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

+ CRL. A. 438/2011

Decided on 8th August, 2012

SANDEEP

..... Appellant

Through: Mr. Deepak Vohra, Adv.

versus

STATE

..... Respondent

Through: Mr. Mukesh Gupta, APP

CORAM:

HON'BLE MR. JUSTICE A.K. PATHAK

A.K.PATHAJ, J. (ORAL)

1. Trial court has convicted the appellant under Sections 376/363 IPC; sentenced to undergo rigorous imprisonment for 7 years with fine of Rs.2,000/- and in default of payment of fine to face simple imprisonment of 6 months under Section 363 IPC; rigorous imprisonment of 5 years with fine of Rs.1,000/- and in default of payment of fine to undergo simple imprisonment for 3 months under Section 363 IPC. Both the sentences have been directed to run concurrently, inasmuch as, benefit of Section 428 Cr.P.C. has been accorded to the appellant.

2. Aggrieved by his conviction as also the quantum of sentence, appellant has preferred this appeal.

3. Prosecution case, as emerges from the record, is that the appellant had kidnapped the prosecutrix aged about 13 years on 7th July, 2007, kept her with him for about 11 days and committed rape on her during this period. Prosecutrix and the appellant were apprehended from Sarai Kale Khan, Bus Stand on 8th August, 2007 by the police officials on the pointing of the father of prosecutrix.

4. During the course of hearing, conviction of the appellant has not been challenged on merits. However, learned counsel has prayed for leniency in the sentence on the ground that the appellant was himself young in age and bachelor at the time of incident; he was neighbour of the prosecutrix; prosecutrix was in love with the appellant and had accompanied him of her own volition; he has no previous criminal record, inasmuch as, has to support his aged and ailing parents living in the village.

5. Though, conviction has not been challenged on merits but still to satisfy myself with the correctness of the impugned judgment I have perused the same as well as the Trial Court Record carefully and find that the prosecutrix was less than 16 years of age at the time of incident. In her statement under Section 164 Cr.P.C. prosecutrix had given her age as 15 years. In the FIR, father of prosecutrix has given her age as 13 years. As per the birth certificate Ex.P-1 issued by Sub

Registrar (Birth & Death) Shahdara Zone, Delhi, the date of birth of prosecutrix is 2nd March, 1997; meaning thereby she was about 11 years of age at the time of incident. As per the ossification report, prosecutrix was between 13 to 14 years of age. Documentary evidence in the form of her birth certificate which has been duly proved by producing witness from the Sub Registrars' office, has to be preferred as against the ocular and medical evidence. From the evidence adduced on record, it is clear that prosecutrix was less than 16 years of age as on the date of incident.

6. In her statement under Section 164 Cr.P.C., prosecutrix has stated that she was in love with the appellant. She had accompanied him on 7th July, 2007 of her own free will and volition. She stayed with him in the village Firozadabd, Uttar Pradesh of her own free will. On 18th August, 2007 she came to Delhi along with the appellant and was present at the bus stand when her father, who was there along with the police officials, saw them and on his pointing police officials apprehended the appellant. Her father was forcing her to marry with a man aged about 45 years, thus, she went away with the appellant of her own free will. Though, in her subsequent statement as also in her deposition, she has changed her this version by saying that the statement under Section 164 Cr.P.C. was made by her under the

influence of appellant as also on account of threats given by his brother but still the overall reading of her deposition makes it clear that she was a consenting party. In spite of the fact that the appellant was unarmed during the period of 11 days when she stayed with him she neither raised any alarm nor made any effort to escape or complain anyone that the appellant had brought her forcibly and was keeping her with him against her wishes. She had accompanied the appellant in crowded buses and was found roaming with him in a crowded place when she was apprehended but in spite of this she did not raise any alarm, which also indicates that she was a consenting party.

7. However, her consent is immaterial as regard to the offence under Section 376 IPC is concerned, in view of the Clause Sixthly of Section 375 IPC which envisages that a man is said to commit 'rape' who has sexual intercourse with a woman with or without her consent, when she is under sixteen years of age. Even exception to Section 375 IPC envisages that sexual intercourse by a man with his own wife who is less than 15 years of age is 'rape'. From whichever angle the matter is viewed, the act of appellant, in view of the age of the prosecutrix would amount to rape. Accordingly, conviction of appellant under Section 376 IPC otherwise, cannot be interfered with,

in the facts of this case and is maintained.

8. As regards offence under Section 363 IPC is concerned, the same is not made out in view of the fact that the prosecutrix was a consenting party. In her statement under Section 164 Cr.P.C. prosecutrix has categorically stated that she had accompanied the appellant of her own free volition. No allegations of inducement, enticement or using force by the appellant have been levelled therein. Her deposition also makes it clear that she was a consenting party. It shows that she had herself accompanied the appellant. If a minor accompanies the accused of her own free will and without any undue force, pressure or inducement, then the act would not fall within the ambit and scope of 'kidnapping' as defined under Section 361 IPC. In **S. Varadarajan versus State of Madras AIR 1965 Supreme Court 942**, it has been held that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. In the said case, a minor girl had accompanied the accused to the Sub Registrar Office for registering marriage agreement of her own volition and in this context, it was held that offence under Section 363 IPC was not made out against the accused. Thus, appellant cannot be said to have committed offence under Section 363 IPC and he is acquitted of the charge under Section 376

IPC.

9. Section 376 IPC envisages minimum sentence of 7 years. However, proviso to Sub Section 1 of Section 376 IPC vests power in the Court to impose sentence of imprisonment for the term of less than 7 years for adequate and special reasons to be recorded. In this case, appellant himself was young in age at the time of incident; he has no past criminal record; aged parents of appellant, are dependent upon him; Appellant is in continuous incarceration for the last five years. Keeping in mind all these factors and while upholding the conviction of appellant under Section 376 IPC his sentence is reduced to five years from seven years. As regards sentence of six months in default of payment of fine, same is reduced to 1 month. Needless to add that appellant shall be entitled to the benefit of Section 428 Cr.P.C.

10. Appeal is disposed of in the above terms.

A.K. PATHAK, J.

AUGUST 08, 2012

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