

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

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Date of Judgment: 17.8.2015

Crl. Appeal No. 1631/2013

MUKESH KUMAR @ SONU

.....Appellant

Through: Mr.Mohit Mathur, Sr. Adv. with
Mr.S.P.Kaushal, Mr.Rohit Kumar,
Mr.Praman Narain Mathur and
Mr.Dhananjai Kaushal, Advocates.

Versus

STATE

.....Respondent

Through: Mr.Akshai Malik, Advocate.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. This appeal is directed against the impugned judgment and order of sentence dated 14.8.2013 and 30.8.2013 wherein the appellant had been convicted under Sections 376 read with Section 511 of the IPC as also under sections 342/323/201/506 of the IPC. He had been awarded a sentence of RI for a period of 5 years and to pay a fine of Rs.25,000/- in default of payment of fine to undergo SI for 6 months his conviction under Section 376 read with Section 511 of the IPC; he had been

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sentenced to undergo RI for a period of 5 years and to pay a fine of Rs.25000/- in default of payment of fine to undergo SI for a period of 6 months; for his conviction under Sections 323/342 of the IPC he has to undergo RI for a period of 1 year each; for his conviction under Section 201 he had been sentenced to undergo SI for 3 years and to pay a fine of Rs.10,000/- in default of payment of fine to under SI for 3 months; for his conviction under Section 506 of the IPC he had been sentenced to undergo RI for a period of 2 years and to pay a fine of Rs.10,000/- in default of payment of fine to undergo SI for 3 months. Sentences were run concurrently. Benefit of Section 428 of the Cr.P.C. had also been granted.

2. The version of the prosecution is that the 12 year old daughter of Smt.Surji Rawat (PW-4) had become the victim of lust of the appellant. The victim "S" a minor aged 12 years was examined as PW-3. The FIR was registered on the complaint of PW-4. Her version was that the appellant was known to the victim and her family and was running a medical store in front of their house. PW-4 and the appellant developed a relationship and solemnized a marriage in the year 2008. They started

living together as husband and wife. PW-3 was a child born out of the first marriage of PW-4. On 30.10.2011 the appellant had taken PW-3 on his motor cycle on the pretext of dropping her at her hostel but he instead took her to a two storeyed building where he attempted to commit rape upon her. PW-4 was shocked when she learnt of this on the narration given to her by PW-3. PW-3 disclosed to her mother that the appellant who was to drop her to the hostel did not take her there but instead had taken her to a room where he put his male organ in her vagina and tried to insert the same into it. Since he could not insert it he inserted his finger in order to widen her vagina. She described the manner in which the appellant made her suffer the obscene act and forced her to follow the scenes in the obscene pornographic film shown to her. She was also threatened not to disclose the incident to any person.

3. The victim was medically examined and her MLC Ex.PW-7/A had noted injuries upon her cheeks besides bruises on various parts of her body. Her hymen was found torn. Appellant was arrested from his house vide memo Ex.PW-4/A.

4. On the basis of the aforementioned evidence oral and documentary evidence adduced by the prosecution, the appellant was convicted and sentenced as aforementioned.

5. On behalf of the appellant learned senior counsel for the appellant submits that although admittedly the victim was a minor on the date of the offence but even as per the version of the prosecution she was more than 12 years; being 12 years and approximately 1 month which is evident from Ex.PW-8/B, Ex.PW-8/C and Ex.PW-8/D which are her school leaving certificates and record establishing the submission that her date of birth has been noted to be 10.9.1999 and as such on the date of the offence (30.10.2010) the victim would have been 12 years and 1 month old. Submission being that this would be a relevant circumstance to consider the sentence which has to be awarded in case the Court is of the view that the conviction of the appellant is not to be interfered with. Submission being that this is the alternate argument of the appellant.

6. On merits, it is pointed out that the technicality of the offence under Section 363 of the IPC is not made out as the version of PW-4

clearly shows that the victim had been sent by PW-4 along with the appellant voluntarily and by her own accord. This could not be a case of kidnapping. Attention has been drawn to the defence raised by the appellant and in particular his answer to Question 49; submission being that all along the defence of the appellant was that he had been falsely implicated in the present case because of his close personal relationship with PW-4. She had made demands of money upon him. She was black mailing him and in 2007 she had given an affidavit (Ex.PW-4/D2) wherein she had admitted that she has no relationship or ties left with the appellant; this document is admitted. The whole case has been planted upon the accused only because the illegal demands continuously being raised by PW-4 were not met by the appellant. The version of PW-3 and PW-4 are not consistent and whether the incident had been reported by PW-3 to PW-4 on the intervening night of 30.10.2011 or 31.10.2011 is not clear. PW-4 had stated that after the narration by PW-4 she straightway had gone to the ISBT to board a bus to her parents' home but thereafter she changed her mind and took her daughter to the RML hospital. RML hospital is in front of ISBT.

Submission being that this is a wholly incorrect narration as the RML

hospital is not in front of ISBT. PW-3 and PW-4 are confused. Benefit of doubt is entitled to the appellant. Learned counsel for the appellant has placed reliance upon a judgment reported as 2013[4] JCC 2962 Atender Yadav Vs. State of NCT of Delhi to support his submission that there are ample cases of false implication and testimony of a child witness has to be scrutinized with great caution. The appellant has been falsely roped in.

7. Needless to state that the arguments raised by the appellant have been wholly refuted.

8. Record has been perused.

9. The star witness of the prosecution was the prosecutrix herself. She was examined as PW-3. She was aged 12 years on the date of incident and after putting a preliminary round of questions to her she had been put into the witness box. Her testimony was recorded without oath. She detailed her version and delineated the incident in detail. She has deposed that while she was studying in the 4th standard and was staying in the hostel attached to the school. On the fateful day she was taken by the appellant who was her uncle and whom she knew. On the

way he asked her to go to his friend's house. He took her to a two storeyed house. He went inside the house and bolted the door of the room from inside. He took out his mobile phone and showed her an obscene video clip from the phone and asked her to do whatever was being done in that video clip. PW-3 started crying. She was slapped. She was dis clothed and was asked to see the obscene act. The appellant put his male organ in her vagina and tried to insert the same into it. He widened her vagina with his finger. She was bleeding. He made her to do unnatural sex, which has been detailed in her version. The victim started vomiting. They left the house. On the way she was threatened not to disclose this incident to her mother. She returned home and thereafter narrated the incident to her mother. She was taken to the hospital on the following day. Her statement under Section 164 Cr.P.C. was recorded.

10. In cross-examination, she stuck to her stand. She reiterated the incident again and described it in the manner in which it had occurred. She narrated the incident to her mother on her asking. Her mother had accompanied her to the police station as also to the hospital. She had

denied the suggestion that she had falsely implicated the accused at the asking of her mother. A suggestion was given to the effect that the offence was occurred on 30.10.2010 (Sunday) and as such there was no occasion for her to go to school. Relevant would it be note that that no suggestion has been given to this witness on the lines in which the defence sought to be set up by the appellant in his statement under Section 313 Cr.P.C. on which heavy reliance has been placed upon by the learned counsel for the appellant. In answer to Question 49 the appellant had stated that he had been falsely implicated by the appellant at the behest of her mother as he had stopped paying money to her mother. PW-4 was employed in his shop in 2006. After that she developed physical relations with the appellant which was the cause of grudge which PW-4 had against the appellant for which she started blackmailing. In 2006, she had sworn an affidavit to the said effect. Relevant would it be note that the affidavit Ex.Ex.PW-4/D2. This document is purportedly signed by PW-4 but as per the version of PW-4, she had signed certain blank papers. This document also does not speak of any sum of Rs.50,000/- having been paid by appellant to PW-4.

Further defence in the statement of the appellant under Section 313

Cr.P.C. was that before Deewali a sum of Rs.5 lakh had been demanded by PW-4 from him and which was the reason for his false implication but this defence did not emanate in the suggestions given to PW-3.

11. PW-4 is the mother of victim. She had on oath deposed that the appellant was known to her since the year 2004. They started having regular meetings. They solemnized a marriage in Haridwar. Her daughter (PW-3) was born out from her first marriage. She has a son born out from the marriage with the appellant. Her daughter was studying in hostel. She used to come home during holidays. As the appellant had promised to drop her at her hostel she sent her daughter with the appellant. PW-3 had narrated the incident on the asking of her mother, which completely out nerved PW-4. PW-4 decided to go to her native village. She was afraid of the incident. PW-4 wrung up her brother who advised her to take her daughter to RML Hospital where PW-4 took her.

12. In this jumble of a situation which PW-4 was facing in her life if PW-4 had stated that the RML Hospital is situated in front of ISBT and was not able to give its right location, it would not throw out her

otherwise cogent and coherent testimony which was to the effect that the narration of the incident as given by PW-3; i.e. the illegal act having been committed by the appellant upon her 12 year old daughter when he had taken her to drop her at school hostel is definitely not tarnished.

13. In her cross-examination PW-4 did not shift her stand. Most of the questions put to the witness were irrelevant. They did not in any manner detract from the gist of the version of PW-4. No improvement has also been pointed out in her version.

14. Testimony of PW-3 and PW-4 about the manner in which the incident had occurred was fully corroborated by the medical evidence of the victim which was carried out at RML Hospital. Her MLC was proved as Ex.PW-7/A. Bruises and multiple abrasions were noted on her cheeks. She was referred to the Gynecologist. The Gynecologist vide her report Ex.PW-17A noted the bruises on the internal parts of the body of PW-3 i.e. scratch marks on her breast and shoulder and nail injuries as also human bite on her face and cheeks. Hymen of the victim was also found torn. There was bleeding from her vulva and swelling and redness on her labia majora which were the private parts of the

victim. The medical evidence is thus fully corroborative of the narration given by PW-3 to her mother PW-4.

15. The defence of the appellant that this is a case of false implication because PW-4 was trying to extort money from him also did not find mention in the cross-examination of PW-4. The defence of the appellant was wholly false and that is why a shifting stand was taken by him during cross-examination of PW-3 qua his statement recorded under Section 313 Cr.P.C. The defence of the appellant is wholly improbable. The submission of the learned senior counsel for the appellant that an offence under Section 363 is not made out and the word “taking” which is the essential ingredient of the aforementioned offence means a voluntary taking. PW-4 had handed over the custody of her daughter to the appellant negatives the conviction of the appellant under Section 363 of the IPC is a wholly misplaced argument. The word “kidnap” as is contained in Section 363, means taking which is voluntary but it should be with the valid voluntary and legal consent of the lawful guardian. It should not be based on misconception of fact as was so in the instant case. The appellant had taken the custody of PW-3 from PW-4 on the

pretext that he would drop her to the hostel. He, however, misrepresented her and took PW-3 inside a room where he had committed an illegal act upon her. This in no manner can be said to be a permission having been accorded by the lawful guardian to the appellant to take her to the place where he had committed act of rape upon her. Apex Court while considering such an eventuality in the judgment reported as AIR 2007 SC 3059 Pradeep Kumar @ Pradeep Kumar Verma Vs. State of Bihar and Anr. had noted as under:

The second accused in that case obtained the consent of the Girl's guardian by falsely representing that the object of taking her was for participating in a festival. However, after the festival was over, the 2nd accused took her to a temple in another village and married her to the 1st accused against her will. The question arose whether the guardian gave under a misconception of fact. While holding that there was no consent, Sundara Ayyar, J. speaking for the bench observed thus:

We are of the opinion that the expression under a misconception of fact is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married. In considering a similar statute, it was held in England in R.V. Hopkins (1842) Car & M 254 that a consent obtained by fraud would not be sufficient to justify the taking of a minor. See also Halsbury's Laws of England, Vol. 9 p. 623. In Stephen's Digest of the Criminal Law of England (6th Edn., p.217) the learned author says with

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reference to the law relating to abduction of girls under sixteen thus..... if the consent of the person from whose possession the girls is taken is obtained by fraud, the taking is deemed to be against the will of such a person. Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90 IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence.”

16. Thus this argument of the learned senior counsel for the appellant that the conviction of the appellant under Section 363 of the IPC is unfounded is an argument without force. No interference is called for in the judgment qua this conviction of the appellant.

17. The only submission of the learned senior counsel for the appellant which requires consideration is that the victim was aged about 12 years and 1 month on the date of offence. Under the un-amended IPC (prior the Criminal Law Amendment Act, 2013) for the offence of rape of a child below 12 years the minimum sentence was 10 years extending up to life. In this case admittedly the victim was more than 12 years of age on the date of the incident. The Trial Court was guided by the fact that the sentence for an attempt to commit an offence would be half of the minimum to be accorded for the substantive offence. In

this case memo the minimum sentence would be 7 years for conviction of rape of a victim above 12 years and half of its would be 3½ years.

18. Learned counsel for the appellant points out that the appellant is young in years and he has learnt his lesson having been remained in jail for the last more than 3 years. This Court also notes that there is no minimum sentence prescribed for any of the other offences for which the appellant has been convicted. This Court also notes the second submission of the learned senior counsel for the appellant that protracted trial which had been suffered by the appellant has made him learn the lesson and it has been borne upon him and accordingly leniency has been prayed for in this background.

19. In view of the above noted factual position the sentence of the appellant is reduced from RI for a period of 5 years to RI for a period of 4 years; fine remains unaltered.

20. Appeal disposed in the above terms.

INDERMEET KAUR, J

AUGUST 17, 2015/ndn