

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

RESERVED ON : JANUARY 21, 2015

DECIDED ON : JANUARY 27, 2015

+ CRL.A. 176/2014 and Crl.M.B.145/2015 (u/S 389 Cr.P.C.)

IKLAKH @ BABLU

..... Appellant

**Through : Mr.Pramod Kumar Dubey with
Mr.Shiv Chopra and Ms.Megha,
Advocates.**

VERSUS

STATE

..... Respondent

Through : Ms.Kusum Dhalla, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant-Iklakh @ Bablu challenges the legality and correctness of a judgment dated 18.12.2013 of learned Additional Sessions Judge in Sessions Case No.46/13 arising out of FIR 266/11 under Section 363/376 IPC registered at Police Station Rajouri Garden by which he was held guilty for committing offence under Section 376 IPC. By an order dated 19.12.2013, he was awarded RI for seven years with fine ₹2,000/-.

2. The prosecution case as reflected in the charge-sheet was that on 26.07.2011 at about 03:30 p.m. the appellant kidnapped 'X' (assumed
Crl.A.176/2014

name) aged 16 years from the lawful guardianship of her parents without their consent and took her at Sangam Vihar where he sexually assaulted her against her wishes. Victim's father Chander Bhan (PW-6) lodged missing person report on 29.07.2011 and DD No.43A (Ex.PW-15/A) came into existence. FIR (Ex.PW-15/B) was recorded under Section 363 IPC. On 8th August, 2011 both the appellant and the prosecutrix were apprehended at bus stand Sangam Vihar. Statements of witnesses conversant with facts were recorded. The prosecutrix was medically examined. She recorded her statement under Section 164 Cr.P.C. Exhibits were sent to Forensic Science Laboratory for examination. After completion of investigation, a charge-sheet under Section 363/376 IPC was submitted against the appellant in the court. The prosecution examined 18 witnesses to prove its case. In 313 statement, the appellant denied his involvement in the crime and alleged false implication. He, however, did not examine any witness in defence. The trial resulted in his conviction under Section 376 IPC. It is relevant to note that the prosecutrix was found major and the appellant was acquitted for commission of offence under Section 363 IPC. The State did not challenge the said acquittal.

3. I have heard the learned counsel for the parties and have examined the file. Admitted position is that the prosecutrix was major on the day of incident i.e.26.07.2011. Both the prosecutrix and the appellant were known to each other before the incident being native of the same village. Both had come in the same train on 12.07.2011 to Delhi. Further admitted position is that on 26.07.2011 'X' herself had called the appellant on his mobile to her house and had accompanied him with her free consent. In the cross-examination, she admitted that her bhabhi was present in the house that time. She had left the house with the appellant without informing her. It is not in dispute that thereafter the appellant had taken the 'X' at the residence of his friend at Sangam Vihar where he lived along with his wife and sister. Both the prosecutrix and the appellant stayed at the said house for ten days. At no stage, the prosecutrix raised any alarm for objectionable conduct or behavior of the appellant. She was introduced by the appellant to be his 'wife' to the inmates of the house. Admittedly, when on the day of apprehension the prosecutrix left Sangam Vihar, she was wearing 'burka' to conceal her identity. She did not attempt to inform her parents about her whereabouts during her ten days stay at Sangam Vihar with the appellant. She has admitted that greeting card (Ex.PW2/DA) and letter (Ex.PW2/DB) in her

hand writing were sent to the appellant. The appellant had visiting terms at her house. From all these circumstances reasonable inference can be drawn that the appellant and the prosecutrix were having love affairs and she had accompanied him with her free consent. It was a case of elopement with consent.

4. At no stage during her stay with the appellant, the prosecutrix levelled allegations of forcible sexual relations. Only when both of them were arrested on 8.8.2011 by the police, her statement under Section 164 Cr.P.C. was recorded. For the first time she alleged commission of rape on her person without her consent by the appellant. Her statement (Ex.PW-2/A) under Section 164 Cr.P.C. was recorded on 11.08.2011. She did not give detailed account if any forcible sexual relation was established against her wishes by the appellant. She did not give specific date and time when she was ravished by the appellant. She merely stated that during her stay there 'Usne mere saath jabardasti bhi ki'. She did not inform about the alleged forcible rape by the appellant to any neighbour. Even on the day of apprehension when she had accompanied the appellant, there was no alarm raised by her. The appellant was not armed with any weapon to cause reasonable fear in her mind to prevent him from indulging in physical relations. In the MLC (Ex.PW-8/A) recorded on

8.8.2011, no visible physical injuries were found on her person or on her private parts. Hymen was found 'torn'. In the alleged history recorded in the MLC there is no mention of commission of rape by the appellant. Rather it records that sexual intercourse was done multiple number of times. Lastly, the intercourse was done on the previous night.

5. In her deposition before the court as PW-2 again she did not divulge detailed account as to when she was sexually assaulted against her wishes by the appellant. No reliance can be placed on her testimony to base conviction under Section 376 IPC. Physical relations (if any) were established by the prosecutrix with her consent. Even on her apprehension, she opted to go to Nari Niketan where she stayed for two or three days. There is no other evidence to corroborate her version. Missing person report was lodged after three days of the incident. The Investigating Officer had admitted that he had conversation on mobile with one Sarfraz and he had informed him about the stay of the prosecutrix and the appellant in his house. Despite that, raid was delayed and only on 8.08.2011 both of them were apprehended.

6. In the light of the above discussion, conviction under Section 376 IPC cannot be sustained. The appeal is allowed. The conviction and sentence order are set aside. The appellant be released forthwith if not

required to be detained in any other case. Pending application also stands disposed of.

7. 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.

(S.P.GARG)
JUDGE

JANUARY 27, 2015
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