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IN THE HIGH COURT OF DELHI AT NEW DELHI
Crl. Appeal No. 169/2001

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Reserved on: 16th November, 2010

Decided on: 4th January, 2011

Babloo

..... Appellant

Through: Mr. Rajesh Mahajan, Adv.

versus

The State

..... Respondent

Through: Mr. Manoj Ohri, APP.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment?

Not necessary

2. To be referred to Reporter or not?

Yes

3. Whether the judgment should be reported
in the Digest?

Yes

MUKTA GUPTA, J.

1. By this appeal the Appellant challenges the judgment whereby he has been convicted for offences punishable under Section 366 and 376 IPC and sentenced to undergo Rigorous Imprisonment for a period of five years and to pay

a fine of ₹1,000/- and in default of payment of fine to further undergo Rigorous Imprisonment for six months and seven years and a fine of ₹2000/- and in default to further undergo Rigorous Imprisonment for one year respectively for the two offences.

2. As per the prosecution case, on 5th June, 2000 at about 6 pm, the Appellant went to the house of the prosecutrix and told her that her father had met with an accident and on hearing the same, she accompanied the Appellant to the place where he confined her in a jhuggi. He expressed his desire to marry her but, the prosecutrix told him that she could not marry him, without the permission of her father. It is alleged that the Appellant committed rape on her in the jhuggi, where she was kept by him. It is further the case of the prosecution that the accused took the prosecutrix to the Zoo on 15 June, 2000 where her father, mother and aunt met them and got the Appellant apprehended by the police. In the meantime, the brother of the prosecutrix lodged FIR at PS Kalyan Puri about her missing on the 15th June, 2000. The prosecutrix and the Appellant were got medically examined. The statement of the prosecutrix was recorded under Section 164 CrPC before the learned Metropolitan Magistrate wherein she stated that the Appellant used to threaten her, confined her in the jhuggi and raped her every night, contrary to her wishes. When the Appellant took her to the zoo, her mother, father and police were already present there and the Appellant was apprehended by them. After

completion of investigation, a charge sheet was filed. After recording the statement of the witnesses and examining the accused under Section 313 CrPC the learned Trial Court convicted him for the above mentioned offences and sentenced him as aforesaid.

3. Learned counsel for the Appellant stated that the testimony of the prosecutrix PW1, her father PW2 and aunt PW3 is replete with concealment, incorrect statements and does not inspire confidence. The prosecutrix had gone in a three wheeler and lived with the Appellant in a jhuggi. As she had gone willingly, she raised no alarm at any point of time. Moreover, no missing report was lodged by the family of the prosecutrix till she and the Appellant were apprehended at the zoo. It is admitted by PW1 and PW2 that the Appellant brought PW1 prosecutrix to the Zoo where her parents and aunt were already present and he was apprehended by the police. Thus, this was all preplanned. After the Appellant was arrested at the Zoo, the brother of the prosecutrix PW4 lodged the FIR at PS Kalyan Puri.

4. It is stated that the Appellant is related to the prosecutrix in as much as he is the son in law of her uncle and this fact has been admitted by PW2, the father of the prosecutrix, however, the prosecutrix denies knowledge thereof though in her statement recorded under Section 164 CrPC she has stated that the accused was son-in-law of her uncle. The CFSL result of the vaginal swab and the

clothe of the prosecutrix do not connect the Appellant with the alleged offence as neither the blood group of the Appellant matched nor any report thereof has been received. Mere presence of semen stains do not show that the Appellant committed rape on her. It is alleged by the Appellant that since his younger brother had refused to marry the prosecutrix, he has been falsely implicated in the present case. As regards the age of the prosecutrix, it is contended that no documentary evidence has been produced. As per the oral evidence of her father PW2, prosecutrix is stated to be 14 years of age whereas prosecutrix in her statement under Section 164 CrPC gives her age as 15 years and in the court at the time of her deposition she withheld her age. The brother in the FIR lodged gives her age as 15 years. The radiological examination gives the age of the prosecutrix as more than 14 years and less than 16 years. In view of the error of two years, on either side in this regard, the Appellant is entitled to the benefit of doubt. Reliance is placed on *Jaya Mala v Home Secretary, Govt of Jammu & Kashmir and Ors. 1982 SCC (Crl.) 502* and *Kulwant Singh v State (Govt. of NCT of Delhi) Crl. Appeal No. 715 of 2008 of Delhi High Court.*

5. In the alternative, it is contended that from the evidence on record, at best that can be adduced is that, it is a case of elopement and the girl went with the Appellant of her own free will and consent. It is urged that though this plea of consent had not been taken by the Appellant during the trial, however, in view of

the decision rendered by the Hon'ble Supreme Court in *Pratap Misra and Ors v. State of Orissa AIR 1977 SC 1307*, this plea can be taken even at the appellate stage.

6. It is further contended that even if this Court comes to the conclusion that the age of the prosecutrix is 16 years or below and thus incapable of giving consent, then the aspect that she willingly went with the Appellant should be taken note of while awarding the sentence. Reliance is placed on *Iqbal vs. State of Kerala JT 2007 (12) SC 311*, and *State of Punjab vs. Rakesh Kumar JT 2008 (9) 424*. Parity is also claimed to the decisions rendered by this court in *Puran Singh vs. State Crl. Appeal No. 300/2008* and *Guddu vs. State Crl. Appeal No. 229/2009* wherein the sentences were reduced to five years in similar circumstances. As per the nominal roll, the Appellant has already undergone a sentence of imprisonment for more than 5½ years including remissions and thus, his sentence be reduced to the period already undergone.

7. Per contra, learned APP for the State submits that the prosecutrix in her statement recorded under Section 164 CrPC and before the court has consistently stated that the Appellant took her from her house on a false pretext and then raped her. The version of the prosecutrix is corroborated by the MLC and the CFSL report which shows semen stains on the vaginal swab and the cloth of the prosecutrix, thus supporting the version of her being raped. The father of the

prosecutrix has stated that they had lodged a report for the inaction of the police in not lodging the missing report of the prosecutrix. The age of the prosecutrix has been opined by the doctor already giving benefit of margin of two years, i.e. more than 14 and less than 16 years, thus the consent of the prosecutrix is immaterial for the offences of kidnapping and rape. Relying on *State of U.P. v/s Manoj Kumar Pandey 2009 (1) SCC 72*, it is contended that merely because the prosecutrix was aged above 16 yrs, she cannot be held to be a consenting party and absence of explanation for lodging the FIR belatedly, does not per se apply to cases of rape. Thus, it is prayed that the appeal be dismissed being devoid of merit.

8. I have heard the learned counsel for the parties and perused the record. From the evidence on record, and the statement of the prosecutrix, it is evident that the prosecutrix was enticed by the Appellant on 5th June, 2000 at about 6 pm from her jhuggi however she lived willingly with the Appellant as despite opportunities, she raised no alarm. She stated that she could not marry the Appellant for want of her parents' permission. She was kept in a jhuggi and raped. On 15th June, 2000, the Appellant brought her to the Zoo where her parents and aunt were already present. During the cross examination, the prosecutrix has contradicted her earlier statements on the point of willingness in living with the Appellant. However, in view of the age of the prosecutrix being opined to be more

than 14 and less than 16 years, her consent is immaterial as her age is below 16 years.

9. As per the testimony of PW3 Smt. Shimla, besides her and the parents of the prosecutrix, the sister and the brother in law of the Appellant were also present at the Zoo when the prosecutrix was recovered. From the testimony of the witnesses it is apparent that the Appellant produced her to her parents on the 15th June, 2000, when this meeting had taken place, as a preplanned arrangement. As per PW8 SI Mahender Lal, he received the copy of the DD No. 13-A, at about 2 pm whereupon he went to the Zoo where the Appellant along with the prosecutrix, her parents and her aunt Shimla was present. On an inquiry made by him, he was informed that the Appellant had taken the prosecutrix on 5th June, 2000 from her house in Kalyan Puri. He apprehended the Appellant and took him and the prosecutrix to PS Kalyan Puri. A perusal of the FIR Ex.PW4/A lodged by the brother of prosecutrix about her missing shows that the same was lodged at 4:05 pm on 15th June, 2000 at PS Kalyan Puri. Thus, this FIR is lodged only after the prosecutrix was produced by the Appellant at the Zoo and the Appellant had been apprehended by the Police. The fact that FIR for her missing from 5th June, 2000 was lodged only on 15th June, 2000 when the prosecutrix was recovered does not belie the version of the prosecution that the prosecutrix was kidnapped and raped. In such cases, many a times it happens that to save the family honour the family

members do not come forward to lodge the complaint and make efforts to recover the girl at their own level as has been done in the present case. Be that as it may, I am of the opinion that in the present case, the non-lodging of the FIR or the missing report by the parents of the prosecutrix does not inure to the benefit of the Appellant.

10. The factum of sexual intercourse with the prosecutrix as stated by her is corroborated by the fact that immediately after her recovery she was medically examined and in her vaginal swab and cloth, semen stains have been found. Though, the blood group of the semen stains has not been detected, however, this fact is established beyond reasonable doubt that immediately prior thereto, the prosecutrix was in the company of the Appellant. The explanation rendered by the Appellant in his statement under Sec. 313 CrPC and as suggested to the witnesses is not plausible. The Appellant states that he had not taken the prosecutrix to the zoo. At the zoo, her parents and aunt and his relatives were present, the prosecutrix was called subsequently and he was falsely implicated.

11. In view of the conclusions arrived at, the judgment of the trial court convicting the Appellant for offences under Section 366/376 IPC cannot be faulted. Thus, in this appeal this court is not inclined to interfere with the judgment of conviction of the Appellant.

12. The quantum of sentence has to be decided after giving due consideration to the facts and circumstances of each case. For deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of relevant circumstances in a dispassionate manner by the court. In order to exercise the discretion of reducing the sentence below the statutory minimum, the requirement is that the court has to record “adequate and special reasons”. Learned amicus curiae has vehemently challenged the impugned judgment on the point of sentence. In this regard it would be proper to note that in the MLC, the history given by the prosecutrix herself is of absconding. The conduct of the girl in not cooperating in medical examination, the fact that the Appellant and the prosecutrix were related and known to each other prior to the incident are relevant. The conduct of the prosecutrix shows that the prosecutrix willingly went with the Appellant. All these factors persuades this court to take a lenient view in the matter of sentencing, by awarding a sentence less than the minimum prescribed to the Appellant. Taking into consideration all the facts and circumstances, the Appellant is sentenced to undergo imprisonment for the period already undergone which now comes to more than five years eight months, for offences punishable under Section 376/366 IPC.

13. The appeal is partly allowed. The sentence of the Appellant is modified to the period already undergone. The copy of this order be sent to the Appellant through the Superintendent, Jail. The Appellant be released forthwith if not required in any other case.

(MUKTA GUPTA)
JUDGE

JANUARY 04, 2011
‘raj’