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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : AUGUST 04, 2015

DECIDED ON : AUGUST 14, 2015

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CRL.A. 260/2005

AJAY KUMAR

..... Appellant

Through : Mr.Braham Singh with

Mr.M.S.Vidhudi, Advocates.

versus

STATE

..... Respondent

Through : Mr.Navin K.Jha, APP.

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CRL.A. 324/2005

RAM SAHU @ RAM

..... Appellant

Through : Mr.Krishan Kumar, Advocate.

versus

STATE

..... Respondent

Through : Mr.Navin K.Jha, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 27.01.2005 of learned Additional Sessions Judge in Sessions Case No.48/01 arising out of FIR No.243/00 registered at Police Station Vivek Vihar by which the appellants were convicted under Sections 363/366/376 IPC, they have preferred the instant appeals. By an order dated 01.02.2005, the appellants were awarded various prison terms with fine.

2. Briefly stated, the prosecution case as set up on the charge-sheet was that on 23.11.2000 in between 7.30 a.m. to 9.30 a.m., the appellants in furtherance of their common intention kidnapped the prosecutrix 'X' (assumed name) aged 13 years from the lawful guardianship of her parents. After kidnapping, they took her to village Ramoli, Distt. Darbangha, Bihar where the appellant-Ajay committed rape upon her.

On 23.11.2000 'X' went missing and could not be found despite hectic search by her parents. PW-2 (Nirmala Chaubey) 'X's mother lodged First Information Report with the police and suspected the appellants involvement in the crime. 'X' was recovered from appellants' custody at their village Ramoli, Distt. Darbangha, Bihar on 30.11.2000.

‘X’ was medically examined, she recorded her statement under Section 164 Cr.P.C. Both the accused persons were medically examined after their arrest. Statements of witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against them for committing offence under Sections 363/366/376 IPC. To establish its case, the prosecution examined seventeen witnesses. In 313 statements, the appellants denied their involvement in the crime and pleaded false implication. The trial resulted in their conviction as mentioned previously. Being aggrieved and dissatisfied, the instant appeals have been preferred.

3. I have heard the learned counsel for the parties and have examined the record. Admitted position is that on 23.11.2000 along with her father ‘X’ had gone to Ucchar Madhyamik Vidyalaya, Jhilmil Colony at 7.30 a.m. She went missing from the school leaving her school bag there. Principal of the school informed her parents. The appellants were working in the factory of the victim’s father. They were acquainted with ‘X’ before the incident.

4. On scrutinizing the testimony of the prosecutrix, it leaves no doubt that it was a case of elopement with consent. ‘X’ had entered inside the school premises after she was left there by her father. However, she of

her own voluntarily came out of the school gate to accompany the appellants without informing anyone. She travelled by train to Darbangha, Bihar and remained in the company of the appellants for about seven days. Physical relations were established between 'X' and appellant Ajay during this period. At no stage 'X' raised any alarm to attract the attention of public/police to complain about the alleged forcible kidnapping and seek help from them. The appellants were not armed with any weapon to create real apprehension in 'X's mind to desist from protesting her kidnapping. At Darbangha (Bihar) also, where she lived for about seven days before her recovery by Delhi police, she had no complain, whatsoever, against the conduct and behaviour of the appellants. She was acquainted with the accused persons and used to be in conversation with them before the incident. During her stay with the appellants, she did not attempt to contact her parents to apprise them her whereabouts. She left the school without informing her friends or school teacher leaving her school bag there. She had no reasons or occasion to come out of school gate during school hours without seeking prior permission of her school teachers. Apparently, 'X' was a willing and consenting party. She was medically examined vide MLC Ex.PW-8/A by Dr.Anju Gautam on 2.12.2000. No visible injuries were found on her

body. Vagina admitted two fingers with pain; hymen was found torn. Obviously, there were no marks of struggle or violence on her body. She had sexual intercourse even on 30.11.2000 with the appellant-Ajay.

5. She did not lodge any report with the police about her alleged forcible kidnapping/rape. After she was brought to Delhi and was produced before the learned Metropolitan Magistrate for recording 164 Cr.P.C.statement, she fairly informed the learned Metropolitan Magistrate that she was being threatened by her mother to state that Ajay and Ram had forcibly kidnapped her after showing knife or else she would beat her. Considering that 'X' was not making statement voluntarily, the learned Metropolitan Magistrate did not deem it proper to record her 164 Cr.P.C. statement on 02.12.2000.

In her Court statement, feeble attempt was made by 'X' to wriggle out of it, alleging that police had threatened her not to state anything against the appellants. This explanation does not inspire confidence as 'X' who was before the Court had no reasons to fear and not to disclose the real facts. Apparently, 'X' had no grievance against any of the appellants when she was produced before the learned Metropolitan magistrate on 02.12.2000 for recording 164 statement. Number of discrepancies and improvements have emerged in her Court

statement and she was duly confronted with 161 Cr.P.C. statement (Ex.PW-2/DA). 'X' was unable to offer any sound reasons for vital improvements made in her Court statement. It appears that at the time of recording her statement before the Court, she was under the influence of her parents. No reliance can be placed on her statement to base conviction in the absence of any independent corroboration.

6. Age of the prosecutrix on the day of occurrence was crucial to find out if the appellants were guilty of crime. The prosecution case from the very inception is that 'X' was aged about 13 years at the time of incident and was studying in VIIth standard. During investigation, however, no attempt, whatsoever, was made by the investigating agency to collect any proof of her date of birth; no birth certificate was placed on record. Date of birth recorded in the school at the time of 'X's admission was also not relied upon. PW-6 (Smt.Usha Kathuria), Vice Principal of Govt.Girls Senior Secondary School, Jhilmil appeared in the court to prove that after coming to know 'X' missing from the school premises, she informed her parents on phone. The prosecution did not consider it relevant to ask her to bring and produce the school record showing her date of birth at the time of her admission there. PW-14 (Dr.Ratan Mahesh) who had examined 'X' by MLC Ex.PW14/A on 27.02.2001 had

advised bony age x-ray test. It appears that no ossification test was conducted to ascertain her approximate age. No explanation has been given by the Investigating Officer for this omission. Even during trial, no application was filed for conducting ossification test to prove her age. Adverse inference is to be drawn against the prosecution for not collecting and proving the cogent and reliable documentary evidence showing the exact or approximate age of the prosecutrix on the day of incident. PW-1 (Smt.Nirmala Choubay) 'X's mother claimed that 'X' was born in 1987. However, she was not aware about the exact date and month. She disclosed that at the time of 'X's admission in the school, she had given her 'janampatri' where her correct age was reflected. PW-4 (Krishan Kant Choubey) 'X's father contradicted her stating that no such 'janampatri' was handed over to the school authorities at the time of her admission. He claimed that 'X' was born on 12.03.1987 but did not produce any document including 'janampatri' to confirm it. Oral testimony of the prosecutrix and her parents disclosing her age 13 years on the date of incident cannot be taken at its face value. Conflicting and contradictory statements have been given by PW-1 and PW-4 if 'X' had failed or not during her studies upto VIIth standard. In the cross-examination, PW-4 admitted that she had failed once in the VIIth class;

‘X’ mother denied it. The fact remains that no document, whatsoever, has surfaced from any quarter to assess the age of the prosecutrix. The burden was heavily upon the prosecution to prove all the ingredients of Section 363/366/376 IPC. Simply because the appellants did not bring any document about the ‘X’s age or did not examine any witness in defence, it does not absolve the prosecution to establish its case beyond reasonable doubt.

7. In the light of the above discussion, I am of the view that the prosecution has failed to prove its case beyond reasonable doubt. Giving benefit of doubt, both the appellants are acquitted and their appeals are allowed.

8. Trial Court record (if any) along with a copy of this order be sent back forthwith. A copy of the order be sent to Jail Superintendent, Tihar Jail for intimation. Bail bonds and surety bonds stand discharged.

(S.P.GARG)
JUDGE

AUGUST 14, 2015
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