

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

% *Judgment reserved on :22.05.2014.*
Judgment delivered on :27.05.2014.

CRL.A. No.891/2002

RAMESHWAR GIRI

.....Appellant

Through: Mr. Harshit Jain, Adv.

Versus

STATE

.....Respondent

Through: Ms. Kusum Dhalla, Adv.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order of sentence dated 16.04.2001 and 23.04.2011 respectively wherein the appellant has been convicted under Sections 376/366/363 of the IPC and has been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.2,000/- and in default of payment of fine, to undergo SI for 3 months for the offence under Section 376 of the IPC; for the offence under Section 366 of the IPC, he has been sentenced to undergo RI for a

period of 3 years and to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo SI for 2 months; for the offence under Section 363 of the IPC, he has been sentenced to undergo RI for a period of 3 years and to pay a fine of Rs.1,000/- and in default of payment of fine, to undergo SI for 2 months. The sentences were to run concurrently. Benefit of Section 428 of the Cr.PC had been granted to the appellant.

2 The nominal roll of the appellant has been requisitioned. It reflects that as on the date, when he had been granted bail, he has suffered incarceration of about 4- ½ years.

3 Version of the prosecution was unfolded in the statement of the prosecutrix examined as PW-5. Admittedly the appellant was known to her prior to the date of the incident. Her version is that on 17.02.1999 at about 05:30 pm, she was standing at the public water tank near her house when the appellant asked her to accompany him for sightseeing; she went with him; he took her to the railway station; she was threatened there; the appellant took her to his village in Bihar in a train. She stayed there for 2-3 days pursuant to which she was recovered.

4 Her mother Madhu has been examined as PW-6. She has deposed

that her daughter was found missing and she suspected the appellant. So also is the version of her father Satish Kumar examined as PW-7. He also suspected the appellant when he learnt about the missing of his daughter. The victim was recovered on 21.02.1999 when she was medically examined by Dr. Suman Bala examined as PW-8. As per her version, the findings are suggestive of sexual intercourse; no injury was noted upon the victim but her hymen was torn.

5 The date of birth of the victim was established through the version of Virender Jain (PW-4) who had brought the record of date of her birth proved as Ex.PW-4/A as 25.05.1983 evidencing the fact that as on the date of the offence (17.02.1999) she was aged 15 years and about 8-9 months.

6 In the statement of the accused recorded under Section 313 of the Cr.PC, he has stated that he has been falsely implicated in the present case due to enmity.

7 No evidence was led in defence.

8 On the basis of the aforementioned evidence both oral and documentary, the accused has been convicted for the aforementioned offences and sentenced accordingly.

9 On behalf of the appellant, arguments have been addressed in detail. It is pointed out that the victim was at the age of discretion and she fully understood and conscious of her act; she had accompanied the accused voluntarily as she knew him. She has admitted that she stayed with the accused 2-3 days in his village at Bihar; she was treated well; in her cross-examination, PW-5 has admitted she had gone for sightseeing with the accused. Submission being that the offence under Sections 363/366 & 376 of the IPC clearly not made out. Further submission being that had it been a case of force, injuries would have been noted upon her person but no such injury was noted in her MLC. In the alternate, it is pointed out that keeping in view the fact that out of 7 years RI, the appellant has already undergone a sentence of about 4- ½ years, the proviso of Section 376 of the IPC be put into operation and in this case, there are adequate and special reasons for reducing the sentence of the appellant. To support this submission, learned counsel for the appellant has placed reliance upon a judgment of this Court reported as 2010 CrI. L.J 1756 Mohd. Imran Khan Vs. The State.

10 Arguments have been refuted. It is pointed out that on no count, does the impugned judgment call for no interference as the statement of

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the victim examined as PW-5 has been fully corroborative by the version of her mother and father (PW-6 & PW-7) who had suspected the appellant as having taking away their daughter; the victim being less than 15 years was admittedly a minor and even presuming that the victim had gone with the accused voluntarily, such a 'consent' is no 'consent' in the eye of law. The MLC of the victim shows that her hymen was torn.

11 Arguments have been heard. Record has been perused.

12 PW-5 'G' was the star witness of the prosecution. She has deposed that she knew the accused prior to the incident as she used to visit her house. On 17.02.1999 at about 05:30 pm, when she was standing at a public water tank near her house, accused asked her to accompany him for sightseeing; she accompanied him; he took her to the railway station; she wanted to go to her house but accused threatened her to kill her. The accused took her to Bihar in a train where he committed bad act with her twice. After a few days, she was recovered; she was medically examined. She admitted that when the accused took her, they kept roaming in Delhi for one hour; they then went to the railway station at 06:30 pm where the appellant purchased the tickets

from a rushed ticket counter; she had been taken to the railway station in three wheeler scooter; several persons were also present at the Bihar railway station. Police officials were also there; she remained in the house with the appellant for 2-3 days where other persons were also there; some ladies were also present; she was not threatened by any person. She denied the suggestion that because of a money dispute, the accused has been falsely implicated.

13 The mother of the victim Madhu was examined as PW-6. She had deposed that her daughter was missing and was recovered after 3-4 days. Version of the father of the victim Satish Kumar (PW-7) is also to the same effect. He had lodged the missing report (Ex.PW-7/A) when he learnt that his daughter was missing. Both PW-6 and PW-7 have admitted that the appellant was known to them prior to the incident.

14 Medical examination of the victim conducted through Dr. Suman bal (PW-8) reveals her hymen was torn suggestive of sexual intercourse but no injury was found on the body of the victim.

15 As noted supra, the victim was aged 15 years and 9 months on the date of the offence meaning thereby that she was at the age of discretion; she was studying in the 7th standard and as such it cannot be

said that she did not know the consequence of her act. More so, this is not a case where there was any persuasion on the part of the accused which can amount to a 'taking' or 'enticing' the victim as is the language contained in Section 361 of the IPC. Version of PW-5 is coherent in this regard. She has stated that while she was standing near the public park, the accused invited her to accompany her for sightseeing and she accordingly did so. In these circumstances, it cannot be said that the accused was guilty of taking the victim out of the keeping of her lawful guardianship; she was admittedly standing at the public park when he invited her to join him for sightseeing. There was no active persuasion on the part of the accused; it was an invitation extended by him to the girl which was accepted by her.

16 As held by the Supreme Court in AIR 1965 SC 942 S. Varadarajan Vs. State such an act would not tantamount to 'taking'. The observations of the Apex Court in this context are as under:-

"The offence of "kidnapping from lawful guardianship" is defined thus in the first paragraph of s. 361 of the Indian Penal code :

"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."

8. It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping.....

.....11. It must, however, be borne in mind that there is a distinction between "taking : and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

12. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfillment of the intention of the girl.

That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking". ”

17 This version is further fortified by the fact that the victim was admittedly known to the accused as he was residing in the same street since the last 2 years. The fact that the accused was known to the victim is also admitted by both PW-6 and PW-7 i.e. the mother and father of the victim. PW-5 had accompanied the appellant for sightseeing; they did sightseeing for one hour in Delhi; then by a TSR, the appellant took her to the railway station; people were gathered there to purchase tickets. Tickets were purchased by the appellant from the railway station from where he took her to Bihar which would be a more than one day journey. The victim stayed in the village of the appellant 2-3 days. She was never threatened by the persons living in that house. 5-6 ladies were also present. Other persons from the village also came to meet her. The MLC of the victim also shows that there was no injury upon her person. This corroborates the argument of the learned counsel for the appellant that the victim was not subjected to any force.

18 This Court thus necessarily draws the conclusion that the victim was a consenting party with the accused. The offence of rape as defined

under Section 375 of the IPC (unamended) is not made out as for the purposes of rape to qualify as a minor, the victim should be less than 16 years. As noted supra, the victim was aged 15 years & 9 months on the date of the offence i.e. just about three months short of the age of 16. Being in the age of discretion; this Court is of the view that she was conscious of her act in accompanying the accused and it cannot be said to be an act of force. The accused is entitled to an acquittal for the offence under Section 376 of the IPC. He is accordingly acquitted of the said charge.

19 Even for the offence under Section 363/366 of the IPC since the victim had accompanied the appellant for sightseeing on her own and having met him at a public place, the ingredients of Sections 363 & 366 which necessarily entail a “taking” or “enticing from the lawful guardianship” is not met.

20 The appellant is accordingly acquitted of all the charges leveled against him.

21 Appeal allowed. His bail bonds are cancelled; surety discharged.

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