

S-19 & 20

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

+ CRL.A. 946/2013

SMT BALA Appellant

Through Mr.Surender Bharti, Advocate,
versus

STATE Respondent

Through Ms.Kusum Dhalla, APP,

+ CRL.A. 279/2014

SURENDER Appellant

Through Mr.Chetan Lokur, Advocate,
versus

STATE Respondent

Through Ms.Kusum Dhalla, APP,

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

ORDER

% **03.08.2015**

These two appeals are directed against the impugned judgment and order on sentence dated 04.6.2013 and 07.6.2013 respectively wherein appellant Bala stands convicted under Sections 363/366 of the IPC.

For the offence under Section 363 of the IPC, she has been sentenced to undergo RI for a period of 3 years and to pay a fine of Rs.5,000/- and in default of payment of fine, to undergo SI for 1 year. For her second conviction under Section 366 of the IPC, she has been sentenced to undergo RI for a period of 5 years and to pay a fine of Rs.8,000/- and in default of payment of fine, to undergo SI for 1-½ years.

Appellant Surrender had been convicted under Sections 363/366/376/174 of the IPC; for his conviction under Sections 376 he had been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.10,000/-, in default of payment of fine to undergo SI for 2 years; he had been sentenced to undergo RI for a period of 5 years and to pay a fine of Rs.8000/-, in default of payment of fine to undergo SI for a period of ½ years for his conviction under section 366 of the IPC; for his conviction under Section 363 he had been sentenced to undergo RI for a period of 3 years and to pay a fine of Rs.5000/-, in default of payment fine to undergo SI for 1 year; for his conviction under Section 174A of the IPC he had been sentenced to undergo SI for a period of 1 year and to pay a fine of Rs.2000/- in default of payment of fine to undergo SI for a period of 4 months.

Sentences were to run concurrently. Benefit of Section 428 of the Cr.P.C. was given.

Nominal roll of the appellant-Surender reflects that as on 23.7.2015 he has undergone incarceration of 5 years, 3 months and 25 days besides remission earned of 6 months and 11 days meaning thereby that he has undergone incarceration of almost 6 years.

Nominal roll of the appellant-Bala reflects that as on 13.7.2015 she has undergone incarceration of 2 years, 1 month and 24 days besides remission earned of 6 months meaning thereby that as on date, she has completed incarceration of 3 years. Her jail conduct is satisfactory.

Version of the prosecution is that on 13.7.2006 a complaint was

lodged by the father of the victim A-(examined as PW-4) that his daughter was missing. Efforts to trace her were fruitless. She was recovered and thereafter her statement was recorded under Section 164 Cr.P.C. Further investigation revealed that the victim on 30.6.2006 was going to the factory when accused Bala called her. She asked the prosecutrix to go to the Preet Vihar Temple where she met a boy; he had a conversation with her. That boy (accused Surrender) took her to Ghaziabad in an auto and then to Moradabad by bus. The parents of the boy were informed that the victim was to be married to Surrender. The prosecutrix and the boy got married. Physical relations were made by co-accused Surrender with the prosecutrix and she was threatened not to disclose this to anyone or else her sister would be kidnapped. In view of the version of the prosecution challan was filed. Evidence was led and thereafter the accused were convicted and sentenced as aforesaid.

Learned counsel for the co-accused Surrender submits that he has been convicted under Sections 363/366/376/174A of the IPC but perusal of the evidence reveals that the prosecutrix is a willing party. She had accompanied Surrender on her own. She was even otherwise at the age of discretion. She had stayed with the accused for 25 days. In the alternate it is submitted that the conviction is not being challenged on merits; the period of incarceration already suffered by the appellant be treated as the sentence imposed upon him. The appellant be released on sentence already undergone by him.

Qua Bala on merits, it is submitted that the only role attributed to Bala was that she had called the victim to her house and thereafter

no other role had been assigned to her. Even as per the version of the victim, it was Surrender who had married 'A' and made physical relation with her against her consent.

Alternate submission being that the appellant is not challenging her conviction on merits but the period of incarceration already suffered by her be treated as the sentence imposed upon her.

Record shows that the victim was recovered on 25.7.2006; she had gone missing on 30.6.2006. She had been recovered after a period of almost 25 days. She was at the age of 15+ years on the date of the incident. There was a marriage certificate also on record which was produced in the course of trial to substantiate that the parties had got married. The submission of the prosecution being that this was a forcible marriage.

Noting the factual matrix as also the submission of the learned counsel for the appellant that Surrender has completed almost more than 80% of the incarceration which has been imposed upon him and this clearly being a case of consent where the victim had stayed voluntarily with the appellant for more than 25 days and had married him but without delving any further into this argument as the appellant has not challenged his conviction on merits this would be a fit case where the Court would wish to exercise its discretion to award a sentence lesser than the minimum by taking recourse to the proviso of Section 376 of the IPC; the period of incarceration already suffered by Surrender be the sentence imposed upon him. However, it is made clear that this order will be effective subject to deposit of fine by the appellant.

In this context the Apex Court in AIR 2009 SC 1467 Zindar Ali SK Vs. State of West Bengal and Anr. while considering the grant of a sentence below the minimum for a conviction under Section 376 of the IPC had held as follows:

"...In our opinion, considering the fact that the incident took place about 6 years back and the fact that the accused is behind the bars for last about 5 years, as also poverty on the part of the accused, we feel that the sentence already suffered would be sufficient. The sentence of fine is however, confirmed."

Appeal of Surender is disposed of in the above terms.

Gravity of offence qua appellant Bala is still on the lesser side. She had suffered conviction under Sections 363/366 of the IPC. The maximum sentence which had been awarded to her is RI for a period of 5 years. As rightly pointed out by learned counsel for the appellant-Bala, the role attributed to the appellant is that she had called the prosecutrix to her home; thereafter all the allegations were levelled against Surender. Appellant-Bala has suffered incarceration of 3 years. She is a lady. She is a first time convict and there is no other case which is pending against her. Her jail conduct is satisfactory. Appellant-Bala also be released on the sentence undergone by her, if not required in any other case.

Appeal of appellant-Bala also stands disposed of in the above terms.

INDERMEET KAUR, J

AUGUST 03, 2015/ndn