradesh; her father was a rickshaw puller; she had gone to Amritsar along with her brother, where she was lost in the crowd. Thereafter she came to Delhi by a train and someone dropped her at Bangla Sahib Gurudwara. That the appellant and one Raj Singhanian met her there. They committed "*galat kaam*" with her after removing her clothes; while committing rape they also gagged her mouth.

6. Charge under Section 376 IPC was framed by the learned Additional Sessions Judge against the appellant on 13<sup>th</sup> January 2005 to which he pleaded not guilty and claimed trial.

7. Prosecution examined eleven witnesses in all. Prosecutrix was examined as PW1. Dr. Varsha Jain, who had medically examined prosecutrix, was examined as PW6. Dr. Amit Kochar, who had opined the age of prosecutrix between 10 to 12 years, was examined as PW7. Learned Metropolitan Magistrate, who had recorded the statement of prosecutrix under Section 164 Cr.P.C., was examined as PW11. Sub Inspector Ram Babu Singh and Constable Ram Kishore, who

found prosecutrix in the company of appellant in the odd hours in the night intervening 22<sup>nd</sup> and 23<sup>rd</sup> September, 2004 near Patel Chowk, were examined as PW4 and PW8 respectively. These were the material witnesses. All other witnesses are formal being police officials, who had participated in the investigation at one stage or the other.

8. After prosecution closed evidence, statement of appellant under Section 313 Cr.P.C. was recorded on 20<sup>th</sup> August, 2005, wherein entire incriminating evidence, which had come on record during the evidence, was put to him. Appellant denied it to be incorrect and claimed himself to be innocent. He stated that he had been falsely implicated. However, he did not examine any witness in his defence.

9. I have heard the learned Amicus Curiae for the appellant, learned counsel for the State and perused the trial court record, more particularly the deposition of PW1 prosecutrix. First of all, it is necessary to ascertain whether prosecutrix was minor on the date of incident. As per the prosecutrix herself she was raped outside the Gurdwara not only by the appellant but by some other boys as well. In case she is found major and healthy woman the whole case has to be viewed with different perspective as in such an eventuality

question regarding prosecutrix being a consenting party may have to be looked into. But in case she is minor, the consent would be meaningless.

10. In her statement under Section 164 Cr.P.C. prosecutrix had given her age as 10 years. This statement was recorded on 1<sup>st</sup> October, 2004. While deposing in the court on 26<sup>th</sup> February, 2005 she gave her age as 10 years. During the investigation, birth certificate of the prosecutrix was not collected by the Investigating Officer. Prosecutrix deposed that she was not attending any school. Thus, no documentary evidence was available on record to indicate the exact age of the prosecutrix. The only evidence is in the shape of medical evidence. Her age was determined on the basis of radiological examination. PW7 Dr. Amit Kochar proved the report given by the team of doctors regarding bony age of prosecutrix as Ex. PW7/A. He deposed that on 8<sup>th</sup> November, 2004 six number of x-ray plates of prosecutrix were examined by him along with Dr. Yasoda Rani and Dr. Atul Murari and on the basis thereof prosecutrix was found between 10 to 12 years of age. This witness was not even cross-examined by the appellant. There is no reason to disbelieve the statement of PW7 duly supported by Ex. PW7/A according to which, age of the prosecutrix was between 10 to 12 years of age as on the

date of incident. At the same time, it is also well settled that age determined through radiological examination is not accurate. It varies two years on either side. In *Jaya Mala vs. Home Secretary, Govt. of J & K*, reported in AIR 1982 SC 1297, it has been held that margin of error in age ascertained by radiological examination is to be taken as two years on either side.

11. In absence of any other documentary evidence, court has no option but to accept the age as determined through radiological examination but while doing so, it shall give margin of two years, that too for the benefit of accused. However, in this case even if this benefit is extended to the appellant, the age of prosecutrix would be at the most about 14 years. This shows that the prosecutrix was minor as on the date of incident.

12. I have perused the testimony of PW1 and find her to be trustworthy and reliable. Statement of PW1 has remained unshattered in her cross-examination and is in line with the prosecution story, as set up in the FIR, as also in her statement recorded under Section 164 Cr.P.C. From the version of the prosecutrix it is clear that she along with her brother had gone to Amritsar where she was lost in the crowd.

At the railway station she boarded another train and reached New Delhi Railway Station. She was a destitute minor girl, lost in a metropolis like Delhi and in search of a shelter she reached Bangla Sahib Gurudwara, where she was violated by unscrupulous and mischievous boys including the appellant. She was a helpless adolescent girl who had fallen prey to the lust of the appellant who in fact continued to exploit her till PW4 Sub Inspector Ram Babu Singh and PW8 Constable Ram Kishore intercepted them in the odd hours of about 2:30 AM near Patel Chowk. She being minor, illiterate and a small town girl probably could not do anything to fend away the appellant from sexually assaulting her. In her cross-examination prosecutrix categorically affirmed that accused had raped her; she confirmed that the police met her and saved her from the clutches of appellant. In my view testimony of PW1 is trustworthy and reliable and has been rightly accepted by the learned Additional Sessions Judge for convicting the appellant under Section 376 IPC.

13. Learned Amicus Curiae has failed to point out any discrepancy in the testimony of PW1, so as to make her testimony unreliable and untrustworthy.

14. I do not find any material illegality, impropriety or any infirmity in the impugned judgment and order on sentence, inasmuch as, learned Additional Sessions Judge has already taken a lenient view by awarding minimum sentence of seven years to the appellant as provided under Section 376(1) IPC.

15. Appeal dismissed.

**A.K. PATHAK, J**

**February 01, 2010**

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