

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

RESERVED ON : 2nd SEPTEMBER, 2015

DECIDED ON : 17th SEPTEMBER, 2015

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CRL.A.827/2013

VIMAL KUMAR

..... Appellant

Through : Mr.Jivesh Tiwari, Advocate.

versus

STATE (GOVT. OF NCT) OF DELHI

..... Respondent

Through : Mr.Ashok K.Garg, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 22.03.2013 in Sessions Case No.79/13 arising out of FIR No.639/11 PS Narela by which the appellant – Vimal Kumar was convicted for committing offences punishable under Sections 363/366/376 IPC, he has preferred the instant appeal. By an order 26.03.2013, he was awarded RI for seven years with fine ₹ 5,000/- each under Sections 363/366 IPC; RI for ten years with fine ₹ 10,000/-

under Section 376 IPC. The substantive sentences were directed to operate concurrently.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that on 26.12.2011 at about 12.00 p.m., the appellant kidnapped the prosecutrix 'X' (assumed name) aged about 13 / 14 years out of lawful guardianship of her parents and took her to his residence at Bihar. From 26.12.2011 to 17.03.2012, he committed rape upon her there.

3. On 26.12.2011 at about 12.00 p.m., the prosecutrix left her house on the pretext to get medicine. However, she did not return. Efforts were made to find her whereabouts but she could not be traced. On 28.12.2011, her father – Vinod Poddar lodged 'missing person report' (Ex.PW-3/A) without suspecting the involvement of any individual. In his supplementary statement, he named the appellant to be the suspect. On 17.03.2012, 'X' returned to her home. Vinod Poddar, her father took her to the police station; she was medically examined and her statement under Section 164 Cr.P.C. was recorded. Statements of the witnesses conversant with the facts were recorded during investigation. After completion of investigation, a charge-sheet was filed against the appellant in the Court. The prosecution examined twelve witnesses to prove its case. In 313 Cr.P.C. statement, the accused denied his involvement in the crime and

pleaded false implication. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, he has filed the instant appeal.

4. I have heard the learned counsel for the parties and have examined the file. The occurrence took place on 26.12.2011 when 'X' left her home at around 12.00 noon on the pretext to take medicine but did not return. Her family members searched her at various places and finally, lodged 'missing person report' on 28.12.2011. She returned to Delhi on 17.03.2012 and was produced by her father in the police station. In her statement under Section 164 Cr.P.C. (Ex.PW-2/A), she completely exonerated the appellant. She disclosed that on 26.12.2011, she had run away from her house at around 11.00 a.m. and had gone near a temple to see the appellant. She herself had left home as she loved the appellant. On 27.02.2012, they both performed marriage at Chattarpur mandir and thereafter, she lived in her in-laws' house. She claimed the appellant to be her 'husband'. She declined to accompany to her parents and expressed her desire to live at her in-laws' house. She did not attribute any role to the appellant in 'taking' or 'enticing' her. She was categorical to say that she on her own had voluntarily accompanied the appellant and had performed marriage with him. Instead of staying with her parents, she preferred to stay at Nari Niketan for about 15 days.

5. In her Court statement as PW-2, she deviated from her earlier statement recorded under Section 164 Cr.P.C. and introduced a new story that on 26.12.2011 when she was on her way back after getting herself checked up at a hospital at Pooth, the appellant met and asked to drop her at her residence. He, however, took her to some other place where he offered her a cup of tea with some intoxicating substance, as a result of which, she became unconscious. The appellant, thereafter, took her to his village in Bihar and insisted her to marry which she declined. The accused, however, forcibly married her and had physical relations without her consent. She was kept for two – three months in the said house. On 17.03.2012, the accused brought her back to Delhi. When he had gone to toilet at the Delhi Railway Station, finding an opportunity, she hired a TSR and returned to her parents' house at Bawana.

6. 'X', in her Court statement, did not disclose at which place the appellant had taken her at first instance when she was returning to her home after getting herself checked up at a hospital. No record was collected from the concerned hospital during investigation to infer if on that day, 'X' had visited the hospital or had taken any prescription for any ailment. It is also not clear if the appellant was aware of her visit to the hospital and had planned to kidnap her. 'X' did not elaborate as to at

which place she was offered a cup of tea with stupefied substance. She had no sound reasons to accompany the appellant initially on her way back to home. It was not made specific as to how and by what mode (of transport), the appellant had taken her to any definite place where she was served a cup of tea. She did not raise any alarm when the appellant took her to a place, other than her residence. Apparently, the prosecutrix has not presented true facts.

7. Admitted position is that both the prosecutrix and the appellant were acquainted with each other before the incident. Despite denial by 'X', her parents were fair enough to admit that the accused used to visit them and have conversant with 'X' being her brother's friend. 'X' did not explain as to what had forced her to stay at 'Nirmal Chhaya' for about fifteen days and what compelled her not to accompany her parents soon after her recovery. Her return to home on 17.03.2012 by hiring a TSR from Delhi Railway Station is suspect. Nothing has come on record to show if the appellant had brought back the prosecutrix on 17.03.2012 by any specific train at Delhi. From the railway station or on the way to home, 'X' did not make any telephone call to her parents.

8. The prosecutrix remained for about three months with the appellant and his family members at his native place. Physical relations

were established and she even became pregnant. Nothing has come on record to show if any time the prosecutrix resisted the sexual acts. She did not suffer any injury on her body including private parts. She performed journey of two days from Delhi to Bihar and at no stage protested her kidnapping. She did not complain about the appellant's conduct and behaviour to his family members. In the cross-examination, she admitted that she did not raise any alarm in the train though it was crowded; it took two days to reach there. She reasoned that she was threatened by the accused and was under fear. This reasoning does not inspire confidence as the appellant was not armed with any weapon to create real apprehension in her mind. She admitted that during her stay with the appellant, she used to cook food and do other household chores. She further admitted that appellant's parents, brothers and sisters living in the said house treated her with love and care. She admitted to have become pregnant and the foetus was aborted by her parents. All these facts go to show that 'X' was willing and consenting party throughout. She was fair enough to admit in the cross-examination that the statement given by her before the Court was at the instance of her parents. Since the statement given by the prosecutrix was not voluntarily, it is unsafe to base conviction on her uncorroborated statement particularly when she had completely exonerated the appellant

in her 164 Cr.P.C. statement. 'X' made a feeble attempt to wriggle out of her statement under Section 164 Cr.P.C. pretending that it was under the influence of the accused. 'X's version on this aspect is conflicting. As per her own statement, finding an opportunity at the railway station when the appellant had gone for toilet, she had directly reached her house by hiring a TSR. Thereafter, she was taken by her parents to the police station. The accused was in custody on the day her statement 164 Cr.P.C. was recorded on 17.03.2012. She had no reasons to be under fear to make a false statement before the learned Metropolitan Magistrate. It is a case of elopement with consent. Both 'X' and the appellant being in love ran away to live together after performing marriage. Since they belonged to different castes, their relationship was not acceptable to X's parents.

9. Conflicting dates of birth of the prosecutrix have emerged on record. In the complaint (Ex.PW-3/A), Vinod Poddar described her age 14 years without disclosing the exact date of birth. In her statement under Section 164 Cr.P.C. (Ex.PW-2/A), 'X' disclosed her age 18 years. She admitted in the cross-examination that age 18 years was given by her in 164 Cr.P.C. statement. MLC (Ex.PW-7/A) prepared on 17.03.2012 also records her age 18 years. Medical document (Ex.PW-8/A) records her age 17 years. In her Court statement, 'X' gave her age 15 years. She did not

specify her exact date of birth and merely stated that she was born on the day of Ekadashi in August, 1998. She did not clarify if any specific date of birth was recorded in the school records. Subsequently, during investigation, school record was collected where at the time of taking admission her date of birth was registered as 19.08.1998. PW-5 (Harish Chandra Tamta), Principal Nagar Nigam Prathmik Vidyalaya, proved the relevant records (Ex.PW-5/A & Ex.PW-5/B). He fairly admitted in the cross-examination that at the time of recording the date of birth, no certificate from Registrar of Birth and Death was placed on record. Date of birth of the prosecutrix was entered in the record on the verbal instructions of the prosecutrix's mother. PW-6 (Neelam), X's mother is not sure of her exact date of birth. Apparently, there was no basis upon which this date of birth was recorded in the school. Certificate mark 'A' was obtained on 20.03.2012 after the incident. The prosecution did not produce on record the date of birth recorded in the institution where the prosecutrix took admission for the first time. No ossification test was conducted to ascertain the approximate age of the prosecutrix. Hence date of birth recorded therein cannot form sole clinching factor for determining her age. It would not be safe to place implicit reliance on the school certificate concerning her age in the present case.

10. In the light of above discussion, conviction recorded by the Trial Court cannot be sustained. The appeal is allowed. Conviction and sentence are set aside. The appellant shall be released forthwith if not required to be detained in any other criminal case.

11. 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 compliance.

(S.P.GARG)
JUDGE

SEPTEMBER 17, 2015 / tr