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

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Judgment reserved on :11.8.2015

Judgment delivered on :14.8.2015

+ CRL.A. 325/2013

VIJAY KUMAR

..... Appellant

Through Mr.Deepak Vohra and Mr.Vipin
Malik, Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through Mr.Kewal Singh Ahuja,
Advocate, APP

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order on sentence dated 08.6.2012 and 06.7.2012 respectively wherein the appellant had been convicted under Sections 363/366/376 of the IPC. The sentence awarded to him is RI 5 years and a fine of Rs.2000/- in default of payment of fine to undergo SI for 3 months for his conviction under Section 363; for his conviction under Section 366 of the IPC he has to undergo RI for a period of 5 years and to pay a fine of Rs.2000/-

in default of payment of fine to undergo SI for 3 months; for his conviction under Section 376 of the IPC he had been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.2000/- in default of payment of fine to undergo SI for 6 months. Sentences were to run concurrently. Benefit of Section 428 of the Cr.P.C. had also been granted to the appellant.

2 Version of the prosecution was unfolded in the testimony of the prosecutrix "S" examined as PW-8. The prosecutrix was reported missing from her house since 08.5.2010. Her mother was examined as PW-7 who had lodged the missing report. She had given her statement Ex.PW-7/A. Her version was to the effect that her daughter aged 15 years of age, student of Swami Dayanad Adarsh Vidyala had gone to school but had not returned home. It was alleged that the accused Vijay had also gone missing from the shop and she suspected that Vijay had enticed "S" away. The prosecutrix was recovered 8-9 days later from Bhatinda. She had reach Delhi. Ms.Rekha, learned M.M. (PW-10) had recorded statement of the prosecutrix under Section 164 Cr.P.C. It was proved as Ex.PW-10/A. The version of the prosecutrix was that the accused had enticed her and taken her away to Bhatinda. She was

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confined for 8-9 days in a room by the accused where he committed the forceful act of rape upon her which was against her wishes. The prosecutrix was medically examined. Dr.Namita Gupta (PW-5) had given her detailed report Ex.PW-5/A. Hymen of the prosecutrix was found torn. Her vaginal slides and undergarments were taken, sealed and handed over to the police. Accused was also medically examined. His MLC was proved as Ex.PW-6/A. There was nothing to suggest that he could not perform the sexual act. The father of the victim had also been examined as PW-11. Further version of the prosecution is that PW-11 along with Head Constable Satish and Contable Sajjan had gone to Bhatinda and had brought the victim and the accused from there to Delhi. This has come in the version of the Investigating Officer (PW-13). On the basis of the aforementioned evidence collected by the prosecution oral and documentary the accused was convicted and sentenced as aforementioned.

3 In the statement of the accused recorded under Section 313 Cr.P.C. he had stated that this is a case of false implication.

4 On behalf of the learned Amicus Curiae it has been argued that this is a clear case of consent. The victim was known to the accused and

she had stayed with the accused for 8-9 days. The victim had ample opportunity to run away or to make a complaint but she did not do so. She was a willing and consenting party. The place of arrest of the accused has been shown to be in Delhi. The case of the prosecution is that the victim and the accused had been recovered from Bhatinda. The arrest is also doubtful. As per the prosecutrix she was aged 15 years on the date of commission of offence. She was at the age of discretion and she knew the repercussions of her acts. The accused is entitled to a benefit of doubt and a consequent acquittal.

5 Needless to state that these arguments have been refuted.

6 The star witness of the prosecution was Pw-8. She was the prosecutrix herself. She had been examined on oath on 29.3.2011 i.e. less than 1 year from the date of offence. She had on oath stated that her age is 16-17 years. She had deposed that in May, 2010 she had gone to her school and she was standing outside her school when the appellant who was working in her father's shop took her to the shop where no one else was present and thereafter he made her sit in a bus. Thereafter the accused changed 3-4 buses, then she was taken in a auto-rickshaw and then they boarded a train from a station to Bhatinda where the accused

bought new clothes and bangles for her. The accused had also put sindoor in her 'maang' and thereafter did 'ganda kaam' with her. She explained the 'ganda kaam' by stating that sexual act had been done upon her. She stated that the accused did this act 3-4 times. He threatened her not to disclose this incident to anyone. While the accused was taking her away he promised to marry her. She was brought to Delhi by her father along with police officials after 8-9 days. She was medically examined. In her cross-examination she had stated that on the fateful day she was dropped by the school van near the shop where the accused met her. She stated that the accused had met her outside the school before she boarded the school van. She boarded her school van and when it reached near her shop it was stopped by the accused and she stepped down and then went to the shop of her father. They had stayed outside the shop for two hours and thereafter she sat in a bus. The accused had told her to accompany him to Punjab to which she refused and told him that she would go to her house. On this the accused gave her 2-3 slaps and told her to accompany him. She had been taken away against her wishes. She did not raise an alarm in the bus though there were numerous passengers present. She denied the

suggestion that she did not raise any alarm as she was a willing and consenting party. In another part of her cross-examination she admitted that for 9 days she stayed in Bhatinda with the accused. His sister used to live there. She never told the sister of the accused that the accused had forcibly taken her away. The accused had shown her the room which he wanted to take on rent so that they could stay there. They had also gone to the market to purchase bangles etc. She did not take the articles which included bangles, clothes and sindoor. She admitted that her mother used to beat her. She voluntarily stated that the door of the room in Punjab used to remain open. She did not make any complaint to police or any other person.

7 This version of the prosecutrix has been highlighted by the learned counsel for the appellant to substantiate the submission that this is a clear case of willingness and consent on the part of the victim to have accompanied the accused. This submission shall be examined on the touchstone of the other evidence which has come on record.

8 The mother of the victim has been examined as PW-7. She had reiterated about the missing of her daughter and lodged a complaint. She admitted that the accused used to work in the shop of her husband.

The father of the victim was examined as PW-11. He has also deposed that at the time when his daughter went missing from the house she was aged 15-16 years. The appellant had lured her away. In his cross-examination, he admitted that he had accompanied the police to get his daughter recovered from Bhatinda. He admitted that this information about the prosecutrix being in Bhatinda was received from some unknown person. The medical evidence i.e. MLC of the victim Ex.PW-5/A shows that her hymen was torn. There was a history of sexual intercourse in this intervening period of 8-9 days. No physical trauma was noted on the patient. She was conscious, well oriented and cooperative.

9 The evidence adduced so far does persuade this court to hold that the victim had gone with the accused after taking a conscious decision. She was studying in a school. On the fateful day she boarded the school van but the school van was stopped by the accused; she de-boarded the van and accompanied the accused to the shop of her father which was closed at that time. They waited outside the shop for about two hours and they then boarded a bus; thereafter they changed 3-4 buses and then took a rickshaw and then boarded a train to Bhatinda. She had awaited

outside the shop for two hours. Several persons were available to her to raise her voice or to complain to any person outside the shop; she could also have made efforts to run away from the alleged clutches of the appellant but she did not do so. She voluntarily accompanied the appellant to Bhatinda. Nothing prevented her from running away or making a phone call or even shouting to the passersby as it was a public place where they were sitting. It has also come in the version of the victim that the accused had promised to marry her. He purchased bangles, clothes and sindoor for her while they were in Bhatinda. He also committed sexual act with her. It has further come in her version that during the 8-9 days stay in Bhatinda the doors of the room used to remain open and thus there was ample opportunity available to her to run away from the place where they were residing or even make a phone call but she did not do so. It was 8-9 days later that on an information (not given by the victim but by an unknown person) to PW-11 that the parents of the victim learnt about the whereabouts of their daughter. Even when PW-8 was living in Bhatinda, the sister of the appellant was there; she did not disclose to her either about any forceful act/pressure being put by the appellant upon her.

10 These facts are evident from the deposition of PW-8, lead to the inevitable conclusion that this is a case of willingness and consent and the victim had voluntarily accompanied the accused. There was no force in the contention that she was kidnapped.

11 The next question to be answered by this Court is whether the victim was an adult or a minor on the date of offence. If it is held that she was a minor and below the age of 16 years; the act of the accused would amount to rape; in such a situation the consent of a minor would be no consent in the eyes of law.

12 The date of birth of the victim has been sought to be established through the version of Principal of the school where the victim was studying. Smt.Sudesh (PW-12) principal of Swami Dayanand Adarsh Vidyalaya had brought the certificate regarding the date of birth of the victim. As per the school record her date of birth was 22.12.1994. This was also her date of birth as per the birth certificate issued by the MCD (Ex. PX). Thus the date of birth of the victim being 22.12.1994 and the date of offence being 07.5.2011, on that date she was 15 years and 6 months old.

13 Learned counsel for the appellant submits that the victim was of

the age of discretion and was well within the knowhow of her acts. She knew the repercussions which would follow. She was a fully grown girl and just short of a few months of the age of 16 (which was the age of an adult for the purpose of rape under the pre-amended law i.e. prior to the Criminal Amendment Act of 2013). She was sensible and aware of the intention of the accused. She stayed with the accused for 8-9 days. This was a voluntary stay. It is also not as if she called her parents to inform them about their whereabouts. Her father had received an unknown call pursuant to which the whereabouts of the couple were traced. No injuries have also been noted upon the victim. Had it been a case of force or pressure, some injuries would have emanated on the body of victim; none were found.

14 In a judgment of the Apex Court in AIR 1995 SC 2169 Shyam and another Vs State of Maharashtra, while dealing with the offence under Section 366 of the IPC and noting that the victim had not touched the age of 18 years (18 years being the adult age for the offence under Section 366 of the IPC), the Apex Court in this context noting that the victim was at the age of discretion being sensible and aware of the intention of the appellant and having gone with him on her own,

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notwithstanding the fact that she was technically a minor, the Court had thought it fit to acquit the appellant for the offence under Section 366 of the IPC. Relevant extract of the aforementioned judgment reads herein as under:

“ In her statement in Court, the prosecutrix has put blame on the appellants. She has deposed that she was threatened right from the beginning when being kidnapped and she was kept under threat till the police ultimately recovered her. Normally, her statement in that regard would be difficult to dislodge, but having regard to her conduct, as also the manner of the so-called "taking", it does not seem that the prosecutrix was truthful in that regard. In the first place, it is too much of a coincidence that the prosecutrix on her visit to a common tap, catering to many, would be found alone, or that her whereabouts would be under check by both the appellants/ accused and that they would emerge at the scene abruptly to commit the offence of kidnapping by " "taking" her out of the lawful guardianship of her mother. Secondly, it is difficult to believe that to the strata of society to which the parties belong, they would have gone unnoticed while proceeding to the house of that other. The prosecutrix cannot be said to have been tied to the bicycle as if a load while sitting on the carrier thereof. She could have easily jumped off. She was a fully grown up girl may be one who had yet not touched 18 years of age, but, still she was in the age of discretion, sensible and aware of the intention of the accused Shyam, That he was taking her away for a purpose. It was not unknown to her with whom she was going in view of his earlier proposal. It was expected of her then to jump down from the bicycle, or put up a struggle and, in any case, raise an alarm to protect herself. No such steps were taken by her. It seems she was a willing party to go with Shyam the appellant on her own and in that sense there was no "taking" out of the guardianship of her mother. The culpability of neither

Shyam, A-1 nor that of Suresh, A-2, in these circumstances, appears to us established. The charge against the appellants/ accused under Section [366](#), I.P.C. would thus fail. Accordingly, the appellants deserve acquittal. The appeal is, therefore, allowed acquitting the appellants”

15 This Court is inclined to apply the ratio of the aforementioned judgment in the context of age of discretion which according to this Court the victim in this case had also reached. She was just short of a few months of becoming an adult. She was at the age of discretion and at the cost of repetition fully aware of the outcome and the consequences of her act. The fact that the accused had proposed marriage to her on the way has also come in her testimony. She had also disclosed the manner in which the accused had brought bangles and sindoor for her which he had put in her ‘maang’. In the factual matrix of the instant case, this Court thinks that the victim having accompanied the appellant willfully and voluntarily and being at the age of discretion, her consent is deemed to be a valid consent; as such the offences for which the appellant has been convicted are not made out. The word “taking” which is the essential ingredient to make out the offence under Sections 363/366 of the IPC is also absent. The conviction of the appellant under Sections 363/366/376 of the IPC is unfounded. Appellant is entitled to an

acquittal. He is accordingly acquitted. He be released forthwith, if not required in any other case.

16 Appeal is allowed.

INDERMEET KAUR, J

AUGUST 14, 2015
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