

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.A. No.452/2008**

Reserved on: 07.10.2010

Date of Decision 15.11.2010

IN THE MATTER OF :

MUKESH

..... Appellant

Through: Mr. Ajay Verma, Advocate with
Mr. Gaurav Bhattacharya, Advocate

versus

STATE

..... Respondent

Through: Mr. M.N. Dudeja, APP for the State

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* **HON'BLE MS.JUSTICE HIMA KOHLI**

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

HIMA KOHLI, J.

1. The present appeal arises out of the judgment of conviction dated 12.2.2008 and order on sentence dated 14.02.2008, whereunder the appellant was convicted under Sections 363/376/34 IPC in S.C.No. 267/06 arising out of FIR No.492/2005 registered with PS New Ashok Nagar, Delhi.

2. The incident, subject matter of the aforesaid judgment, occurred on 07.11.2005, when the prosecutrix who was a few days below 12 years, left for school and did not return home that day. As a result, her father lodged an FIR with the police. Subsequently, the father of the prosecutrix along with his brother and his nephew went to a village near Khatoli, U.P. and found the prosecutrix and the appellant in the house of the appellant's

married sister. They were brought to Delhi and sent for a medical examination, which revealed that the prosecutrix had been sexually assaulted.

3. The disclosure statement of the accused person was recorded and after the investigation was completed, a challan was filed before the court. Charges were framed against the appellant/accused who pleaded not guilty and claimed trial. In the trial, 14 witnesses including the prosecutrix, her father and brother were examined, whereafter the trial court arrived at the conclusion that a case of kidnapping and rape was established against the appellant/accused and that he had not been able to raise even an iota of doubt on the case of the prosecution, and further, that the evidence brought on the record was sufficient to hold him guilty and convict him for the offence under Sections 363 and 376 of the IPC.

4. As per the order on sentence dated 14.2.2008, the appellant was sentenced to undergo RI for a period of three years and to pay a fine of Rs.5,000/- for the offence punishable u/s 363 IPC and in default of payment of fine, he was directed to undergo simple imprisonment for a period of six months. The appellant was also sentenced to undergo RI for a period of ten years and to pay a fine of Rs.15,000/- for the offence punishable u/s 376(2)(f) IPC and in default of payment of fine, he was directed to undergo simple imprisonment for a period of one year. Both the sentences were directed to run concurrently and the benefit of Section 428 Cr.P.C. was given to the appellant for the period already undergone by him during the trial.

5. Counsel for the appellant stated at the outset that the appellant did not propose to assail the impugned order of conviction on merits and confined his submissions to the order of sentence by requesting that the

appellant be released by reducing the sentence to the period already undergone by him or to a lesser period. He stated that the appellant is disabled as he has a limp in his leg, a fact which has also been confirmed by PW-2 (complainant/father of the prosecutrix) in his testimony. The father of the appellant expired last year and now his family comprises of only himself and his two elder brothers. He stated that the conduct of the appellant in jail has been exemplary and he has been supervising the team working in the Tailoring Department of Tihar Jail. It is submitted that the appellant is a first time offender with clean antecedents and without any criminal history.

6. A perusal of the impugned judgment reveals that the appellant was a tenant in the house of PW-2 (complainant/father of the prosecutrix) for about two years. It is relevant to note that after examining the evidence on the record, the trial court concluded that the prosecutrix voluntarily accompanied the appellant from her school and the story of her abduction by the appellant on the point of knife, was rather hard to believe. The following observations made in the impugned judgment are relevant:-

"11. Defence argued that facts projected by Deepika are not at probable. Sh. Vijay Kumar argued that as per events unfolded, Deepika was dragged and made to board three wheeler scooter in front of her school, where school children, peon and other persons were present. It was not possible to drag a girl and bundle her in a three wheeler scooter. Her testimony to this effect that she was forcibly taken to a house in Harsh Vihar and thereafter to a village near Khatoli, U.P., is contrary to ordinary human behavior and tenets of veracity. Sh. Kumar argued that Deepika admits that she travelled in a public transport bus without raising any hue and cry. According to Sh. Kumar, these facts are suggestive that she was consenting party to the

entire episode. He made a claim that Deepika was above 16 years of age, hence competent to consent to sex. Coitus by Deepika with accused nowhere falls within the mischief of definition of rape, contained in Section 375 of the Penal Code. He claimed that no offence at all was committed by the accused, since Deepika had abandoned keeping of her father and went along with him of her sweet will. Contra to it, Ld. Prosecutor argued that Deepika had projected that she was abducted and taken to a village near Khatoli, U.P., on the point of a knife and sexually exploited there by the accused against her will.

12. For appreciation of arguments advanced by the rival parties, it is expedient to peruse facts unfolded by Kumari Deepika. She deposed that on 07.11.05 at about 6.30am, she went to Government Inter College Kundli, Delhi, for her studies. When she reached near her school, a three wheeler scooter reached there. Accused present before the Court along with a boy was present in the said scooter, besides the driver. She was dragged in the said scooter by the accused and taken to house of his friend. Accused had put a knife on her, when she was dragged in the scooter. In that house, none was present. She was made to change her dress. Accused took her school bag and kept it in the said house. From there she was taken to his sister's house in a village by a public transport bus. None was present in the house, when they reached there. She was raped by the accused. Sister of the accused and his brother-in-law (jija) came there. They asked the accused to leave her at her parents house. They stayed in that house for one night. During night hours, accused had again raped her. On 08.11.05, sister and brother-in-law (jija) of the accused left for their fields. In their absence, accused had again raped her during day hours. During evening hours, her father, uncle and brother of the accused reached there. They stayed there for that night. On 09.11.05, she along with the accused was brought to Delhi and produced before the Court. Her statement was recorded by

a Magistrate.

13. When facts testified by Deepika are assessed on standards of ordinary human behavior and tenets of veracity, it emerges over record that there is no probability in the events to the effect that she was dragged by accused in a three wheeler scooter and taken away on the point of a knife. She persuades the Court to believe that knife was shown to her, consequently, she could not raise an alarm for help. She had categorically testified that she left for her school at 6.30 am and reached there within 30 minutes. Therefore, it emerges out of her testimony that she reached her school around 7am. It was the time, when students reach school for morning assembly followed by class room instructions. At that time, students, teachers and other staff of school reach there. Testimony of Deepika, to the effect that in broad day light, she was dragged and bundled in a three wheeler scooter by the accused, is not in consonance with ordinary human behavior. A person would not dare to drag a girl in a three wheeler scooter, within the view of students, teachers and other staff of school. In case such a step was taken, it would have invited attention of public at large. Public would have reacted to the situation by stopping said three wheeler scooter and apprehending the accused or by giving a telephone call to the police control room. Deepika ought have resisted her abduction. She tells that since accused had put a knife on her, she had not raised an alarm for help. Her story in that regard is not probable. She tells that for a spell of thirty minutes, scooter went moving and thereafter she was taken into a room on second floor of a house. She was made to change her clothes there and then taken to a bus stand by a rickshaw. She did not try to invite attention of public at large on her way to bus stand. She hastens to add that in the bus accused had put a knife on her back and as such she did not raise any hue and cry. She admits presence of commuters in that bus. She tells that none in the bus could see knife in the hands of accused. She further tells that from bus stand, they walked to a distance of half

kilometre for reaching house of sister of accused. Neither on the way nor on reaching village, she had raised any hue and cry. All these circumstances are suggestive that Deepika had projected a story, which does not satisfy standards of veracity. It is not possible to abduct a girl from a place in front of her school, when other students are rushing there for their studies. Abducting a girl in broad day light is not at all possible in this metropolis city. Why her condition was not noticed by persons on road or commuters at bus stop, or in public transport bus on way to the village or in the village has not been explained by her. She tells that in the bus, she neither raised any hue and cry nor tried to invite attention of commuters towards her. She travelled in the public transport bus for a considerable long period. Her claim on that count is against natural course of events. She wants to persuade the Court to believe that on account of criminal intimidation extended to her, she had not raised any alarm, when she travelled in three wheeler scooter, rickshaw or public transport bus. She further tells that sister and brother-in-law (jija) of accused were present in the house, where she was raped. She does not tell as to why she had not unfolded her tale of woe before sister of the accused. Why she concealed that she was abducted by the accused and brought to that house, when she was confronted with sister of accused. She tells that she was kept in that house for two days, where accused had developed physical relations with her. She nowhere explains as to what persuaded her not to lodge a complaint to any of villagers about her plight. Why she had not made any complaint to sister of accused or her neighbours, when the lady with her husband went to fields. Her silence on this issue is suggestive that Deepika had provided embroidery to facts. Her testimony on its face value is not acceptable. When facts testified by Deepika are assessed through ordinary human behavior it smacks that she had given colour to her version. Had she not been a consenting party, she would not have gone silently to the house of friend of accused, without offering any resistance or raising a hue

and cry. She would not have boarded a rickshaw for reaching bus stand. She would not have boarded a public transport bus without offering resistance to the accused. Had she not been a party to the episode, she would not have travelled in the bus without inviting attention of commuters. In case she was not a consenting party to sensual game of flesh, she would have narrated facts before sister of accused or children present in the house. She would have lodged a complaint to the villagers about her plight, when she was subjected to forcible sexual exploitation. All these facts are suggestive that Deepika had accompanied accused Mukesh to house of his friend, changed clothes there, boarded a rickshaw, went to bus stand from where a public transport bus was boarded and then went to a village near Khatoli, U.P. She stayed there in that house for two days and had sex with him out of her sweet will.

14. Deepika nowhere speaks of inducement on the part of accused Mukesh Kumar, when she was made to board a three wheeler scooter and taken to the house of his friend. Her story of putting a knife on her person and abduction falls to the ground, when same was assessed on behavioural probabilities. She boards a three wheeler scooter, reaches a house in Harsh Vihar, changes her clothes and boards a rickshaw for reaching bus stand and thereafter boards a public transport bus and reached house of accused's sister in a village near Khatoli, UP....."

7. The aforesaid observations made by the learned ASJ are a pointer towards the fact that the prosecutrix was not forcibly taken by the appellant from Delhi to a village named Khatoli, UP, where his sister and brother-in-law were residing. Rather, the prosecutrix appears to have accompanied the appellant quite willingly and it was only later when her father, brother and uncle reached the house of the sister and brother-in-law of the appellant, and she returned with them to Delhi, that it was alleged

that the appellant had abducted the prosecutrix on the point of a knife and sexually exploited her against her will. The aforesaid facts and circumstances have been highlighted by the learned counsel for the appellant to plead that there exist mitigating factors in favour of the appellant for claiming reduction of the sentence imposed on him.

8. As per the nominal roll, as on 20.7.2010, the appellant had undergone imprisonment for a period of 4 years 7 months and 8 days. The remission earned by the appellant till then was 9 months 23 days. As on date, the appellant has undergone conviction for a period of 4 years and 11 months (approx.). As far as the jail conduct of the appellant is concerned, nothing adverse has been reported against him. There is no other case pending against the appellant, nor has he been convicted in any other case.

9. Having regard to the facts and circumstances of the present case and considering the fact that the appellant is a first time offender and has already undergone sentence for a period of 4 years and 11 months and also taking into consideration the fact that the appellant was about 22 years of age on the date of the incident, this Court is inclined to take a lenient view on the point of sentence.

10. The appellant has already suffered incarceration for nearly five years and this must have given him an opportunity to introspect and ponder over his act. A long period of incarceration may brutalize the appellant and blunt his finer sensibilities. It appears that if the period of sentence is shortened, the appellant can be well assimilated in the main stream of the society as a useful citizen, particularly since he has been doing useful work in the Tailoring Deptt. at Tihar Jail. In view of the aforesaid peculiar facts of the case, the young age of the appellant and considering the fact that he is

not involved in any other criminal case apart from the present one, no useful purpose would be served in requiring the appellant to undergo the entire period of sentence.

11. While upholding the order of conviction, the sentence imposed on the appellant under Section 376 (2)(f) IPC is modified and reduced to a period of six years. Further, both the sentences of fine are maintained and it is ordered that in default, the appellant shall undergo simple imprisonment for a period of three months for each offence.

12. The appeal is disposed of.

HIMA KOHLI,J

NOVEMBER 15, 2010
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