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

% *Judgment reserved on : 09.5.2014*
Judgment delivered on : 19.5.2014

+ CRL.A. 830/2002

SONU AND ANR. Appellants

Through Ms.Rita Kumar, Advocate.

versus

STATE NCT OF DELHI Respondent

Through Mr.Varun Goswami, APP.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

Crl.M.A. No.2782/2002 (exemption)

Exemption is allowed subject to just exceptions.

Application disposed of.

CRL.A. No.830/2002

1 There are two appellants before this Court namely Sonu and
Judagi. They are aggrieved by the impugned judgment dated
04.10.2002 and order of sentence dated 05.10.2002 wherein Sonu had
been convicted under Section 354 of the IPC and had been sentenced to
Crl.A. No.830/2002

undergo RI for 2 years and to pay a fine of Rs.1000/- in default of payment of fine to undergo SI for 2 months. Appellant Judagi had been convicted under Section 363 of the IPC had been sentenced to undergo RI for 2 years and to pay a fine of Rs.1000/- in default of payment of fine to undergo SI for 2 months.

2 Version of the prosecution was unfolded in the testimony of the prosecutrix 'N' examined as PW-4. Her version is that she had gone from her house at Gaya (Bihar) to the railway station Patna where she had met Judagi; Judagi insisted that he could arrange a job for her; accordingly she accompanied him to Delhi where she was kept in the house of Shankar as a paid servant. Sonu the son of Shankar had committed rape upon her.

3 This version of PW-4 in her statement recorded under Section 161 of the Cr.P.C. had led to the registration of the FIR which had been registered under Sections 367/368/376 of the IPC. PW-4 was examined one year from the date of incident i.e. on 04.12.2000. She had deposed that about 2 years ago she had gone alone to Patna for work. (Admittedly she was a resident of Gaya, Bihar). She met Judagi at the railway station; this was at Patna. He insisted that he could arrange a

job for her; accordingly she accompanied Judagi; Judagi addressed her as 'Beta'; he brought her to Delhi and kept in the house of Shanker as a servant. PW-4 categorically deposed that Shankar was not at fault but his son Sonu had tried to tear her dupatta and robbed her 'Ijjat'; on her raising a hue and cry Sonu had left. This witness was declared hostile by the learned public prosecutor; she was permitted to be cross-examined. In her cross-examination, she admitted that she told Judagi that she had to go to Kastha; he also told her that he had to go to Kastha but he took her to Poona. Judagi had beaten her and so also his wife. She reiterated that Judagi met her at Patna station where he told her that he would be able to arrange a job for her; thereafter he got her employed with Shankar. She categorically denied that she had told the Magistrate (in her statement under Section 164 of the Cr.P.C.) that Sonu son of Shankar had done 'galat kaam' by opening her 'nada'. She further denied the suggestion that she had stated to the police that Sonu had opened her 'nada' forcefully and made her lie down; she also denied the suggestion given to her that with great difficulty she was able to extract herself from the clutches of Sonu.

4 She was cross-examined by the learned defence counsel at length.

She admitted that she had boarded the train from Patna at about 3.45 p.m.; police were stationed at the railway station; she accompanied Judagi and it took about 17 hours to reach Delhi; she went to the toilet about 3 to 4 times in between; she did not make any complaint to any person either at the railway station or in Delhi about Judagi. She reiterated that Judagi and his wife had given her beatings but no injuries were found on her person at the time of her MLC. She admitted that she had come to Delhi on an earlier date also after the death of her mother; her father was a truck driver and he used to remain outside the house for a long time. On the earlier occasion when she had come to Delhi she had worked in a factory at Mayapuri; she had worked there for about six months and then gone back to the village. She had come to Delhi alone and she had gone back to her house at that time also alone. In the context of her age also she was cross-examined. She admitted that she was the eldest child in the family; on oath at the time of her deposition, she had given her age as 19 years stating that her brother Imtiyaz is two years younger than her and her sister Polia is one year younger to Imtiyaz meaning thereby prosecutrix was about 16 years of age at that time. PW-4 has further deposed that her youngest sister Gulab was aged

about seven years at that time.

5 The statement of the prosecutrix under Section 164 Cr.P.C was recorded by the learned M.M. Dr.Sudhir Kumar Jain (PW-5). The investigation was carried out by SI Kunwar Sahib Singh (PW-11). The victim was medically examined by Dr.Poonam (PW-1) who had noted no injury marks on her person; her hymen was absent but she could not report as to whether this was an old tear or whether it was a fresh hymen torn. In the context of age the investigating officer had also got the bony age of the victim conducted through Dr.Dheeraj Tyagi examined as PW-2. His opinion Ex.PW-2/A had opined her age between 10 to 14.3 years. PW-2, however, admitted that the bony age is not conclusive piece of evidence on the age of a person.

6 The trial court on the basis of the aforementioned evidence had concluded that the victim was a minor; the appellant Judagi had enticed the victim out of the keeping of the lawful guardian and he is guilty of the offence punishable under Section 363 of the IPC. Sonu had attempted to molest the victim and he was found guilty of offence under Section 354 of the IPC. The third accused Shankar had been

acquitted.

7 On behalf of the appellants arguments have been heard in details. Written submissions have also been filed. It is pointed out that on no count can the impugned judgment be sustained. Attention has been drawn to that part of the cross-examination of PW-4 wherein she had denied her version given in her statement recorded under Section 164 of the Cr.P.C. wherein she had implicated Sonu; submission of the learned counsel for the appellant being that the prosecutrix had made substantial improvements in her version; in her statement under Section 164 of the Cr.P.C. she had stated that Sonu had committed rape upon her; in her examination-in-chief and in her cross-examination she had restricted the role of Sonu to molestation; wherein in his cross-examination by the learned public prosecutor she had even denied that version. Submission being that no reliance or credibility can be attached to such a version; appellant Sonu is entitled to benefit of doubt. Qua the role of Judagi it has been pointed out that there is no evidence to suggest that the victim was a minor. Submission being that on oath in court when she was examined in the

year 2000 she had given her age as 19 year and the offence dates back to 09.9.1999 whereas both in her MLC as also in the ticket of the casualty department she had stated her age to be 18 years. Submission being that in this background the bony age opined by the doctor which is even otherwise not a conclusive piece of evidence was wrongly taken into account by the learned trial court to hold that the victim was a minor; she is admittedly a major. It is submitted that that apart there is nothing to suggest that the victim had been enticed from the keeping of the lawful guardian as admittedly she had met Judagi at railway station when she was alone and out of the guardianship of her parents. To support this submission reliance has been placed upon a judgment of the Apex Court reported as AIR 1965 SC 942 S.Varadarajan Vs. State of Madras. Submission being that where a victim knows and has the capacity to understand the full import of what she was doing and she voluntarily joined the accused it could not be said that the accused had taken her away from the keeping of her lawful guardianship. It is pointed out that the investigation is also tainted. On all counts benefit of doubt must

accrue in favour of the appellants.

8 Arguments have been refuted. Learned public prosecutor pointed out that on no count does the impugned judgment call for any interference. Qua the role of Sonu, learned public prosecutor has pointed out that the victim in her examination-in-chief has categorically admitted that Sonu attempted to molest her and this version cannot be ignored. Qua the role of Judagi it is submitted that the victim being a minor, her consent was no consent in the eye of law and her having been instigated by Judagi to join him to go to Delhi clearly established the defence of kidnapping. On no count can it be said that the impugned judgment is an illegality. Learned public prosecutor has placed reliance upon a judgment of the Apex Court reported in AIR 1955 Andhra 59 (Vol. 42, C.N. 23) in re Khalandar Saheb, Petitioner (Accused). to support his submission that the word “kidnapping” as appearing in Section 361 of the IPC cannot be interpreted in a narrow sense; it is not the physical presence in the precincts of the father’s house that matters but whether the daughter was in fact under his guardianship. Submission being that the victim

who was a minor was admittedly under the guardianship of her father when she had left her house at Gaya.

9 Arguments have been heard and record has been perused.

10 The answer to the arguments raised by the respective parties lies in the version of PW-4 who is the star witness of the prosecution. Her version has been noted supra. From this narration which is on oath it is apparent that the victim had left her house at Gaya to go to Patna for work. She met Judagi at the railway station at Patna. He insisted her that he could get her a job and she accompanied him. He was addressing her as “Beta”. She was brought to the house of Shankar where son of Shankar attempted to rob her ‘Ijjat’. In her cross-examination by the learned public prosecutor she clearly denied the suggestion that Sonu son of Shankar did any ‘GALAT KAAM’ with her by opening her ‘nada’ of her salwar or he made her lie down forcefully or with great difficulty she was able to extricate herself from underneath him.

11 This version on oath of PW-4 is also in contrast with the version which she had given in her statement under Section 164 of the

Cr.P.C. In her statement before the learned M.M. under Section 164 of the Cr.P.C. she had clearly stated that Sonu son of Shankar had done 'Galat Kaam' with her.

12 The witness was clearly flip-flopping. In her statement under recorded Section 164 of the Cr.P.C. the allegation against Sonu was of rape. In her examination-in-chief it was corrected and had become molestation i.e. Sonu attempted to rob her 'Ijjat'. In her another part of cross-examination which was conducted by learned public prosecutor she turned turtle. She retracted from her examination-in-chief. She categorically denied the suggestion that Sonu had opened her 'nada' forcefully or made her lie down or she extracted herself from underneath him with great difficulty.

13 In this context trial judge convicting the appellant Sonu for the offence under Section 354 of the IPC has committed a grave illegality. Benefit of doubt has to accrue in favour of the appellant Sonu as the prosecutrix in her version is not trustworthy qua the role which had been assigned to Sonu. Appellant Sonu is accordingly acquitted of the charges leveled against him.

14 Qua the role of Judagi, this Court holds that the offence under Section 361 of the IPC is not made out. As per the version of PW-4 she had left her house at Gaya (more than 2-3 hours distance from Patna railway station) and on reaching Patna railway station she met Judagi. On an earlier occasion also PW-4 had admittedly gone to Delhi alone; stayed in Delhi alone; and worked in a factory at Mayapuri for six months. Thereafter she returned to her village, at that time also she was alone. Even on the fateful day when she had left her house at Gaya; she had left it independently and voluntarily and on her own; she had gone to Patna railway station hoping to go to Kastha; at that point of time she had met Judagi. He had insisted that he could get her a job and she accompanied him to Delhi.

15 Section 361 of the IPC reads herein as under:

“361. Kidnapping from lawful guardianship.—Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words “lawful guardian” in this section include any person lawfully entrusted with the care or custody of such minor or other person.”

16 This section essentially entails a taking or enticing away of a minor; minor must be under 16 years of age if a male, or under 18 years age if a female; taking or enticing away must be out of the keeping of the lawful guardian of such a minor; further this must be without the consent of the guardian.

17 Even presuming that the version of PW-4 on oath is consistent on the fact that it was on the insistence of Judagi that she had accompanied him to Delhi and enticement qua Judagi is made out, the other essential ingredient of Section 361 of the IPC which entails a taking or enticing out of the keeping of the lawful guardian is also required to be proved. The initial taking away of the girl must be from the keeping of her lawful guardian. Admittedly, in this case the victim had come out from her house at Gaya on her own volition, independently and on reaching the railway station at Patna (which is at a distance of more than 2-3 hours from Gaya) she had met Judagi. At the cost of repetition it is noted that even on an earlier occasion the

victim had gone to Delhi alone and had stayed in Delhi and worked for six months in a factory at Mayapuri at Delhi. This establishes the submission of the learned counsel for the appellant that the victim was a person knowing the full import of her acts and had made a conscious decision to come from Gaya to reach the railway station at Patna. It is clear that the victim had left the custody of her father on her own and it was only after she reached the railway station at Patna that she had met Judagi. This act was her own voluntary act.

18 This Court is thus of the view that the ingredients of enticement and keeping away from the keeping of the lawful guardian of the victim have not been established by the prosecution. Conviction of the appellant under Section 363 of the IPC thus cannot be sustained.

19 The age of victim is also in quandary. The trial judge has relied upon the bony age which had been opined by the doctor to be between 10 to 14.3 years and drawn a conclusion that the victim is less than 16 years of age. This is contrary to the version given by the prosecutrix herself who had on oath in the witness box on 04.12.2000 stated her age to be 19 years. Her MLC and her casualty ticket on the

date of the incident i.e. 12.7.1999 has recorded her age as 18 years. The MLC also notes that the victim had given the history herself. Where the victim had herself given her age as 18 years on the date of the offence in two separate documents and has reiterated the same version on oath in Court, the trial judge relying upon the bony age report of the victim which is admittedly not a conclusive piece of evidence and holding the victim to be a minor has committed another illegality. However, this Court need not to go any further into the age of the victim to establish as the other ingredient of offence under Section 361 of the IPC i.e. an enticement from the keeping of the lawful guardian is missing and as noted supra benefit of doubt on this count must accrue to the appellant and on this count alone he is entitled to an acquittal.

20 The Apex Court in the judgment of S.Varadarajan (supra) in this context had noted that taking or enticing away out of the keeping of the lawful guardian is an essential ingredient of the offence of kidnapping. In that case the victim had decided to marry the accused. It was on her insistence that the appellant had agreed for the marriage.

She had accompanied the appellant on her own willingly; she being at the age of discretion and on the verge of attaining majority was aware of the import of her act. The Apex Court had concluded that the offence of kidnapping is clearly not made out.

21 Judagi is accordingly also acquitted of the charges leveled against him.

22 Appeal is allowed.

23 Appellants are acquitted. Bail bonds cancelled. Sureties discharged.

INDERMEET KAUR, J

MAY 19, 2014
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