

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

RESERVED ON : MAY 20, 2015

DECIDED ON : JULY 06, 2015

+ **CRL.A.433/2006**

GAURAV KATARA

..... Appellant

Through : Mr.Rajiv Bajaj, Advocate.

versus

STATE

..... Respondent

Through : Ms.Kusum Dhalla, APP.

+ **CRL.REV.P. 519/2006**

AMBRISH MAHESHWARI

..... Petitioner

Through : None.

versus

MEENA KATARA & ANR

..... Respondents

Through : Ms.Kusum Dhalla, APP for R-2.
SI Rajendra Singh, PS Krishna
Nagar.

+ **CRL.REV.P. 490/2006**

AMBRISH MAHESHWARI

..... Petitioner

Through : None.

versus

GAURAV KATARA & ANR

..... Respondents

Through : Mr.Rajiv Bajaj, Advocate, for R-1.

Ms.Kusum Dhalla, APP for R-2.
SI Rajendra Singh, PS Krishna
Nagar.

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

S.P.GARG, J.

1. The appellant Gaurav Katara challenges the legality and correctness of a judgment dated 18.05.2006 in Sessions Case No.152/04 arising out of FIR No.302/2004 registered at Police Station Krishna Nagar by which he was held guilty for committing offences under Section 366/376 IPC. By an order 20.05.2006 he was awarded RI for five years with fine ₹5,000/- under Section 376 IPC and RI for three years with fine ₹2,000/- under Section 366 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 17.07.2004 from Shani Bazar, Delhi, the appellant abducted 'X' (assumed name) with an intent to force or seduce her to illicit intercourse with him against her wish. She was taken to various places and was sexually assaulted. Ambrish Maheswari, 'X's father lodged missing person report DD No.24A (Ex.PW-12/A) at 2205 hours and informed the police that on 17.07.2004 at around 04:00 p.m. her

daughter 'X' had gone without informing anyone and she did not return thereafter. On 18.07.2014 after recording Ambrish Maheshwari's statement (Ex.PW1/A), the Investigating Officer lodged First Information Report. In the complaint Ambrish Maheshwari (PW-1) suspected appellant's involvement in the kidnapping of her daughter 'X', aged 14½ years. Efforts were made to find out the prosecutrix. She and the appellant were recovered/apprehended on 22.07.2004 at Bus Stand of Mahua District, Rajasthan. Intimation was sent to Delhi police. They were brought to Delhi. 'X' was medically examined; she recorded her statement under Section 164 Cr.P.C. The accused was arrested and medically examined. Statements of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted against the appellant for the commission of the offences under Sections 363/366/376 IPC. Meena Katara, appellant's mother, was kept in Column No.2. By order dated 22.02.2005 Meena Katara was summoned to face trial under Section 319 Cr.P.C. Charges under Sections 366/376 were settled against the appellant. Meena Katara was charged under Section 109 read with Section 366/376 IPC. They pleaded not guilty and claimed trial. The prosecution examined sixteen witnesses to establish its case. In 313 statement, the accused denied their involvement

in the crime and pleaded false implication. They did not examine any witness in defence. The trial resulted in appellant's conviction as mentioned previously. It is relevant to note that Meena Katara was acquitted of the charges. The State did not challenge the said acquittal. Ambrish Maheshwari filed Crl.Rev.P.No.519/2006 to challenge Meena Katara's acquittal. He also preferred Crl.Rev.P.490/06 for enhancement of the sentence awarded to the appellant by the Trial Court. However, none appeared on behalf of the revision petitioner Ambrish Maheshwari on the day arguments were heard.

3. I have heard the learned counsel for the parties and have examined the file minutely. The main controversy is about the exact age of the prosecutrix 'X' on the day of incident. The Trial Court has discussed all the relevant facts and was of the opinion that 'X' was below 16 years of age on the day of occurrence. The appellant was unable to produce any evidence to establish that she was more than 18 years of age that day. In the missing person report (Ex.PW-12/A), lodged on 17.07.2004, age of the prosecutrix was described as 14½ years by her father Ambrish Maheshwari; he reiterated it in his statement (Ex.PW-1/A). In 164 statement (Ex.PW2/A), the prosecutrix claimed her age to be 14 years. In her Court statement she disclosed her age 15 years as on

22.02.2005. In the cross-examination, she denied to be more than 18 years. The accused did not elaborate as to on the basis of what document/material, he assessed 'X's age to be more than 18 years. The prosecution examined PW-7 (Madhu Gogia), Principal, Biglow's Public School, Krishna Nagar, who brought the record pertaining to 'X's admission in her school. She deposed that as per record 'X' was admitted in class Vth on 03.04.1999 and her date of birth recorded was 26.01.1990. Admission form filled by her father was exhibited as Ex.PW-7/A. He had furnished photocopy of birth certificate (Ex.PW-7/B) issued by MCD at the time of admission. Her name was mentioned in admission and withdrawal Register at Serial No.1313. She studied in their school till March, 2004 and Transfer Certificate (Ex.PW-7/E) was issued to her on 12.04.2004. 'X's father had also submitted school certificate of the previous school (Ex.PW-7/D). She admitted in the cross-examination that as per Ex.PW-7/D issued by the previous school, the date of birth was recorded as 26.01.1989. She fairly admitted that school leaving certificate was not verified from the previous school. Apparently, document (Ex.PW-7/D), disclosed the date of birth of the prosecutrix as 26.01.1989. The date of birth was recorded much prior to the occurrence. It was not anticipated that time that such an incident would happen in future to manipulate her

date of birth. Even if her date of birth is considered as 26.01.1989, she was well below 16 years of age on the day of incident. Besides this, the prosecution also examined PW-10 (Narender), Sub Registrar Births and Death, Anaj Mandi, Shahdara. He brought record pertaining to the birth of the child whose parents' name was mentioned as Sushila and Ambrish Maheshwari. As per record date of birth of 'X' was 26.01.1990. The said birth was recorded on 10.05.1990. Photocopy of relevant entry in original birth register was exhibited as Ex.PW10/A. Ex.PW-7/B i.e. birth certificate was issued on 10.05.1990 by the office. In the cross-examination, he admitted that entry in the Registrar was made on the basis of affidavit filed by Sushila Devi. No valid reasons exist to disbelieve the date of birth recorded much prior to the incident. It has come on record that 'X' is Ambrish Maheshwari's adopted daughter. Photocopy of adoption deed dated 18.05.1990 executed between the natural parents and the adoptive parents reveal that 'X' was born on 26.01.1990. In the presence of overwhelming evidence about the date of birth as 26.01.1990, no reasons prevail to disbelieve her age particularly when no documents worth the name has been brought on record by the appellant to prove her age more than 18 years.

4. On perusal of the statement of the prosecution witnesses, it stands established that it was a case of elopement with consent. 'X' was a consenting party throughout. Undoubtedly, she was acquainted with the appellant much prior to the occurrence. She admitted in the cross-examination that the appellant was known to her for the last one or one and a half years. Gunnu @ Savitri has introduced her with the appellant. It is alleged by 'X's father that appellant used to tease 'X' on her way to school. However, no complaint was ever lodged against the appellant. Even on the day when missing person report (Ex.PW-12/A) was lodged and 'X' had gone without informing her family members, he did not suspect appellant's involvement in her disappearance. Only when 'X' did not return to home the next day, Ambrish Maheshwari suspected appellant's hand in her kidnapping. Admitted position is that no force was used by the appellant while taking 'X' from Shani Bazar. 'X' did not raise any alarm at any stage despite availability of number of persons. She was taken first to the appellant's house where her mother, father and sisters were present. It appears that they did not like their arrival in the house. On that, the appellant took 'X' to various other places. PW-2 ('X') disclosed in her court statement that when she had gone to Shani Bazar for purchasing buttons at 04:00 p.m. the accused met her there and

made her to sit on his motor-cycle forcibly. He took her to his house at Laxmi Nagar. After the arrival of his father, his mother turned them out of the house clandestinely. She did not claim if she had raised any alarm for her alleged kidnapping. Thereafter, the appellant took her to Rewari in a train and from there they went to Gurgaon in a van/jeep. In the morning of 19.07.2004 she was taken to Balaji in a bus and they stayed there in Dharamshala. There physical relations were established. She admitted that the appellant established physical relations with her during this period 13/14 times. On 20th July, they had gone to a temple in the evening time. On 22.07.2004 at 04:00 p.m. when they were present at the Bus Stand to board a bus, they were apprehended by the police at Mahua. Apparently, 'X' and the appellant had roamed together throughout all these days without any objection by her. During this period physical relations were established without any demur / resistance. 'X' did not suffer any external visible injury on her body. MLC (Ex.Pw-4/A) reveals that there was no injury on any part of her body. No mark of violence was seen; hymen was found torn. Vagina admitted two fingers easily. Obviously, the prosecutrix had not put resistance, whatsoever, at the time of having physical relations for number of times. She admitted that photograph (Ex.PW-2/DB) was hers. It shows both the appellant and 'X' together in

happy mood. From these facts and circumstances, it can safely be inferred that the 'X' was a consenting party throughout. Since she was below 16 years, her consent was inconsequential. The appellant has been rightly convicted under Section 366/376 IPC as 'X' was below 16 years and was incapable to give any free consent. In 313 statement, the appellant fairly admitted that he and 'X' was having love affairs. He did not deny that 'X' was not taken by him at various places and physical relations were not established. Conviction under Sections 366/376 needs no intervention.

5. Acquittal of appellant's mother Meena Katara cannot be faulted as there was no evidence, whatsoever, if she abetted the appellant to kidnap 'X' or to have physical relations with her. Merely because 'X' had accompanied the appellant from Shani Bazar to his house, it did not attract any criminal liability of the inmates of the house. No specific role has been assigned to appellant's mother in the episode. 'X' and the appellant were in love much prior to the incident and used to meet each other. Appellant's mother had no say in the incident and was not aware as to where both had gone. Since 'X' herself was a consenting party, no criminal liability can be attributed to appellant's mother. Nothing has emerged on record to show if she was in constant touch with the appellant during the relevant period. I find no merit in the criminal proceedings

instituted by the petitioner-Ambrish Maheswari (Crl.Rev.P.No.519/2006) to challenge her acquittal.

6. The appellant and 'X' were in love. They were acquainted with each other for the last one and a half year before the incidence. Photograph (Ex.PW-2/DB) reveals their intimate relations. 'X' had accompanied the appellant with her free consent to various places and both had physical relations without resistance. The appellant was aged around 18 years; his school certificate (Ex.PW-12/H) reveals his date of birth as 26.02.1986. The trial court has discussed in detail adequate reasons to award the sentence of imprisonment for a term less than seven years. I find no illegality or material irregularity in it. The appellant was aged about 18 years at the time of incident and was not involved in any criminal case. He remained in custody for about two years. The Trial Court was justified to award less than seven years imprisonment which is minimum one prescribed 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 Lucknow. 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.”

7. I find no merit in the Crl.Rev.P.No.490/2006 whereby ‘X’s father has sought enhancement of sentence.

8. Nominal roll dated 11.09.2007 reveals that the appellant has undergone three years, one month and five days incarceration besides remission for three months and five days as on 25.09.2007. He is not involved in any other criminal case. His overall conduct in jail was satisfactory. Nothing has emerged on record if after enlargement on bail by an order dated 26.09.2007, the appellant indulged in any other similar offence. He is now a married man having kids. It is informed that a girl child has been born to him about three days before. The appellant has suffered ordeal of trial/appeal for about twelve years as the incident pertains to the year 2004.

9. Considering all these mitigating circumstances, no useful purpose will be served to send the appellant in custody to serve out the remaining period of substantive sentence awarded by the Trial Court. Period already undergone by the appellant shall be treated as substantive sentence. Of course, the appellant shall deposit the fine and in case of default in payment of fine, he shall undergo SI for one month. The appellant shall pay token compensation amount of ₹50,000/- to the prosecutrix; deposit it within two weeks before the Trial Court; and it will be released to the prosecutrix after due notice.

10. The appeal and revision petitions stand disposed of in the above terms. 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

JULY 06, 2015
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