

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

**RESERVED ON : 7th JULY, 2015
DECIDED ON : 23rd JULY, 2015**

+ CRL.A. 632/2003

AVDESH KUMAR Appellant

**Through : Mr.Pankaj Gupta, Advocate for
Mr.Paramjit, Advocate.**

versus

THE STATE (GOVT. OF NCT OF DELHI) Respondent

Through : Mr.Navin K.Jha, APP.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. This appeal is directed against a judgment dated 14.05.2003 of learned Addl. Sessions Judge in Sessions Case No. 250/01 arising out of FIR No. 159/01 PS Bawana by which the appellant – Avdesh Kumar was convicted under Sections 366/376 IPC. By an order dated 16.05.2003, he was sentenced to undergo RI for seven years with fine ₹ 15,000/- under

Section 376 IPC and RI for five years with fine ₹ 5,000/- under Section 366 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 04.05.2001 the appellant after kidnapping the prosecutrix 'X' aged around thirteen years from the lawful guardianship of her parents took her in a forest and sexually assaulted her. On 04.05.2001, PW-2 (Manohar Lal), victim's father lodged a 'missing person report' (Ex.PW-2/A) informing that her daughter 'X' was missing from his house since 04.05.2001 at around 12.30 p.m. Efforts were made to find her but she could not be located. Finally, she was recovered along with the appellant at Old Delhi Railway Station on 05.05.2001. 'X' was taken for medical examination; she recorded her statement under Section 164 Cr.P.C. The accused was arrested and medically examined. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. After completion of investigation, a charge-sheet was filed under Sections 363/366/376 IPC against the appellant; he was charged for the said offences to which he pleaded not guilty and claimed trial. The prosecution examined thirteen witnesses to prove the charges. In 313 Cr.P.C. statement, the accused denied his involvement in

the crime and pleaded false implication without producing any evidence in defence. The trial resulted in his conviction under Sections 366/376 IPC. It is relevant to note that the appellant was acquitted of the charge under Section 363 IPC and the State did not challenge the said acquittal. I have heard the learned counsel for the parties and have perused the file. Throughout the investigation and trial, 'X' and her parents had claimed that 'X' was a minor child aged 13 years. However, they did not furnish any cogent document to show her exact date of birth. Reliance was placed on school record where the date of birth was recorded as 08.07.1988 as proved by PW-8 (Kaptan Singh). Admittedly, date of birth recorded in school at the time of her admission was not based upon any birth certificate. To ascertain her age, ossification test was conducted and as per ossification test (Ex.PW-6/A) her age was determined 16 – 18 years. The Trial Court came to the conclusion that the prosecutrix was more than 16 years of age as on 04.05.2001. Consequently, benefit of doubt was given to the appellant and it resulted in his acquittal under Section 363 IPC.

3. On perusal of the statements of the prosecution witnesses, it reveals that both the prosecutrix and her family members were acquainted with the accused before the incident. Admittedly, the appellant and 'X's father used to run their respective shops in neighbourhood. 'X' and the

appellant used to meet each other and have conversation. Admittedly, the appellant used to express his love towards the prosecutrix. On 04.05.2001, all of a sudden 'X' went missing from her house without informing her parents. At no stage prior to her recovery, she attempted to contact and inform them her whereabouts. When she could not be located for quite some time, her father PW-2 (Manohar Lal) lodged 'missing person report' with the police on 04.05.2001 at around 11.00 p.m. without suspecting the appellant's involvement in the crime. Only after they were recovered by the police at the railway station, 'X' opted to implicate the appellant for establishing physical relations with her against her wishes after her kidnapping. In her 164 Cr.P.C. statement (Ex.PW-1/A) recorded on 09.05.2001, she disclosed that on the day of occurrence she had gone to her shop, where the appellant, to whom she knew before, met her. She ate cake offered by him and thereafter he took her in a rickshaw. She did not claim that the accused had enticed or allured her to 'take' her out of lawful guardianship of her parents. Apparently, she had voluntarily accompanied the appellant that time. She further disclosed that in the jungle the accused committed rape upon her. Again, she did not utter a word if she had raised any alarm to attract the attention of the public at that time or offered resistance to the sexual act. She further disclosed that thereafter the

accused took her to Old Delhi Railway Station after changing 4 – 5 buses. When the accused was making enquiries at the ticket-counter, finding the opportunity, she informed her parents on phone. It is unclear if the prosecutrix was carrying any mobile that day. It is unclear from where she had made a telephone call to inform her parents. In her Court statement as PW-1, she admitted that the accused who had a shop in front of their shop, used to induce her for marriage; he used to have love talks with her. She admitted that on 04.05.2001, the accused took her in a TSR to Rohini. At no stage prior to the incident, 'X' had lodged any complaint about appellant's conduct and behaviour towards her. She further deposed that at a lonely place near Rohini, the accused established physical relations against her wishes. She did not aver if she raised any hue and cry or alarm that time. Rather she conveniently accompanied the accused thereafter to the railway station while travelling in four – five buses. They remained there throughout the night. She did not bother to inform any police official or public person present at the railway station. All these circumstances indicate that the prosecutrix was a willing party throughout. No force whatsoever was used at any stage by the appellant aged around 20 years. He was not armed with any weapon to create real apprehension in X's mind to succumb to his demands. If regard be had to the sequence of the

events as disclosed by the prosecutrix in her evidence, it is impossible to believe that she was under fear. Conduct of the prosecutrix in keeping silent throughout is indicative of the fact that she was a consenting party. Consent of the prosecutrix is writ large. No external visible injuries were found on her body to demonstrate that there has been any resistance offered by her. There were no struggle marks or marks of violence on her body. Physical relations, if any, were consensual. Since the age of the prosecutrix has been ascertained and relied upon to be above 16 years by the Trial Court, apparently, no conviction under Section 376 IPC was sustainable. As per ossification test, her age was assessed between 16 – 18 years and if margin of error is given as reflected in the impugned judgment, her approximate age comes even above 18 years. It is well settled law that if two views are possible, the one favourable to the accused has to be adopted.

4. On consideration of the totality of the facts and circumstances, it would be unsafe to convict the appellant when there are so many infirmities, holes and lacunas in the prosecution version. The appeal is allowed. Conviction and sentence awarded by the Trial Court are set aside. Bail bonds and surety bonds stand discharged.

5. Trial Court record be sent back immediately with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

JULY 23, 2015 / *tr*