

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

+ **CRL.A.822/2009**

STATE

.....Appellant

Through: Mr.Pawan Sharma, Standing
Counsel (Crl.) with Ms.Charu
Dalal, Advocate.

versus

HASIM

..... Respondent

Through: Mr.C.B.Singh, Advocate.

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Pronounced on : January 29, 2014

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J

1. *“Run Away Marriages' are manifestation of a generational change due to variety of factors, including increased interaction between the sexes, with young boys and girls attaining maturity rapidly. It is a complex problem with inter play of social, economic, religious, caste, educational factors, including sex education and vulnerability and backwardness of the weaker sex having its impact. The Child Marriage Restraint Act, 1929 as well as relevant provisions of the Hindu Marriage Act are social legislations aimed at protection and development of the vulnerable sex and have to be interpreted and worked accordingly. The consequences of considering such marriages as void or voidable need to be evaluated since the State as well as the social reformists who have not been successful to change the mindset of the people tuned to early marriages. By an estimate, prevalence of child marriages in the major States of West Bengal, Rajasthan, Bihar and Madhya Pradesh varies from 56 to 59%. Moreover, it is also to be noted that any adverse fall out of any law*

that makes such underage marriages as void or voidable would be borne by none other than the women and their progeny.”[AIR 2006 Delhi 37].

2. This Court was constrained to make the above observations in view of the increasing number of habeas corpus petitions by the parents for production of their wards who leave their parental house in these run away marriages. This Court deliberated on the growing tendency in minor girls leaving their homes to marry a person of their choice, entering into physical relationship with them after performing marriage and the validity of such marriages.

3. This Court has been dealing with the rising number of Runaway Marriages which not only cause mental agony to the family of the couple but also compel the couple to run for shelter to protect their lives and escape honour killing. While parents of such girls suffer due to social stigma attached with such marriages, the family of the boy is harassed not only by the family of the girl but also by the police to pressurize them to disclose the whereabouts of the boy. If the police is able to recover the couple, the ‘husband’ is generally accused of kidnapping and rape. Most of the time, such girls turn out to be minor. In such circumstances, either the girl has to stay in Nari Niketan and wait for the release of the husband or to return to the parents and succumb to their wishes to marry the person of their choice and stand as a witness against the person with whom she is in love. The opposition to the marriage by the parents to such marriages is mostly on account of caste/religion/disparities in social status, and with a view to break the matrimonial alliance they continue pressing the charge of kidnapping and rape on the boy.

4. 'N' (name withheld to conceal the identity of the prosecutrix) a Hindu girl fell in love with Respondent, a Muslim boy. This is an unfortunate case where perhaps different religion of the Respondent and the prosecutrix 'N' was the biggest hurdle in their way to marry each other. They wanted to marry crossing this hurdle, hence firstly *nikah* was performed on 11.02.2005 and thereafter notice for intended marriage under the Special Marriage Act was also given. However, destiny had something else in store for them. While going through the Trial Court record, we notice the wedding card of 'N' filed along with an application seeking her exemption from appearance in the Trial Court for the reason that she was to get married on 13.05.2007 with another boy of her religion. Thus, the prosecutrix was got married to another boy at the age of 14 years 6 months and 26 days and we are left to ponder over whether the Respondent can be convicted under Section 376 IPC, as the prosecutrix had not attained the consenting age while entering into physical relationship with him as his wife.

5. Before examining the culpability of the Respondent, the question staring in our face is the effect of her marriage on 13.05.2007 with another boy and consummation of that marriage, as even for that purpose she would be under 15 years of age. As per Exception to Section 375 IPC, sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape. Thus, with *nikahnama* dated 11.02.2005 available on record and she having performed *nikah* with the Respondent after attaining the age of puberty, if entering into relationship with the Muslim husband is to be termed as rape, then what about the marriage performed by the parents of the prosecutrix in

contravention of the provisions of the Prohibition of Child Marriage Act and she being under 15 years of age on that date, even consummation of that marriage, technically speaking, would amount to rape. However, we leave this question unanswered, as it is only the State which has impugned the order of acquittal passed by the learned Trial Court acquitting the Respondent of all the charges in respect of kidnapping and rape of the prosecutrix.

6. The State challenged the acquittal of the Respondent by filing Criminal Leave Petition No.77/2009 on the ground that the Respondent had been acquitted of the charge of rape for the reason that the prosecutrix was consenting party, ignoring the fact that as per school record she was a minor. Thus, leave was granted by this Court vide order dated 21.10.2009 observing that consent to have sexual intercourse with the accused by the prosecutrix would be insignificant in case she was a minor.

7. This criminal appeal has been preferred by the State impugning the judgment/order dated 14.11.2008 in Sessions Case No.58/06 passed by the learned Addl. Sessions Judge, Delhi in case FIR No.238/2006 under Sections 363/366/376 IPC, P.S. Sangam Vihar, whereby the Respondent Hasim was acquitted of the charge under Sections 363/366/376 IPC on the ground that the prosecutrix was consenting party and had left the home of her own to join the company of the person with whom she was in love.

8. Facts vide DD No.7A giving rise to this appeal are that on 26.02.2006 PW-3 Shri Subedar Yadav visited Police Station Sangam Vihar to lodge the missing report of his daughter 'N'. He reported that

his daughter 'N' had left home on 24.02.2006 at about 6 a.m. without informing anyone. Earlier also she had left home and was brought back by the police. While giving her description, he further informed that he was searching for his daughter at his own level, but on not being able to find her, he had come to report the matter. He did not suspect anyone behind her missing. Thereafter, on 20.03.2006, he lodged the FIR Ex.PW-3/A wherein he named the Respondent Hasim, who was residing in their neighbourhood and was a hairdresser by profession, to be the person who had enticed his daughter.

9. After registration of the FIR under Section 363 IPC, efforts were made to search the missing girl and the suspect and ultimately on 03.04.2006 both were recovered by I.O. ASI Karambir Singh along with other police officials of P.S. Sangam Vihar from Dingerpur, Distt. Moradabad (U.P.), in the presence of the father of the prosecutrix and were brought to Delhi. They were sent to AIIMS for medical examination. The alleged history given by 'N' in presence of her mother before PW-2 Dr.Gagandeep Kaur and recorded on the MLC of the prosecutrix being relevant for the just decision of this appeal is extracted hereunder:-

*“AIIMS HOSPITAL EMERGENCY DEPTT.
(CASUALTY CARD)*

*Main Emergency
Time: 18 hr 53 min.*

Date of arrival : 03.04.06

Casualty No.: CS-42292-2006

Name: 'N' (name withheld by us)

Age: 14 yrs. Sex: Female

D/o : Subedar Yadav

Brought by: LC Rekha 3413/SD/PS Sangam Vihar

Referred from:

Local Address: 2107/10, L-I, Sangam Vihar, ND.

3/4/06/8.15 p.m

-H/o staying with a man from last 5 months at Moradabad without consent of parents.

-H/o regular intercourse with that person.

-Brought back home by parents in February, stayed at home for 10 days and went back to Moradabad.

-LMP – 14/2/06- lasting for 3-4 days. Menstruation 5 months back.

-Had periods 3 times after that.

-Patient not willing for any medical examination.

RTI of 'N'

*RTI of Mother
(Durga Devi)*

***Adv.: - X Ray for Bone age estimation
- Urine for pregnancy test."***

The prosecution has failed to get the ossification test conducted of the prosecutrix to ascertain her bony age.

10. Thereafter, the prosecutrix was produced before the learned M.M for getting her statement recorded under Section 164 Cr.P.C. wherein she stated that on 23rd or 24th of February maternal uncle and aunt of the Respondent took her to Dingerpur where she stayed with the Respondent, who forcibly did 'galat kaam'. She did not complain to anyone as she was under fear and she was brought back to Delhi by police and that she wanted to live with her parents. She further stated that she did not want the Respondent to be punished and that he be set at liberty.

11. After completion of the investigation, charge sheet was filed in the Court. Since the Respondent pleaded not guilty to the aforesaid charge, the prosecution examined 11 witnesses in order to bring home the guilt of the Respondent. In his statement recorded under Section 313 Cr.P.C., the Respondent denied the case of the prosecution and claimed the prosecutrix to be major.

12. In order to appreciate the testimonies of PW-1 'N' and her father PW-3 Shri Subedar Yadav, it is necessary to examine the different versions coming on record at different stages. Minute examination of evidence of the prosecutrix, PW-1 'N' and her father PW-3 Shri Subedar Yadav makes it clear that they have not been consistent while deposing before the Court. Their versions continued changing colour at every level. The same can be better understood/appreciated from the following illustration tables:

PW-1 'N' (the prosecutrix)

Version as recorded in the statement under Section 161 Cr.P.C.	Version as recorded in the statement under Section 164 Cr.P.C	Version as recorded before the Court.
(i) She was residing at Sangam Vihar with her family. (ii) Hasim was working at a barbar shop in the neighbourhood. (iii) On 24.02.06 at about 6 am he came to her roof and enticed her away on the pretext of giving her everything and offering to marry her.	(i) Kasim's Mama and Mami enticed her away on 23 rd or 24 th of February and took her to Dingerpur, Moradabad where she stayed with Kasim. (ii) Kasim forcibly did 'galatkam', but she did not complain to	(i) She did not remember the date or month, but Hasim came to the roof of her house at 6 a.m. from the roof of the adjoining house. (ii) He asked her to accompany him as he would marry her and provide her everything. (iii) He also told that his maternal aunt (Mami), who was

(iv) On being induced, she accompanied him from the roof itself. In a three-wheeler, they reached Anand Vihar ISBT and from there they went to Sambhal and from there to village Dingerpur (Moradabad). (v) Hasim had been daily committing 'galatkam' with her.	anyone as she was put in fear. (iii) Police brought her and she wanted to live with her parents. (iv) "Mein Use Saja Karana Nahi Chahti aur Use Chhod Diya Jaye".	residing nearby, was sick and she should accompany him to see her. (iv) She accompanied Hasim to the house of his Mami which was at a short distance from her house. (iv) She found that his Mami was not sick. (v) Hasim gave a glass of water and after drinking it she felt giddiness. (vi) She was made to sit in TSR and taken to a place from where they boarded a bus and reached the village Dingerpur, Moradabad to the house of Bua of Hasim where they started living together. (vii) Hasim used to have sexual intercourse everyday against her wishes. (viii) She made complaint to his Bua and Fufa, but they did not listen. (ix) Her father came along with police and both of them were recovered and brought back to Delhi. (x) She was taken to hospital for medical examination, but she refused for the same as
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		recorded on the MLC Ex.PW-1/A & B at point 'A'. (xi) She made statement under Section 164 Cr.P.C. Ex.PW-1/ C before the learned M.M.. (xii) In cross-examination she was confronted with some of the improvements made by her in her deposition before the Court. (xiii) She also admitted having solemnized marriage with the Respondent as well as correctness of <i>Nikahnama</i> and visit to the Court for the purpose of Court marriage. (xiv) She also admitted about the correctness of history given by her before PW-2 Dr. Gagandeep Kaur and recorded on the MLC Ex.PW-1/A & B. (xv) She also admitted that at the time when she gave the history, her mother was present. This fact is also corroborated from the MLC Ex.PW-1/B whereon apart from the signatures of 'N', thumb impression of her mother is also there recording their
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		unwillingness for medical examination.
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PW-3 Shri Subedar Yadav (father of the prosecutrix)

Version as recorded in the DD.	Version as recorded in the FIR.	Version as recorded in his statement under Section 161 Cr.P.C.	Version as recorded before the Court.
(i) The prosecutrix left home on 24.02.06 at 6 a.m without informing anyone. (ii) She had left home in similar manner earlier also and was brought back by the police. (iii) He did not suspect anyone	(i) With reference to the information given in Ex.PW-7/A, he had come to know that his daughter had been enticed away by Hasim, Hairdresser.	(i) He along with the police reached Village of Hasim where father of Hasim informed that Hasim and 'N' were living at Dingerpur. (ii) When they reached Dingerpur, Hasim and 'N' were present there and recovered by the police. (iii) On being questioned by the police, his daughter informed that Hasim came to their roof and enticed her away stating that he	(i) On 24.02.06 when he was in his village, he was informed by his son from Delhi that 'N' was missing. (ii) His son further informed that 'N' left for school on 24.02.06 but did not return. (iii) He informed the police that his daughter was wearing school uniform. (iv) Hasim, Barber of the locality was also missing

		would give her everything and marry her. Thereafter, he brought her to Dingerpur and had raped her.	and suspected to be the person who had taken away his daughter. (v) Enquiries made from the relatives of Hasim led them to the house of Bua of Hasim where the prosecutrix and Hasim were found staying there. They were brought to Delhi and sent for medical examination. (vi) He was informed by his daughter that Hasim came from the roof of adjoining house and kidnapped her and took her on the pretext that her Mami was unwell. (vii) At the house of his Mami, he gave some drink. Thereafter his
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			daughter became unconscious and on regaining consciousness, she found herself in the village.
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13. The Trial Court record contains the *nikahnama* along with its English transliteration as well as the original notice of intended marriage having the photograph of the prosecutrix and the Respondent and the affidavit of the prosecutrix wherein she admits having performed *nikah* with the Respondent. The prosecutrix not only admitted that she performed *nikah* with the Respondent but also admitted that she had gone to the Court for getting the said marriage registered under the Special Marriage Act.

14. There is clear distinction between rape and consensual sex. Here, in the present case, she consented for sex as a wife after performing *nikah* with the Respondent on 11.02.2005. It is a case where the prosecutrix entered into physical relationship on account of her love and passion for the Respondent. In order to join his company, she left home not once but twice.

15. The prosecution is seeking conviction of the Respondent mainly on the ground that as per school record her date of birth is 17.10.1992. Thus, at the time of entering into physical relationship with the Respondent in February, 2006, she being below 16 years of age, had not attained the consenting age. Thus the Respondent should have been

convicted for committing the offences punishable under Sections 363/366/376 IPC.

16. Admittedly, ossification test has not been got conducted in this case to ascertain the age of the prosecutrix despite being so advised by the doctor. No material has come on record as to on what basis the date of birth was recorded at the time of admission in Govt. Girls Sr. Secondary School, Sangam Vihar in VIth standard. It is not even brought on record as to who filled in the form for admission in VIth standard, as her father does not claim to be the person who got her admitted. Even there is no material on record that she was admitted in VIth standard on the basis of school leaving certificate issued by some primary school and on what basis date of birth was recorded at the time of her initial admission. As per School Leaving Certificate Ex.PW-6/B, date of admission of the prosecutrix in the school is 29.04.2004 and date of leaving the school is 18.03.2006. Out of possible attendance during the relevant school year which should have been 244 days, actual attendance was only for 132 days and leave period is 112 days. In the absence of any material on the basis of which date of birth was recorded at the time of her admission in the said school and failure of the prosecution to get the ossification test conducted despite being advised so by the concerned doctor, we are of the view that benefit of doubt in case of proven consent must go to the Respondent.

17. In the instant case, following facts are established beyond reasonable doubt:

- (i) The prosecutrix was in love with the Respondent. As the prosecutrix was Hindu by religion and the Respondent was a

Muslim boy, so as to provide legal status to their relationship, she left home and performed *nikah* in 2005. She also initiated steps for getting the marriage registered under Special Marriage Act.

- (ii) She left home twice of her own to marry the Respondent and live with him as his wife.
- (iii) The prosecutrix at no point of time made any complaint to anyone that she had been forcibly taken or raped by the Respondent.
- (iv) Even at the time of her being found on 03.04.2006 by the police in the presence of her father as well as at the time of her medical examination by the doctor in the presence of her mother, she did not complain of being sexually assaulted by the Respondent under any threat or by putting her under fear. In fact, she had run away not once but twice but ultimately had to marry the person chosen by her family which speaks of the volume of influence exercised upon her after she was recovered second time by the police.
- (v) The learned Trial Court has taken into account the facts and circumstances of the case while arriving at the conclusion that none of the ingredients for the offences under Sections 363/366 of IPC are made out against the accused and accused is also clearly entitled for acquittal for the offence of rape as contained in Section 376 of IPC as well.

18. From the testimonies of the prosecutrix (PW-1), her father Shri Subedar Yadav (PW-3) and the *nikahnama*, it stands proved that the

prosecutrix was in love with the Respondent and first time she ran away to perform *nikah* with him. She was brought back by the police and restored to the custody to her parents. Perhaps she did not disclose about the *nikah* being performed by her after being brought back to her parents by the police, she just stayed for about 10 days and again left home and continued staying with the Respondent for about 5 months and had physical relationship with him as his wife.

19. Legal position is well settled that while dealing with an appeal against acquittal, in the absence of perversity in the judgment and order, interference by the Appellate Court exercising its extra ordinary jurisdiction is not warranted. In ***Mrinal Das and Ors. Vs. The State of Tripura AIR 2011 Sc 3753***, the Supreme Court has observed as under:-

“8. It is clear that in an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, being the final court of fact, is fully competent to re-appreciate, reconsider and review the evidence and take its own decision. In other words, law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial Court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment

of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts etc., the appellate court is competent to reverse the decision of the trial Court depending on the materials placed.

20. In the circumstances, as the prosecutrix 'N' had eloped and performed *nikah* with the Respondent and had sexual intercourse with him as his wife, we do not find any merit in the plea of the prosecution that it stands proved that she was under 16 years of age at that time and as such her consent becomes immaterial and the Respondent should have been convicted for taking away the prosecutrix from the lawful guardianship of her parents and committing rape on her.

21. We are satisfied upon perusal of the material on record that no offence under Section 363/366/376 IPC has been established against the Respondent. We do not find any perversity in the decision of the Trial Court and there is no ground to interfere with the order of acquittal. Hence the appeal fails and is hereby dismissed. TCR be sent back alongwith with a copy of this order.

(PRATIBHA RANI)
JUDGE

(REVA KHETRAPAL)
JUDGE

January 29, 2014
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