

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

RESERVED ON : MAY 25, 2015

DECIDED ON : JULY 09, 2015

+ CRL.A. 159/2004

SUSHIL KUMAR

..... Appellant

Through : Mr.Kamlesh Kumar, Advocate.

versus

THE STATE

..... Respondent

Through : Ms.Kusum Dhalla, APP.

SI Pramod Kumar, Patel Nagar.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is to a judgment dated 18.12.2003 of learned Additional Sessions Judge in Sessions Case No.35/2000 emanating from FIR No.616/99 registered at Police Station Patel Nagar whereby the appellant-Sushil Kumar was convicted under Sections 363/366/376 IPC. By an order dated 22.12.2003, he was sentenced to undergo RI for three years with fine ₹1,000/- each under Sections 363/366 IPC and RI for seven years with fine ₹5,000/- under Section 376 IPC. The sentences were to operate concurrently.

2. The prosecution case in brief is that on 28.08.1999 Ramdhari Yadav lodged complaint in the police station, Patel Nagar, informing that his daughter 'X' (assumed name), aged 15 years, who had gone at 07:00 a.m. to her school did not return. He suspected appellant's involvement in her kidnapping. Efforts were made to find 'X' but in vain. Finally, on 30.08.1999, the instant FIR was lodged. During investigation, the accused was apprehended and 'X' was recovered from his house on 17.09.1999. She was medically examined; she recorded her statement under Section 164 Cr.P.C. Statements of witnesses conversant with facts were recorded. After completion of investigation, a charge-sheet was laid before the Court. The prosecution examined thirteen witnesses to prove its case. In 313 statement, the appellant denied his involvement in the crime. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the appeal has been filed by him.

3. I have heard the learned counsel for the parties and have examined the file. Admitted position is that 'X' and the appellant were acquainted with each other before the incident. The appellant used to impart tuition to her since the date 'X' was in IVth standard; was her teacher till VIIth standard and lived in her neighbourhood. It appears that during that period intimacy developed between the two and they started

meeting each other. The appellant used to meet 'X' near her school and ask her to marry him. When 'X's parents came to know about it, they discontinued her tuition and the appellant shifted his residence to Prem Nagar. The appellant and 'X', however, continued to meet 'X' disclosed in her Court statement as PW-5 that on 28.08.99 at about 07:00 a.m. when she had gone to school, the appellant met her outside the school-gate and offered to accompany him to watch a movie. She accompanied him leaving her school bag in the school. She was taken to Faridabad in a bus where he had rented a room. 'X' informed that after reaching Faridabad, during day time, the appellant forcibly established physical relations with her; She bled from her private parts. She remained sick for four days. Thereafter, she was confined in a room for twenty days and despite her resistance, the appellant repeatedly established physical relations with her. In the cross-examination, she elaborated that she had voluntarily accompanied the appellant but was not aware of his intention. She just believed him innocently and was not aware of his bad intention. She fairly admitted that no complaint was lodged by her to anyone about her forcible kidnapping.

The appellant has not denied his love and affection for 'X'.

In 313 statement, he fairly admitted that he and 'X' were having love

affairs and he wanted to marry her. He averred that on the date of occurrence, 'X' came to his house and insisted him to take her somewhere as she was being married to someone else against her wishes. Subsequently, he was falsely implicated by 'X' in connivance with her parents. Needless to say, 'X' had accompanied the appellant with her free consent. She did not raise any alarm any time about her alleged kidnapping despite having ample opportunity. She continued to stay with the appellant for twenty-days and at no stage, raised hue and cry to attract attention of the neighbours. She did not complain about the appellant's conduct and behaviour during journey in the bus to Faridabad. Apparently, 'X' was a consenting and willing partner in the entire episode.

4. Age of the Prosecutrix is crucial to ascertain the appellant's guilt. In missing person report lodged on 28.08.1999 vide Daily Diary (DD) No.15A (Mark 'X'), 'X's age was disclosed 15 years. MLC (Ex.PW-10/A) also records her age 15 years. PW-1 (Sita Devi), 'X's mother, stated that she was 14 years old. Her father Ram Dhari Yadav (PW-2) revealed her age 15 years and produced School Leaving Certificate (Ex.PW2/G) seized vide seizure memo (Ex.PW-2/F). The prosecution examined Mrs.Satya Bhatnagar, Principal of Govt. Girls Sec.

School, Prem Nagar, as PW-3 who brought the admission register of the school. As per school record, 'X' was admitted there on 08.04.1997 in VIth Standard. As per entry No.69, her date of birth recorded was 14.04.1985. School Leaving Certificate (Ex.PW2/G) was issued on 06.09.1999 when she was a student of VIIIth standard. She was, however, unaware as to on what basis her date of birth was recorded in the MCD school at the time of her admission. 'X' claimed her age at the time of recording of her statement before the Court on 19.04.2001 more than 15 years but less than 16 years. Apparently, 'X' was below 16 years of age on the day of occurrence. The date of birth recorded in the School Leaving Certificate cannot be suspected as it was recorded much prior to the incident. The genuineness and correctness of this certificate has not been doubted in the cross-examination. 'X' and her parents had not anticipated the incident to happen in near future to manipulate her date of birth recorded in the school register way-back on 08.04.1997. In the cross-examination, age described and proved by the prosecution witnesses remained unchallenged. The appellant did not claim if 'X' was more than 16 years of age on the day of incident. During trial, he did not demand for ossification test of the prosecutrix to ascertain her age. No sound reasons exist to suspect the authenticity of School Leaving Certificate revealing

the exact date of birth of the prosecutrix. Since 'X' was below 16 years of age, her consent to have physical relations with the appellant was inconsequential. The appellant had no reasons to entice the innocent child of immature age who had gone to attend her school as usual, on the pretext to show her a movie without seeking her parents' prior consent/permission. The appellant was assigned a pious duty to impart tuition to the child. Instead of performing his duties, the appellant developed intimacy with the child and allured her to take her out of the keeping of lawful guardianship of her parents. Not only he kept the prosecutrix at a place far away from her residence for long twenty-days, he also established physical relations with her. 'X's consent for sexual relations was irrelevant and immaterial as she was unable to form a conscious decision based on the knowledge of the significance and moral quality of the act due to her tender age. After taking 'X', no attempt was made by the appellant to marry her legally. She was kept in isolation in a rented room. The appellant did not bother to introduce her to his parents showing inclination to marry her. As per MLC (Ex.PW-10/A), her hymen was found torn. Needless to say, appellant's only motive was to satisfy his lust otherwise he had no reasons to establish physical relations with a

child without having any intention to perform marriage. She was not of ripe age even to give valid consent for marriage.

5. Appellant's conduct is unfair and unreasonable as while in judicial custody, he had the audacity to send a threatening letter (Ex.PW5/DB) to 'X's parents boasting that nothing would happen to him and only 'X's life would be ruined. Apparently, 'X's father was threatened not to make statement against him in the Court. This letter was written on 21.12.2000 prior to the recording of the statement of the prosecutrix and her father. She was in fear while recording her statement in the Court.

6. Findings of the trial court convicting the appellant based upon fair appraisal of the evidence, can't be faulted and the conviction for the aforesaid offences is affirmed. Sentence Order requires no modification as there was 10 years gap between the age of the appellant and that of 'X' when he exploited her innocence and established sexual relations betraying the trust of the parents who engaged him to impart tuition to their little child. Court can well understand the trauma of victim's parents who were unaware of her whereabouts for long twenty days. The appellant deserves no leniency in the absence of adequate and special reasons.

7. The appeal lacks merits and is dismissed. The appellant shall surrender before the Trial Court on 20th July, 2015 to serve the remaining period of sentence. The Registry shall transmit the Trial Court records forthwith along with the copy of this order.

(S.P.GARG)
JUDGE

JULY 09, 2015/sa