

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL. A. No. 18/2007

Date of Decision : 21.11.2011

RAFIQ

..... Appellant

Through: Ms. Vidhi Gupta, Amicus
Curiae

Versus

THE STATE OF NCT OF DELHI

..... Respondent

Through: Ms. Ritu Gaba, APP

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

- | | | |
|----|---|----|
| 1. | Whether Reporters of local papers may be allowed to see the judgment? | NO |
| 2. | To be referred to the Reporter or not ? | NO |
| 3. | Whether the judgment should be reported in the Digest ? | NO |

V.K. SHALI, J.

1. There is no appearance on behalf of the appellant.
2. Ms. Vidhi Gupta, Advocate is incidentally present in the Court and she is appointed as Amicus Curiae in the matter and I proceed to hear and dispose of the matter.

3. It has attained only an academic interest. The appeal is filed by the present appellant against the judgment dated 20.04.2006 and the order of sentence dated 26.04.2006 holding the appellant guilty for an offence under Section 363/366/376 IPC.
4. Briefly stated the facts of the case are that one Shweta Mal is alleged to have been abducted by Rafiq the present appellant on **22.10.2005**. The appellant is alleged to have taken the prosecutrix to his home which was hired at Noida in a public transport and lived for **one month and seven days there**. During this period, it has been alleged that the appellant had made physical relationship with Shweta Mal. The father of the prosecutrix one Gau Prasad lodged initially a report regarding missing of his daughter, and thereafter, made a complaint that she has been kidnapped by one Rafiq and he is threatening him. In the meantime, the prosecutrix was recovered and her statement was recorded under Section 164 Cr.P.C. wherein she had

admitted having sexual intercourse with Rafiq with her own consent. The matter was investigated by the police and thereafter a challan was filed against the appellant under Section 363/366/376 IPC.

5. The prosecution in support of its case examined prosecutrix/PW-1, Prem Shankar Sharma PW-2, Pramod PW-3, Gau Prasad PW-4, Ashok Kumar, Constable PW-5, Sumitra ASI PW-6 and Suman Kumar SI/PW-7 and various documents were proved regarding the age of the prosecutrix. After recording of the statement of the appellant and hearing the arguments of the counsel for the parties, it held the appellant guilty for an offence of kidnapping a person under Section 363 IPC, kidnapping a woman with an intention to seduce and have intercourse under Section 366 IPC and subjecting her to rape. The time of incident that the prosecutrix was 15 years 7 months and 27 days old, and she had stated that she was competent enough to consent to have sexual intercourse with the appellant/accused. After holding

the appellant guilty for an offence under Section under Section 363/366/376 IPC, the learned Additional Sessions Judging had taken a lenient view on account of the young age and clean antecedents of the appellant/accused and the fact that a consented sex was performed by the prosecutrix. The appellant was sentenced to 4 years of RI for an offence under Section 376 IPC apart from fines were also imposed.

6. I have heard Ms. Vidhi Gupta, the learned Amicus Curie who has stated that the appellant was not guilty of committing offence of rape in as much as the prosecutrix has made a statement under Section 164 Cr.P.C. that she had voluntarily established physical relationship with the appellant. It has also been stated by her that the prosecutrix on the date of incident was more than 15 years of age, and therefore, though she was less than 16 years of age but she was competent enough to take a decision regarding her welfare and she had sex with the

appellant of her own freewill, no fault can be found with the same.

7. The learned APP has contended that the consent of the prosecutrix was immaterial in as much as admittedly she was less than 16 years at the time when the incident is purported to have been taken place, and therefore, the establishment of physical relationship is of no consequence.
8. I have gone through the judgment and the order of sentence as well as the nominal roll of the convict.
9. The learned Additional Sessions Judge has rightly convicted the appellant on the basis of evidence which has been adduced by holding that the prosecutrix though may be of 15 years 7 months and 27 days old but as she was less than 16 years of age her consent was immaterial, and therefore, the establishment of physical relationship by the prosecutrix with the appellant was prohibited by law and it constitutes rape within the definition of Section 376 IPC. The learned Additional

Sessions Judge has rightly given concessions to the appellant on account of these peculiar facts and circumstances by observing that the appellant's sentence should not be minimum of seven years for the good and adequate reasons which in the instant case was the consent of the prosecutrix for the physical relationship.

10. I do not find any infirmity and illegality both either in the judgment and the order of sentence which calls for any interference by this Court. Even otherwise the appellant has already been under gone 4 years of sentence and he is stated to have released from the Central Jail as given in the nominal roll dated 26.01.2009 after completing his sentence. If that be so the appeal of the appellant has only become of an academic interest which has no meaning.
11. For the reasons mentioned above, I feel that the appeal of the appellant does not have any merit so as to warrant any interference by this Court against the judgment dated 20.04.2006 and the order of sentence dated

26.04.2006. Accordingly, the present appeal is dismissed.

NOVEMBER 21, 2011
KP

V.K. SHALI, J.