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

% *Judgment reserved on : 08.5.2014*
Judgment delivered on : 16.05.2014

+ CRL.A.26/2006

PANKAJ alias PRAVEEN Appellant

Through Mr.Chetan Lokur, Advocate.

versus

STATE Respondent

Through Mr.Varun Goswami, APP.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order of sentence dated 25.10.2005 and 09.11.2005 wherein the appellant Pankaj @ Praveen had been convicted under Sections 363/366 of the IPC and had been sentenced to undergo RI for 3 years and to pay a fine of Rs.1000/- in default of payment of fine to undergo RI for 3 months for the offence under Section 363 of the IPC; for the offence under Section 366 of the IPC he had been sentenced to undergo RI for 5 years and to pay a fine of Rs.2000/- in default of payment of payment of fine to undergo RI for 6 months.

2 DD No.10A (Ex.PW-2/A) was recorded in local police station Hauz Qazi on 02.3.2005 noting that the daughter of Devender Kumar (PW-4) was reported missing since 01.3.2005. Statement of Devender Kumar, father of the victim disclosing the involvement of the present appellant was recorded on 04.03.2005 (Ex.PW-4/D). Submission being that he suspected the role of the appellant in the missing of his daughter. Pursuant to this statement the rukka was taken and the FIR was registered on the same date at 5.40 p.m. SI Balbir Singh (investigating officer) arrested the accused from his house Himmatgarh, Hauz Qazi, Delhi vide memo Ex. PW-4/B; personal search of the appellant was conducted. His disclosure statement Ex. PW-4/A was recorded.

3 Relevant would it be to state that the victim has not been recovered till date. In the course of the investigation apart from the statement of the father of the victim Devender Kumar (Ex.PW-4/D) the statement of her mother Meena (PW-5) was also recorded. She had also stated that since her daughter did not return home she suspected the appellant behind the missing of her daughter as she had seen the appellant talking to her daughter on 2-3 earlier occasions.

4 Three public witnesses had also been examined. PW-3 (Anil
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Kumar) had deposed that on 01.3.2005 the appellant along with one girl came to his sweet shop; they sat in his shop but they did not place any order and they left the shop. PW-3 later on, on 05.3.2005 had identified the appellant as that boy who had come in his shop with the victim and from the photograph he identified the victim as the said girl. Testimonies of PW-8 and PW-10 are also relevant. They are also public witnesses. Gopal (PW-8) had deposed that on the fateful day i.e on 01.3.2005 at about 4/5 p.m. while he was sitting at the shop of his co-brother/sadu Kundal Lal (PW-10) he noticed that one girl whose hair was open after getting her hands free from the hands of a boy went away towards opposite direction and boy went towards her opposite direction. PW-8 told this to his co-brother PW-10 also uttered that this did not matter. Version of PW-10 is wholly corroborative of this version of PW-8. He has also deposed that on 01.3.2005 at about 5.00 p.m. when he along with PW-8 were sitting at his shop along with his co-brother (sadu) they noticed that the appellant and a girl were talking to each other in front of his shop; thereafter the appellant went away in the opposite direction and the said girl went away on the other side. In his cross-examination he admitted that he was unable to hear their

conversation; at that point of time the girl was not weeping.

5 Mr.R.S.Rana, Sub –Registrar, death and births (PW-6) had brought the birth certificate of the victim evidencing her date of birth as 23.4.1989; meaning thereby that on the date of the offence she was approximately 16 years of age; thus a minor for the purpose of the offence of kidnapping as contained and defined under Section 361 of the IPC.

6 Learned counsel for the appellant has pointed out that the versions of PW-5 and PW-8 clearly show that both the victim and the boy were together at about 4/5 p.m. on 01.3.2005 but thereafter both of them had gone away in opposite directions; thus offence punishable under Section 363 and subsequent offence under Section 366 of the IPC are clearly not made out as there is no “taking away” or any “enticement”. Attention has also been drawn to the version of the parents of the victim namely PW-4 and PW-5 who have not whispered anything about kidnapping of the girl by the appellant. Their testimony on oath being bordered only on a suspicion. Submission being that on no count can the judgment of the trial Court be sustained.

7 Arguments have been refuted. It is pointed out by learned public

prosecutor that the testimony of PW-3 is very relevant; he has categorically stated that the appellant and the victim were last seen in the company of one another on 01.3.2005 and this is a vital piece of evidence once this circumstance of last seen is proved the onus shifts upon the appellant to disclose the fact as to where the victim is. Further submission is that in the statement of the appellant recorded under Section 313 of the Cr.P.C. had given a contrary version wherein the appellant had stated that he did not know the victim and such a false statement given by the appellant lends assurance to the fact that the appellant is in fact not telling the truth and thus benefit of false version must accrue in favour of the prosecution for which reliance has been placed upon (2002) 2 SCC (Cri) 409 Brajendra Singh vs. State of West Bengal; submission being that the statement of an accused recorded under Section 313 of the Cr.P.C. can be used as a piece of evidence against the accused in so far as it supports the case of the prosecution.

8 Arguments have been heard. Record has been perused.

9 Record shows that the complainant PW-4 and his wife PW-5 had nowhere suspected the appellant at the first time. Their daughter had been reported missing on 01.3.2005. In the first missing report filed by

the father (PW-4) no involvement of the appellant was shown; it was only two days later that PW-4 suspected the role of the appellant in the missing of his daughter. Version of PW-4 and PW-5 on oath, however, shows that it was only a suspicion that they had over the appellant and this was for the reason that on two-three earlier occasions they had seen their daughter talking with the appellant. Legal proposition on suspicion is clear; it can never take the place of proof.

10 That apart this Court notes that the version of PW-8 and PW-10 who are the witnesses of the prosecution clearly show that even if the victim and the appellant were last seen in the company of one another; they thereafter went in opposite directions; the victim was also not crying; she did not appear to be disturbed; PW-10 has categorically stated that the girl was not weeping at that point of time; her hair was open and the victim went away in one direction and the appellant went away in another direction.

11 This version on oath of PW-8 and PW-10 becomes very relevant. Testimony of PW-3 has been viewed in this context. PW-3 had on oath deposed that the accused and the victim were last seen together when they were sitting in his sweet shop. The shop of PW-3 is at Sita Ram

Bazar. PW-8 and PW-10 who also have their shop at Sita Ram Bazar had noted the conduct of the victim and the appellant; it was after the victim and the appellant had left the sweet shop of PW-3 that they went away in the opposite directions. The question of “taking” or “enticing” as is coined in the language of Section 361 of the IPC would therefore definitely not arise.

12 Ingredients of Section 363 of the IPC are clearly not established. Even presuming that the victim was a minor it would make no difference. The second necessary corollary is that the offence Section 366 of the IPC also cannot be sustained.

13 Appellant is entitled to benefit of doubt. He is accordingly acquitted of the charges leveled against him. Bail bond stands cancelled. Surety discharged. Appellant be released forthwith if not required in any other case.

14 Appeal is allowed in the aforesaid terms.

MAY 16, 2014/ndn

INDERMEET KAUR, J