

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.A. No. 889/2006**

Date of Decision 05.04.2011

IN THE MATTER OF :

ANTHONY

..... Appellant

Through: Mr. V.M. Issar, Advocate

versus

THE STATE (NCT GOVT. OF DELHI)

..... 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 (Oral)

1. The present appeal arises out of the judgment of conviction dated 14.9.2006 and order on sentence dated 16.9.2006, whereunder the appellant was convicted under Sections 363/366/376 IPC S.C.No. 160/05 arising out of FIR No. 44/2004 registered with PS Gulabi Bagh, Delhi and sentenced under section 363 IPC to undergo rigorous imprisonment for a period of 3 years and pay fine of ₹1,000/-, in default thereof, to undergo rigorous imprisonment for a period of 1 month; under section 366 IPC to undergo rigorous imprisonment for a period of 5 years and pay fine of ₹1,500/-, in default thereof, to

undergo rigorous imprisonment for a period of 2 months; and under Section 376 IPC to undergo rigorous imprisonment for a period of 7 years and pay fine of ₹2,500/-, in default thereof, to undergo rigorous imprisonment for a period of 3 months. All 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.

2. The incident, subject matter of the aforesaid judgment, occurred on 24.02.2004 at 1 am, when the mother of the prosecutrix got DD no. 3 registered at police post Andha Mughal of PS Gulabi Bagh stating that her daughter, the prosecutrix was missing from 23.02.2004 since 2 pm and that she did not return home from her tuition class. On the same day, at 11.30 pm, the prosecutrix was dropped by the appellant at Police Post: Andha Mughal. After a gap of one week from the date of the incident, on 1.3.2004, the prosecutrix, accompanied by her mother, came to the police station and gave a statement (Ex. PW-2/A) that on 23.2.2004 at about 2 pm, the appellant, who was her neighbour, duped her into sitting on his scooter, on the pretext of dropping her at her tuition place. Thereafter, as per the prosecutrix, he took her to various unknown places, committed rape on her and threatened her that he would kill her, if she disclosed what had happened to anyone. On the next evening, he brought the prosecutrix back to police post Andha Mughal. Based on the statement of the prosecutrix, FIR No.44/2004 was registered with PS Gulabi Bagh. Subsequently, the appellant was arrested and both

the prosecutrix and the appellant were medically examined and their swab slides and clothes were sent to the FSL for examination.

3. After the investigation was completed, a challan was filed before the court of the learned MM, who committed the case to the court of Sessions. Charges were framed against the appellant/accused under Sections 363/366/376 IPC, to which the appellant pleaded not guilty and claimed trial. In the trial, 16 prosecution witnesses were examined including the mother of the prosecutrix (PW-1) and the prosecutrix herself (PW-2). Statement of the appellant was recorded under Section 313 CrPC, and three defence witnesses were examined in defence evidence. On an examination of the evidence which came on record, the trial court arrived at the conclusion that the said evidence was sufficient to hold the appellant/accused no. 1 guilty of kidnapping and rape under Sections 363/366/376 IPC and thus convicted him for such offences. Hence the present appeal.

4. At the outset, counsel for the appellant submits that the appellant does not propose to assail the impugned order of conviction on merits and would like to confine his submissions in the appeal, to the order of sentence alone, by requesting that the sentence of the appellant be reduced to the period already undergone by him.

5. Counsel for the appellant states that at the time of the incident, the appellant was a young man of the age of 23 years. He submits that the appellant and the prosecutrix are both Christians and were neighbours. He suggests that the possibility of the prosecutrix

having consented to sexual intercourse cannot be ruled out entirely, especially since even the learned ASJ had found force in this submission, based on the conduct of the prosecutrix in not raising an alarm and not making a complaint to anyone during the period she was with the appellant. In spite of this finding, having regard to the age of the prosecutrix, which at the time of the incident was 14 years and 3 months, the appellant was held guilty of rape. He further submits that even the conduct of the appellant in bringing the prosecutrix back to the police post Andha Mughal suggests that the prosecutrix had willingly gone with him. He has also drawn the attention of this court to the MLC report of the prosecutrix dated 1.3.2004, to submit that the same indicates that there were no marks of external injury on the body of the prosecutrix and that she had an old torn hymen.

6. Counsel for the appellant suggests that there are several other mitigating factors, which may be taken into consideration for reduction of the sentence of the appellant to the period already undergone by him. He states that the appellant is a first time offender with clean antecedents, and without any criminal history, his father who is a daily wager doing the job of painting houses, is suffering from tuberculosis, and there is no other earning member in his family who can take care of his father. He further submits that the appellant's family is in a poor economic condition and the appellant is not in a position to pay the fine ordered by the learned ASJ in the order of sentence.

7. Counsel for the appellant has also drawn the attention of

the court to the fact that the prosecutrix has in the meantime got married and is happily settled. He places reliance on the decision of the Supreme Court in the case of Ram Kumar v. State of Haryana reported as **(2006) 4 SCC 347**, where in case of a conviction on rape, the sentence was reduced as the prosecutrix had got married and was settled. The father of the prosecutrix is present in Court and hands over a copy of the ration card to identify himself. He unequivocally states that he has forgiven the appellant and now he bears no ill-will or grudge against him. He further submits that he is not opposed to the reduction of the sentence of the appellant to the period undergone.

8. As per the nominal roll, as on 1.4.2011, the appellant has undergone imprisonment for a period of 5 years, 02 months and 14 days, the remission earned by him is 1 year, 07 months and 04 days. As on date, the appellant has undergone conviction for a period of 6 years, 09 months and 18 days, leaving the unexpired portion of his sentence as 02 months and 12 IFP. As far as the jail conduct of the appellant is concerned, the same is indicated as satisfactory. There is no other case pending against the appellant, nor has he been convicted in any other case.

9. Having regard to the fact that the appellant is a first time offender and has already undergone sentence for a period of approximately 6 years and 9 months, including the period of remission and also considering the fact that the prosecutrix is happily married and her father has forgiven the appellant, in the peculiar facts and circumstances of the present case, a lenient view is taken with respect

to him. Furthermore, it is expected that the purpose of reformation, with regard to the appellant, would have been sufficiently served in a period of incarceration extending over 6 years. In view of the aforesaid facts and circumstances of the case and considering the fact that the appellant is stated not to be involved in any other criminal case apart from the present one, and it also appears that if released, he can be well assimilated in the main stream of the society as a useful citizen, this Court is of the opinion that no useful purpose shall be served in requiring the appellant to undergo the remaining portion of the sentence.

10. Therefore, while upholding the order of conviction, the sentence imposed on the appellant is modified to the extent that it is directed that the appellant be released by reducing the sentence to the period already undergone by him. As regards the fine of ₹5,000/- imposed on the appellant under the order on sentence, taking into consideration the financially weak background of the appellant and his family, in lieu of the fine imposed on him, the appellant is admonished.

11. The appeal is disposed of.

A copy of this order be forwarded forthwith to the Jail Superintendent for perusal and compliance.

April 05, 2011
pm

(HIMA KOHLI)
JUDGE