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\* **HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.A. 19/2001**

Date of decision : 23.05.2008

# SUNIL ..... Appellant  
! Through : Mr. Rajesh Mahajan,  
Amicus Curiae appointed  
by Legal Aid along with  
appellant in person.

**Versus**

\$ STATE GOVT OF N.C.T OF DELHI. .... Respondent  
^ Through : Mr. O.P. Saxena, APP for the  
State.

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**CORAM:**  
**HON'BLE MS. JUSTICE ARUNA SURESH**

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not?
- (3) Whether the judgment should be reported in the Digest ?

**ARUNA SURESH, J. (Oral)**

1. Appellant faced trial in a case FIR No.162/99, Police Station Trilok Puri, New Delhi for having committed an offence under Sections 363/366/376 IPC. He was convicted vide judgment dated 28.09.2000 for offences under Section 363/376 IPC. Vide order dated 29.09.2000, the learned trial court was pleased to inflict imprisonment for a period of

seven years and fine of Rs.4,000/- in default six months SI for offence under Section 376 IPC and further to suffer rigorous imprisonment (RI) for a period of three years and fine of Rs.1,000/- in default one month SI for the offence under Section 363 IPC. Both the sentences were ordered to run concurrently and benefit under Section 428 Cr.P.C. was also given to the appellant. Appellant remained in custody for about two years and therefore his sentence was suspended and the appellant was released on bail during the pendency of the appeal.

2. I have heard Mr. Rajesh Mahajan, Amicus Curiae and Mr. O.P. Saxena, APP for the State and have also perused the record.

3. In her statement as PW2 prosecutrix admitted that she had told the appellant on his persistent questioning that she loved him. She also admitted that she had gone to Etta with the appellant on 24.04.1999 and there she married him in a temple. She maintained physical relationship with the appellant for about 1½ years in the house of one Ranjit. In her statement under Section 164 Cr.P.C. made before the Magistrate prosecutrix had stated that she had gone with the appellant to Khora of her own will and consent and from there they went to Etta and from there they went to Chillasi.

Thereafter they came back to Delhi. She also disclosed that she knew the appellant for about two years before the date of the incident and she was maintaining physical relationship with the appellant for about six months before the date of the incident. She did not disclose her relationship with the appellant to her parents. She further admitted that she had been maintaining this relationship of her own will and consent and also married the appellant in a temple on 24.04.1999.

4. Section 361 of the Indian Penal Code (IPC) defines kidnapping. This section has four ingredients to be fulfilled before the offence of kidnapping is made out against the accused persons, which are:-

1. Taking of enticing away a minor or a person of unsound mind.
2. Such minor must be under sixteen years of age, if a male, or under eighteen years of age, if a female.
3. The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.
4. Such taking or enticing must be without the consent of such guardian.

When these ingredients are complete, then only an offence of kidnapping is made out. In this case, the prosecutrix was minor being below 18 years of age. She was

taken out of lawful guardianship of her parents without their consent.

5. Now it is to be seen whether she was enticed away or taken away by the appellant/accused within the meaning of Section 361 IPC. Inducement of the accused to make the girl leave her home amounts to taking within the meaning of Section 361 IPC. However, there must be proof of taking. A man is not bound to return to his father's custody a minor girl who, without any inducement on his part, has left her parents house and joined his company, unless, there is evidence to show that accused took some active steps and persuaded the girl to leave her parents home. The word 'take' means to cause to go, to escort or to get into possession. In the case before me, the prosecutrix left her father's protection knowing and having capacity to know the full import of what she was doing and she voluntarily joined the appellant of her own free will. Under these circumstances, it cannot be said that appellant had taken away or enticed away the prosecutrix. No kidnapping is involved when the girl left her house voluntarily and joined the company of the appellant voluntarily. In this case, the prosecutrix while leaving her father's custody did not inform her parents that she was leaving the house and was going with the appellant. She

never raised any hue and cry. There is no evidence to indicate that she protested the action of the appellant in taking her away with him.

6. From the testimony of the prosecutrix it is evident that she was in love with the appellant. She ran away with him of her own free will, married him and maintained physical relationship with him voluntarily with her own consent. On the basis of the evidence adduced on the record offence under Section 363 IPC is not made out against the appellant. Even if the prosecutrix was minor on the date of the incident she was not enticed away by the appellant nor was forcibly taken away from the custody of her natural guardian her parents and even if the appellant took her away with him, it cannot be said that offence under Section 363 is made out.

7. Prosecutrix was minor on the date of the incident. As per the birth certificate and the school certificate, her date of birth was 20<sup>th</sup> December, 1985, therefore, on the date of incident she was about 14 years of age. As per ossification report, the doctor has determined her age between 14 to 16 years. This corroborates the age of the prosecutrix as disclosed in the birth certificate as well as in the school certificate. She being minor could not be a consenting party to her physical relationship with the appellant and therefore

the trial court has rightly convicted him under Section 376 IPC.

8. Hence, appeal is partly allowed. Appellant is acquitted of offence punishable under Section 363 IPC, whereas his conviction under Section 376 IPC is maintained. Learned counsel for the appellant has submitted that in view of the facts and circumstances of this case, the sentence inflicted upon the appellant be reduced to the undergone period.

9. In view of my discussion as above, the sentence inflicted upon the appellant under Section 376 IPC is hereby reduced to the extent of period already undergone by him. The order on sentence dated 29.09.2000 is hereby modified. The appellant shall deposit the fine of Rs.4,000/- as imposed within one week failing which he shall surrender himself before the trial court and face sentence of six months as inflicted upon him in default of payment of fine.

10. Appeal stands disposed of accordingly. Proof of deposit shall be produced by the appellant before the trial court. Attested copy of the order be sent to the concerned trial court.

**ARUNA SURESH  
(JUDGE)**

**May 23, 2008/vk**