

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

DECIDED ON : FEBRUARY 02, 2015

+ CRL. A. 883/2004

MUKESH KUMAR

..... Appellant.

Through : Mr. R.P. Shukla with
Mr.R.K.Sonaki and Mr.Dhanajay
Singh, Advocates along with
appellant in person.

versus

THE STATE

..... Respondent

Through : Ms. Kusum Dhalla, APP for State.

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

S.P.GARG, J. (ORAL)

1. The appellant-Mukesh Kumar impugns a judgment dated 16.10.2004 of learned Additional Sessions Judge in Sessions Case No.24/2002 arising out of FIR No.11/2002 registered at Police Station Vasant Kunj by which he was held guilty for committing offence under Section 376 IPC. By an order dated 23.10.2004, he was awarded RI for seven years with fine ₹4,000/-.

2. Allegations against the appellant as reflected in the charge-sheet were that on 06.01.2002 he kidnapped the prosecutrix 'X' (assumed

name) aged about 16 years from the lawful guardianship of her parents without their consent and sexually assaulted her thereafter. Daily Dairy (DD) No.36/A (Ex.PW.13/A) came into existence on 06.01.2002 at Police Station Vasant Kunj when intimation about 'X' missing from her house was lodged. The investigation was assigned to SI Naubat Singh. On 07.01.2002 'X' was recovered and after recording her statement, the investigating officer lodged first information report (Ex.PW-5/A). The prosecutrix was medically examined. She recorded her statement under Section 164 Cr.P.C. Statements of witnesses were recorded; the accused was arrested; and exhibits were sent to forensic science laboratory for examination. After completion of investigation, a charge-sheet was submitted against the appellant for committing offence under Sections 363/366/376 IPC. The prosecution examined 14 witnesses to establish his guilt. In 313 statement, the appellant denied his involvement in the crime and pleaded false implication. The trial resulted in his conviction under Section 376 IPC. It is relevant to note that he was acquitted of the charges under Section 366/363 IPC. The State did not challenge the said acquittal. Being aggrieved and dissatisfied, the appellant has preferred the present appeal.

3. During the course of arguments, learned counsel for the appellant, on instructions, stated at Bar that the appellant has opted not to challenge the findings of the trial court on conviction under Section 376 PC. He, however, prayed to take lenient view as the appellant has remained in custody for about two years. He has since been married and has two small kids to take care of. Learned APP has no objection to take lenient view considering the mitigating circumstances.

4. Since the appellant has voluntarily accepted the findings on conviction, conviction under Section 376 IPC is affirmed. Besides confession, the prosecutrix 'X' (PW-1) deposed that the appellant had taken her in a three wheeler scooter when she had gone to ease in the fields at 6:00 a.m. Thereafter, he committed rape on her person at a place unknown to her. She identified her Salwar (Ex.P-1) and shirt (Ex.P-2) seized by the police. In the cross-examination, she denied if she had love affairs with the appellant and wanted to marry him. She denied that the letters Mark A-1 to A-21 were in her hand-writing. Learned counsel for the appellant urged that the physical relations (if any) were with the consent of 'X' and she had accompanied the appellant on her own accord. On perusal of the evidence on record, it transpires that the appellant lived in the neighbourhood of the prosecutrix and both of them were known to

each other. The prosecutrix did not raise alarm when the appellant had taken her at odd hours at 06:00 a.m. in a TSR. She had remained with the appellant for one day and at no stage she raised any hue and cry about the conduct and behaviour of the appellant. MLC (Ex.PW-9/A) does not reflect any physical body injury on her private parts. The doctor was unable to give definite opinion regarding rape. There was no specific opinion that the hymen was torn. In the alleged history recorded in the MLC (Ex.PW-9/A), the victim informed the doctor that she herself had married with the appellant on the previous day. In her statement under Section 164 Cr.P.C., the victim revealed that she had accompanied the appellant with her consent but the physical relations were established against her wishes. The very fact that the appellant was acquitted of the charge under Section 363/366 IPC reveals that the prosecutrix was a consenting party. There is no intention if any force was used by the appellant to establish physical relations against her wishes. Even if the consent of the prosecutrix is taken as a valid defence of the appellant, age of the prosecutrix below 16 years at the time of incident does not exonerate him of the crime under Section 376 IPC. Her date of birth has been proved by PW-7 (Raj Kaur), Headmistress of MCD Primary Girls School Rangpuri, New Delhi. As per their record the date of birth of the

prosecutrix was 01.11.1986 in the certificate (Ex.PW-7/A). Apparently, the prosecutrix was below 16 years on the day of incident. Consent of the prosecutrix to establish physical relations was immaterial and is of no consequence.

5. Regarding modification of sentence, the order reveals that the occurrence took place on 06.01.2002. The appellant has suffered agony of trial/appeal for about 13 years. He remained in custody for one year six months and twenty three days as on 25.07.2005. He also earned remission for two months and five days. His jail conduct was satisfactory. He is not involved in any criminal case and is not a previous convict. He was released on bail on 25.07.2005 and there is nothing on record that he indulged in any such activity thereafter. It has come on record that the appellant has since been got married and has a wife and two small kids to maintain them. The prosecutrix 'X' has also been married at the age of 16 years. She was on the verge of attaining the age of sixteen years on the day of incident. The appellant was also aged about 21 years. It appears that there were love affairs between the prosecutrix and the appellant and they wanted to marry. Since the prosecutrix was below 16 years of age and did not know the consequences of sexual relations, the appellant is liable for committing offence under Section 376 IPC.

6. Considering all these mitigating circumstances, the sentence order is modified and instead of awarding minimum sentence i.e. RI for seven years under Section 376 IPC, the appellant is ordered to undergo RI for three years with fine. Other terms and conditions of the sentence order are left undisturbed.
7. The appeal stands disposed of in the above terms.
8. The appellant, who is present in Court, be taken in custody to serve out the remaining period of sentence.
9. Copy of this order be sent to the concerned Jail Superintendent for information and necessary action. Trial court record be sent back along with a copy of this order.
10. Copy of the order be given dasti to the parties under the signature of the Court Master.

(S.P.GARG)
JUDGE

FEBRUARY 02, 2015

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