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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : OCTOBER 12, 2015

DECIDED ON : OCTOBER 14, 2015

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CRL.A. 127/2014

RAJESH @ BATLA

..... Appellant

Through : Ms.Inderjeet Sindhu with
Ms.Divya Chugh, Advocates.

versus

STATE

..... Respondent

Through : Mr.Amit Ahlawat, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 24.09.2013 of learned Additional Sessions Judge in Sessions Case No.40/13 emanating from FIR No.450/12 registered at Police Station Prashant Vihar by which the appellant-Rajesh @ Batla was held guilty for committing offences under Section 376/363 IPC, he has filed the instant appeal. By an order dated 08.10.2013, the appellant was sentenced to undergo RI for seven years with fine ₹5,000 under Section 376 IPC and RI for two years with fine

₹2,000/- under Section 363 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 07.11.2012, at about 5:00 p.m. at Village Razapur, Sector-9, Rohini, Delhi, the appellant kidnapped the prosecutrix 'X' (assumed name), aged around 12 years, from the lawful guardianship of her mother Badami Devi; wrongfully confined her at Noida and committed rape upon her without her consent. 'X' went missing from her house on 07.11.2012 when her mother had gone at her work-place. When 'X's mother Badami Devi returned to her residence at about 3:00 p.m., she found 'X' missing. Efforts were made to search her but to no effect. The Investigating Officer lodged First Information Report after recording her statement (Ex.PW-3/A). On 09.11.2012, 'X' returned to her house on her own and taken to Police Station. She was medically examined; she recorded her 164 Cr.P.C. statement. The accused was arrested and taken for medical examination. Statements of witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against the appellant in the court. The prosecution examined fourteen witnesses to substantiate its case. In 313 statement, denying the allegations, the appellant stated that the prosecutrix was a consenting

party. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the record. On perusal of the statements of the prosecutrix and other relevant witnesses, it stands established that 'X' was a consenting party throughout. The appellant and the prosecutrix were familiar with each other and used to have conversation. They lived in the same building and used to meet often. 'X' remained in the company of the appellant for about two days and at no stage she raised any alarm protesting her alleged forcible kidnapping. Physical relations were established and no external injuries were found on her body. At the time of her medical examination vide MLC Ex.PW-4/A, she revealed to the doctor that the appellant was known to her for the last about three years and he lived in the same building. She further revealed that she had courtship with him about two months back with her consent. PW-4 (Dr.Roopal Ilwadi) proved the MLC (Ex.PW-4/A). No injuries/struggle marks were found on her body. In her 164 Cr.P.C. statement (Ex.PW-2/A), the prosecutrix categorically admitted that she had accompanied the appellant on 07.11.2012. Physical relations were established with her consent. In her Court statement, the prosecutrix deviated from her previous version and testified that physical

relations were forcible and without her consent. This statement seems to have been made by the prosecutrix at the instance of her mother to implicate the appellant for commission of rape without her consent. In the cross-examination, she admitted that the appellant was known to her for about three years before the incident. She had gone with the accused to see some marriage function and had taken her clothes with her. She admitted that she had not raised alarm at the house of the accused. In her 313 statement, the appellant was fair enough to admit that the prosecutrix had accompanied him with her free consent and he had established physical relations with her. He claimed that the prosecutrix loved him. The prosecutrix had travelled to Noida during day time but at no stage she protested her alleged kidnapping. There were no struggle or injury marks on her body at the time of physical relations. She returned to the house by Metro but on the way did not complain about the appellant's conduct and behaviour. From the circumstances brought on record it can safely be inferred that the prosecutrix was a consenting party.

4. Age of the prosecutrix is relevant to infer the appellant's guilt. Throughout, the prosecution's case is that 'X' was aged about 12 years on the day of incident. PW-5 (Daisy Grover), Principal, Municipal Corporation Primary School, Section-13, Rohini, Delhi deposed that as

per school record, date of birth of the prosecutrix was 10.04.2000. She proved the relevant documents Ex.PW-5/A to Ex.PW-5/D. The said date of birth was recorded at the time of admission in 1st class in 2007. 'X's mother had filed affidavit (Ex.PW-5/C) disclosing the said date of birth of the prosecutrix. It is true that at the time of recording her date of birth no birth certificate issued by the competent authority was furnished. No ossification test to ascertain the approximate age of the prosecutrix was conducted during investigation. However, there are no reasons to disbelieve the date of birth recorded in the School records as 'X' parents never anticipated such an incident to happen in future to manipulate her age that time. The appellant has not suggested any other date of birth of the prosecutrix. The Trial Court has dealt with this aspect minutely in the impugned judgment. Since the prosecutrix was below 16 years of age on the day of incident, her consent to have physical relations with the appellant was of no relevance. 'X' being an immature girl of tender age was incapable to take informed decision and to submit herself for sexual relations without understanding its consequences. Conviction recorded under Section 376/363 IPC cannot be faulted.

5. Regarding appellant's prayer to take lenient view, it reveals that he has already undergone more than three years incarceration; he was

aged around 20 years on the date of occurrence. There was love affair between the prosecutrix and the accused and both wanted to marry. As noticed above, the prosecutrix was a consenting party. The appellant was not aware of her exact date of birth. He is a first time offender and is not involved in any other criminal activity. His overall conduct in jail is satisfactory. Sentence order records that he has four younger brothers, two sisters and an old widow mother to look after. He is the only bread winner of his family. Considering all these circumstances, I am of the view that there exist special and adequate reasons to award sentence less than seven years as mandated under Section 376 IPC. In Sanjay vs. State 2014 (1) C.C.Cases (HC) 326, this Court held:

“The legislature in its wisdom made a provision for awarding a sentence of less than seven years when there are special and adequate reasons for the same. I have before me the prosecutrix’s testimony. It goes without saying that the prosecutrix merrily proceeded with the Appellant most willingly. She travelled with him in a bus and then in a train to Luchnow. The prosecutrix was brought back to Delhi by the Appellant himself where the Appellant and the prosecutrix were apprehended at New Delhi Railway Station by the police. Thus, although the Appellant does not want to contest the appeal on merits, it is borne out from the record that it was a case of consensual intercourse with the prosecutrix. While awarding punishment, the Court has to take into consideration the mitigating and aggravating circumstances. The prosecutrix was aged 15 years and

eight months and she was incapable of giving the consent for sexual intercourse. I have seen numerous cases where the girls sometimes less than 16 years of age take a lead in eloping with a boy, enters into a marriage with the boy and have sexual intercourse with him. Such a predicament was noticed by this Court in several cases including in two judgments passed by the Division Benches of this Court, namely, Manish Singh v.State Govt. of NCT & Ors, AIR 2006 Delhi 37 and Bholu Khan v.State of NCT of Delhi & Ors. (W.P.(Crl.)1442/2012 dt.01.02.2013.”

Considering the age of the prosecutrix and the facts narrated above, in my view, it is a fit case where sentence less than the minimum should be awarded. Similar view was taken and sentence less than minimum was awarded by a learned Single Judge of this Court in Brij Pal v.State (Crl.Appeal No.278 of 2000) decided on May 31, 2011. I accordingly, sentence the Appellant to undergo RI for four years and to pay a fine of Rs.2,500/- for each of the offences under Sections 366 and 376 IPC, and in default of payment of fine, the Appellant shall undergo SI for one month each. Both the substantive sentences shall run concurrently.”

6. In the light of the above discussion, while maintaining conviction, Sentence order is modified and the substantive sentence of the appellant under Section 376 IPC shall be RI for five years instead of seven years. Other terms and conditions of the sentence order are left undisturbed.

7. The appeal stands disposed of in the above terms. Copy of this order be sent to the concerned Jail Superintendent for information. Trial court record be sent back along with a copy of this order.

(S.P.GARG)
JUDGE

OCTOBER 14, 2015
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