

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Criminal Appeal No.1067/2008

Reserved on : 07.12.2009

Date of decision : 09.12.2009

NEKH PAL @ NEK PAL Petitioner

Through: Mr.Sumeet Verma, Amicus Curiae

versus

STATE Respondent

Through: Mr.Manoj Ohri, APP.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J.

1. Vide judgment dated 27.1.2006, the petitioner Nek Pal had been convicted along with co-accused Manoj under Sections 376 and 366/34 of the IPC. Vide order of sentence of even date, he had been sentenced to undergo RI for 10 years and to pay a fine of Rs.5000/- for each of the two offences; in default of payment of fine to undergo SI for one year for each offence; sentences

were to run concurrently.

2. Nominal roll of the petitioner has been called.

3. As on 25.11.2009, he has suffered a sentence of 7 years, 8 months and 17 days. Fine has not been paid.

4. The facts as emanating from the record show that prosecutrix Heena, on 17.3.2003, had accompanied Nek Pal and Manoj on being enticed by them with a promise of marriage by Nek Pal. She stayed with Nek Pal upto 21.3.2003, on 22.3.2003 she was recovered by the police

5. Niranjan Singh father of Heena had lodged a complaint with P.S. Khajoori Khas on 18.3.2003, that his daughter is missing since 17.3.2003; he suspected the role of Nek Pal and Manoj in her kidnapping. FIR under Section 363 IPC was accordingly registered. Investigation was marked to SI Omvir Singh. Prosecutrix was recovered from the house of Nek Pal on 22.3.2003, from village Karim Nagar, Distt. Hardoi U.P.

6. The prosecutrix was medically examined. In her medical examination she had stated that she had married the accused on 21.3.2003; no injury marks were found on her body; her hymen was found to be torn.

7. Accused Nek Pal had been charged along with his accomplice Manoj for offence under Section 366 read with Section 34 of the IPC. Nek Pal was separately charged under Section 376 of the IPC.

8. His statement under Section 313 of the Cr.P.C. was recorded; he stated that he is innocent and a false case has been framed against him; no evidence was led in defence.

9. Heena, prosecutrix had come into the witness box as PW-4. She on oath has stated that on the fateful day i.e. 17.3.2003, on her way to school Nek Pal met her; he threatened her with a knife and asked her to accompany him or else he would defame her; she accompanied him; she went to the house of his friend where she changed her uniform and wore the clothes provided by him; they went in a three wheeler scooter to Anand Vihar ISBT to take a bus to Hardoi; Manoj accompanied them upto the bus stop; at his village Nek Pal raped her. She was confined there for about for three days. She was medically examined.

10. In her cross-examination she has stated that she had gone with Nek Pal on her own accord and no force was used by Nek Pal upon her; he did not rape her; in the same breath she has denied the suggestion that Nek Pal did not commit rape upon her.

11. Admittedly she stayed at the house of Nek Pal for about three days; she had gone to the village of Nek Pal; in the bus on that day she met several persons; she did not lodge any complaint with any person.

12. The photographs D-1 and D-2 were shown to the witness wherein she admitted that these are photographs taken with

Nek Pal in his village where she appears to be happy and the said photos were taken with her consent. Letters Ex.D-3 and D-4 admittedly in the handwriting of Heena were also put to her; she had admitted that these were letters written by her to Nek Pal. Perusal of these letters show that there are intimate communications between Heena and Nek Pal, which are more than a stage of platonic friendship; they are intimacies exchanged between a couple in love.

13. Be that as it may, the prosecutrix was opined to be 15.2 years of age. This was pursuant to the birth certificate which had been produced by her father showing her date of birth as 6.1.1988 as per the records of the Municipal Corporation of Delhi i.e. establishing that the prosecutrix as on the date of offence i.e. 17.3.2003, was a minor i.e. aged 15 years and about 2 months. This part of the evidence of the age of the prosecutrix has not been challenged. It was thus fully established before the Trial Court that the prosecutrix was less than 16 years i.e. 15.2 years on the date of offence.

14. In these circumstances, consent of Heena was immaterial; whether she had consented to the acts of the accused or not were irrelevant.

15. Learned counsel for the accused has argued that the prosecutrix has admitted that she was married to the accused; in her version on oath she had deposed that she had enticed by

the accused with promise of marriage and this was the reason why she had accompanied him; in her MLC as per the history given by the prosecutrix she stated that she married the accused on 21.3.2003. It is submitted that the prosecutrix having married the accused cannot be sentenced for a period beyond two years or with fine or with both as is the penalty contained in Section 376 of the IPC. In this view of the matter, the petitioner already having suffered an incarceration for a period of 7 years and 8 months; he is entitled to be released forthwith.

16. This argument appears to have little force; the act of rape that had been committed upon the prosecutrix was prior in time to her so-called marriage with the accused. This is borne out from the record. As per prosecutrix in her history as depicted in the MLC she has stated that she had married the accused on 21.3.2003; on 22.3.2003 she had been recovered by the police. She had deposed that accused committed rape upon her on the preceding days i.e. period preceding her so called marriage with the accused i.e. period between 17.3.2003 to 21.3.2003. Even otherwise, it was on a false promise of marriage that the victim had been enticed by the accused; benefit of this provision is not available to the accused.

17. The conviction of the petitioner for the offence under Sections 366 and 376 of the IPC call for no modification. They

stand proved to the hilt.

18. However, keeping in view the fact that the petitioner has already undergone a substantive sentence i.e. sentence of about 7 years and 9 months as on date, as also the other factors i.e. the prosecutrix being almost at the age of discretion; she having accompanied the petitioner on a promise of marriage; photographs depicted the petitioner and the prosecutrix in happy moods; love letters written by the prosecutrix to the petitioner; the sentence requires a modification.

19. Accused is accordingly sentenced to the period of sentence already undergone by him. Fine has not been paid. Appeal is from jail and has been argued under the services of the Delhi High Court Legal Services Committee. Financial penury is the reason for the non-payment of fine. Accordingly, the sentence to be suffered by the petitioner in default of payment of fine will be included in the sentence already undergone by him. The petitioner be released forthwith, if not required in any other case. The appeal is allowed in the aforesaid terms.

20. A copy of this order be sent to the Jail Superintendent for making necessary modification in the records of the petitioner.

INDERMEET KAUR, J.

December 08, 2009
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