

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

RESERVED ON : 29th JULY, 2015

DECIDED ON : 31st JULY, 2015

+ CRL.A. 545/2006

RAKESH

..... Appellant

Through : Mr.D.K.Pandey, Advocate.

VERSUS

THE STATE OF (NCT) DELHI

..... 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 12.12.2005 of learned Addl. Sessions Judge in Sessions Case No. 81/04 arising out of FIR No. 57/04 PS Seemapuri by which the appellant – Rakesh was held guilty for committing offences under Sections 363/366 & 376 IPC, the instant appeal has been filed to challenge its legality and correctness. By an order of the even date, he was sentenced to undergo RI for ten years with fine ₹5,000/- each under Sections 363/366 and 376 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 17.02.2004 at about 09.00 p.m. the appellant kidnapped 'X' (assumed name), a minor, out of the lawful guardianship of her parents and committed rape upon her in a jhuggi. X's father suspecting appellant's involvement lodged report with the police on 20.02.2004 that her daughter who had left the house on 17.02.2004 at around 09.00 p.m. to answer call of nature had not returned to the house. First Information Report under Section 363 IPC was registered on 20.02.2004. The prosecutrix was recovered on 21.02.2004; she recorded her statement under Section 164 Cr.P.C. She was medically examined. The accused was arrested and taken for medical examination. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed; the prosecution examined sixteen witnesses to substantiate its case. In 313 Cr.P.C. statement, the appellant denied the allegations and stated that 'X' had accompanied him with her free consent and she was not sexually assaulted. He examined Hari Singh as DW-1 in defence. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. During the course of arguments, learned counsel for the appellant on instructions opted to accept the findings of the Court below

on conviction. He, however, prayed to take lenient view as the appellant has already undergone substantial period of substantive sentence in custody and is a first time offender. The prosecutrix was a consenting party throughout. Learned Addl. Public Prosecutor urged that the prosecutrix was minor and there are no reasons to modify the sentence order.

4. Since the appellant has given up challenge to the findings on conviction, in the presence of overwhelming evidence whereby the prosecutrix was below sixteen years of age, conviction recorded by the Trial Court cannot be faulted and is affirmed.

5. On perusal of the statements of the prosecution witnesses, it transpires that 'X' was a consenting party. She had accompanied the appellant on her own voluntarily on 17.02.2004 when she had gone to ease herself to latrine and did not return. The appellant was not armed with any weapon to create real apprehension in her mind. At no stage, she raised any alarm or hue and cry to object her alleged kidnapping. During bus journey again, she did not protest. She remained with the accused for number of days before she was brought back by the appellant to Delhi. No external or internal injuries were noticed on her private parts during her medical examination (Ex.PW-4/A). There were no marks of violence or

struggle mark on her body. During her stay with the appellant she did not bother to inform her parents about her whereabouts. The appellant and the prosecutrix were acquainted with each other before the incident. The Trial Court in the impugned order had observed that even if the prosecutrix was a consenting party, her consent was irrelevant or immaterial as she was below sixteen years of age. Apparently, it was a case of elopement with consent. The appellant has suffered conviction as the prosecutrix was below sixteen years of age.

6. Nominal roll dated 02.07.2008 reveals that the appellant has already undergone four years, five months and three days incarceration besides remission of eleven months and fifteen days as on 25.07.2008. Nominal roll further reveals that his overall jail conduct was satisfactory. He is not involved in any other criminal case and is a first time offender. His substantive sentence was suspended by this Court by an order dated 29.07.2008. Nothing has surfaced if after his release, he ever indulged in similar or other criminal activity. Sentence order records that the appellant was aged around thirty years and had clean antecedents. He was a married man with three children. He has suffered ordeal of trial / appeal for about ten years. Apparently, there are adequate and special reasons to award sentence less than seven years as prescribed under Section 376 IPC. No

useful purpose will be served to confine him in custody after his release on bail in 2008.

7. Taking into consideration all the facts and circumstances, Sentence Order is modified and the period already undergone by the appellant in this case shall be treated as his substantive sentence. He shall, however, deposit the fine in the Trial Court within two weeks and in case of default, he shall undergo SI for three months. The appellant shall further pay ₹ 50,000/- as compensation to the victim. This amount shall be deposited within two weeks in the Trial Court and shall be released to the victim after due notice.

8. The appeal stands disposed of in the above terms. While maintaining the conviction under Section 363/366 & 376 IPC, the sentence is modified in the above terms.

9. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

JULY 31, 2015 / tr