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

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Date of Decision: May 19, 2016

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CRL.A. 49/2015

VIPIN YADAV

..... Appellant

Represented by: Mr.Chetan Lokur, Advocate
(DHCLSC)

versus

STATE

..... Respondent

Represented by: Mr.Varun Goswami, APP

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

PRADEEP NANDRAJOG, J. (Oral)

Crl.M.B.No.745/2016

The application, seeking suspension of sentence, pending hearing of the appeal, is listed for August 19, 2016. The appeal has reached for hearing today and therefore the instant application is dismissed as infructuous.

Crl.A.49/2015

1. Being a case of rape, I shall be referring to the victim as 'Prayer' (pseudo name). She was a student of MCP School Nangli Sakrawati, Najafgarh and was born on January 30, 1998, a fact proved by the said date being recorded in the school register Ex.PW-6/A when she was admitted in Primary Class on April 22, 2004.

2. Prayer left her house as usual in the morning of April 12, 2012 at around 7:00 AM to go to her school but did not return home at the usual

time 1:30 PM after school hours. Since it was evening time and Prayer did not return home her mother Nirmala PW-5 lodged a missing person complaint Ex.PW-5/A with the local police station at 5:30 PM. Investigation was entrusted to SI Dinesh PW-13.

3. Prayer had just disappeared without a trace. Information was flashed on the zipnet. Days and weeks passed by.

4. Rahul Aggarwal PW-9 had a retail shop in a building at Nagtalai Kalia Batta, Jaipur, Rajasthan, which was owned by Panchu Lal PW-1. Prayer came to his shop on May 07, 2012 requesting to lend his mobile phone to her so that she could contact her mother. He handed her over his mobile phone having No.9166944660 and she rang up her mother who did not pass on the information to the Investigating Officer and left with a few relatives for Jaipur the next day on May 08, 2012 and at around 11:30 PM she took custody of Prayer and returned to Delhi. This was informed by her to the Investigating Officer SI Dinesh on the 9th morning. Lady Ct.Suman PW-12, under directions of SI Dinesh took Prayer to Rao Tula Ram Marg Hospital where she was medically examined by Dr.S.Dass PW-2 and her MLC Ex.PW-2/A was drawn up who thereafter referred her for gynaecological examination, report whereof was written by the senior gynaecologist to the effect that no injury marks were seen on any part of the body including the private parts but the hymen had a healed tear. Prayer's statement was recorded by the Investigating Officer inw hcih she named the appellant as the man who had kidnapped her, illegally confined her in Jaipur and raped her as also had unnatural sex with her.

5. Upon being arrested appellant was taken to Rao Tula Ram Memorial Hospital where Dr.S.Dass medically examined him and wrote the MLC

Ex.PW-2/B, which makes an interesting reading, overlooked by the learned Trial Judge and would have some bearing on the quantum of sentence to be imposed. Opining that there was nothing suggestive to opine that the appellant cannot commit sexual act, he wrote :

“Patient could not ejaculate in casualty dressing room so semen sample could not be taken.”

6. Before noting Prayer’s testimony I note that when incriminating circumstances emerging in the evidence were put to the appellant he said that Prayer was known to him and she had voluntarily accompanied him to Jaipur. He said that he treated her like a sister and therefore denied having sexual intercourse with her.

7. The defence as well as the prosecution are therefore ad idem on the point that Prayer had travelled from Delhi to Jaipur on April 12, 2012 and she stayed with the appellant till her mother took her back in the night of May 08, 2012.

8. Said fact is also proved by the testimony of Panchu Lal PW-1, in whose house the two had stayed in a room on the first floor taken on rent by the appellant.

9. In her testimony as PW-3, Prayer said that she left her house at 7:00 AM on April 12, 2012 and the destination was her school. Enroute, she met the appellant who was residing in her neighbourhood and he suggested to her to bunk school and make a trip to Surajkund, with assurance that he would get her back by the time her school closed and thus she could return home without any suspicion. The offer looked attractive. She boarded a bus and at Surajkund the appellant brought some sweetmeat and offered it to her. As she consumed it, she felt giddy and became unconscious. When she

regained consciousness she found herself in a room. She requested to be taken back home or at least be permitted to speak to her mother. Appellant refused, and against her consent, had sex with her that night. He regularly had sex with her for about a month and threatened her with a knife to scare her and subdue her. He never left her alone. Once he tried anal sex with her. After a month when the appellant left the room to fetch food he forgot to lock the door and this was an opportunity for her to regain freedom. She went straight to the landlord, borrowed his mobile phone and made a call to her mother.

10. During cross-examination she said that the house where she was confined in Jaipur was two storeyed. She was kept in a room on the first floor where there were three rooms. There were two rooms on the ground floor. She said that she noticed all this in the evening on the first day because she was feeling slightly better and therefore she remembered, a statement which is contrary to her statement during examination-in-chief that after she was given a drugged sweetmeat at Surajkund and she became unconscious, when she regained consciousness she found herself in a room. She said that there was no cooking facility in the room and that each day the appellant used to go out to bring food. There was no toilet attached to the room. The appellant used to bring meals twice a day. She did not have the courage to raise an alarm when the appellant used to leave the room. She admitted having seen a lady in the house, who on one occasion had asked her wherefrom she had come, but she said nothing in reply.

11. The landlord Panchu Lal PW-1 deposed that the appellant and Prayer came to his house and introduced themselves as husband and wife and took a room on rent thereby belying Prayer's statement that when she regained

consciousness she found herself in a room.

12. Prayer's age was 14 years, 3 months and 9 days as of April 12, 2012. She was obviously in the age of puberty, a fact even otherwise proved from her MLC Ex.PW-2/A which records that on May 09, 2012, when she was medically examined, she was menstruating.

13. From the testimony of Prayer it is apparent that she voluntarily accompanied the appellant with whom she was friendly. It is not easy to express the inexpressible and she could not admit to the truth. She obviously had to cook up a story of abduction. But her conduct totally belies said fact. Neither did the appellant coerce her to leave with him nor used any threat. Her story of she being sedated is a hog wash. There was no toilet attached to the room where she stayed, a fact admitted by her in her deposition. She lived in the room for 27 days. There was no bathroom attached either. The calls of nature were obviously answered in a common toilet and she took her bath in a common bathroom. There were other occupants in the building and in the adjoining rooms on the first floor. All of them could have noticed if something was fishy, but none noticed because she and the appellant proclaimed to the inhabitants that they were husband and wife.

14. But obviously something happened that she rang up her mother on May 07, 2012. What was that? It is difficult to answer the question with precision, because faced with the charge of abduction, forced confinement, unnatural sex and rape it became the compulsion of the appellant to deny everything and maintain that he had sisterly relationship with the girl. As regards the girl, she also claimed that she went along with the appellant to Surajkund because he treated her like a sister. But conscious of the fact that

she had been sleeping with the appellant and knowledgeable enough to understand that her medical examination would reveal the same, she said that the appellant raped her. But that still does not answer the question what happened. Prayer could not tell the truth because it was her compulsion not to tell so and so is the case with the appellant.

15. But putting the jigsaw puzzle together, as one does, picking up disjointed parts thereof and looking at the contours of one and matching the same with the other, and piece by piece, within the frame, create the picture, one can create the picture in the instant case.

16. Here lies the importance of what Dr.S.Dass wrote on appellant's MLC Ex.PW-2/B : the appellant could not ejaculate in the casualty dressing room. The appellant obviously has erectile disfunctionality and this coupled with the harshness of life, living as a spouse of a poor husband, took the toll and broke the bond of love which Prayer had with the appellant. Confronted with the perplexing circumstance of a harsh life of existence with a poor husband who having eloped with Prayer had probably run out of his means, finding the life getting tougher by the day, Prayer thought that salvation would lie if she returns to her mother. She was after all a little over 14 years old and her decisions would obviously not be well thought of and reasoned. The age of the appellant emerges as around 19 years.

17. It is not a rape of a kind which is abhorable i.e. the will of the victim over powered, as also her body. It is not that the victim was enslaved. A boy aged 19 years fell in love, and to his misfortune, with a minor girl aged a little over 14 years, and therefore Prayer's consent has to be ignored. There is truth in Prayer's statement that he had sex with her, and I take it that while experimenting, the appellant tried anal sex with her. But that was

not bestiality. It was co-sensual. But Prayer's consent is no consent in the eyes of law. Thus the appellant has made himself liable to be convicted for the offences of rape, unnatural sex, kidnapping as has been held as per the impugned verdict dated July 16, 2014, but not for the reasons given by the learned Trial Judge who has found it to be a case of abducting a girl after feeding her a stupefying drug and then confining her illegally and having sex by force.

18. But, on the issue of sentence, I think I have written enough mitigating circumstances to impose a sentence less than the minimum prescribed i.e. of 07 years. Vide order on sentence dated July 19, 2014, the learned Trial Judge has imposed sentence of 07 years RI upon the appellant for various offences, to run concurrently, I am of the opinion that the sentence needs to be reduced. As per the nominal roll the appellant has undergone a sentence of 3 years and 5 months without remission and remission of 3 months. I reduce the sentence to the period already undergone because evidence establishes that Prayer voluntarily left for Jaipur with the appellant, being in love with him. Appellant was aged 19 years. The two posed as husband and wife. The appellant did not maltreat her or abuse her. There is no evidence of appellant having any brush with criminal law, except the instant incident.

19. LCR be returned.

20. Copy of this decision be supplied to sent to the Superintendent Central Jail Tihar for compliance i.e. the appellant to be released forthwith and to be supplied to the appellant.

(PRADEEP NANDRAJOG)
JUDGE

MAY 19, 2016/mamta