

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

**RESERVED ON : 21st JANUARY, 2015
DECIDED ON : 11th FEBRUARY, 2016**

+ CRL.A. 73/2014 & CRL.M.B. 145/2014

RAKESH

..... Appellant

Through : Mr.Chetan Lokur, Advocate with
Mr.Nitish Chaudhary, Advocate.

versus

THE STATE (GOVT. OF NCT) OF DELHI

..... Respondent

Through : Mr.Vinod Diwakar, APP with SI
Amit Kumar, PS Anand Vihar.

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

S.P.GARG, J.

1. The appellant – Rakesh has preferred the instant appeal to challenge the legality and correctness of a judgment dated 20.02.2013 of learned Addl. Sessions Judge in Sessions Case No.06/2013 arising out of FIR No.508/2006 PS Anand Vihar by which he was held guilty for committing offences punishable under Sections 376/366 IPC. By an order dated 22.02.2013, he was sentenced to undergo RI for eight years with fine ₹12,000/- under Section 376 IPC and RI for seven years with fine ₹8,000/- 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 23.09.2006 in between 09.00 a.m. to 06.30 p.m. the appellant kidnapped / abducted the prosecutrix 'X' (changed name) aged 15 years from the lawful guardianship of her parents to compel her to marry him. He took the prosecutrix far away to his village and from 23.09.2006 to 02.10.2006 committed rape upon her in village Lakeshwar, District Jonpur. On 23.09.2006, 'X' left her parents' house in their absence without informing them. Efforts were made to find her at various places but to no avail. Finally, on 27.09.2006 victim's mother Sangeeta lodged complaint with the police and suspected appellant's involvement in the crime. The Investigating Officer lodged First Information Report after recording Sangeeta's statement (Ex.PW-2/A). On 02.10.2006, 'X' along with the appellant returned to Delhi and both were apprehended by the police. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. Statements of the witnesses conversant with the facts were recorded. The accused was arrested and medically examined. Upon completion of the investigation, a charge-sheet was filed against him in the Court. The prosecution examined twenty-one witnesses to prove its case. In 313 Cr.P.C. statement, the appellant pleaded false implication claiming that 'X' wanted to marry him but he was not agreeable to it.

DW-1 (Bansraj) appeared in defence. The trial resulted in his conviction as mentioned previously. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file minutely. Undisputedly, 'X' went missing from her house on 23.09.2006; accompanied the appellant to his village Lakeshwar, District Jonpur and remained in his company till 02.10.2006 when she was finally brought back to Delhi by a train. In her 164 Cr.P.C. statement (Ex.PW-17/C), she disclosed that on 23.09.2006, the appellant had visited her in the absence of her parents who were away to their place of work. On the pretext to marry her, the appellant took her to his village. She, however, declined to marry him in the village. On her insistence, the appellant brought her back to Delhi on 02.10.2006. She further claimed that the accused had committed a 'wrong act' with her in the village. In her Court statement as PW-1, shifting her stand, she disclosed that on 23.09.2006 the accused had asked her to accompany him to his village on the pretext to take her to different places for outing. Thereafter, he took her to village Lakeshwar, District Jonpur. In her deposition, she did not state if the appellant had exerted any pressure or force to take her to his village. She did not reveal if during her stay with the appellant for long

ten days, she ever complained her alleged kidnapping or abduction. In the cross-examination, she admitted that at the time of occurrence, she was a student of 9th standard and knew the accused since long. She admitted that when she had accompanied the accused in a three-wheeler scooter at about 02.00 p.m. to the railway-station, she did not raise alarm. She denied if in the village, she had married the accused in a temple or had gone to a Court for marriage. She denied that letters (Mark 'DX-1 to DX-2') written to the appellant were in her handwriting. She, however, fairly admitted that she had got herself photographed with the accused (Ex.D-1). She admitted that she did not protest when the accused had taken her to the railway-station and it was expected that she would be taken out of Delhi. In the cross-examination, she disclosed that there were 4 – 5 family members of the accused in the house where she was kept; they were his mausi, two brothers and one sister and she used to have conversation with them. She did not lodge any complaint with the appellant's 'mausi' or any other family members for having physical relations against her wishes with the appellant. Admittedly, she did not contact her parents during her stay in the village. She denied that physical relations were maintained with her own free will after the marriage.

4. On scanning the testimony in entirety, it stands established that the prosecutrix had accompanied the appellant on her own without any demur; she was a willing and consenting party throughout. At no stage, she protested or complained about the appellant's conduct and attitude. She remained in appellant's company for about ten days and at no stage bothered to raise hue and cry. During this period, physical relations took place between the two. Nothing has emerged to infer if any alarm was raised by the prosecutrix at that time or she suffered any physical injuries on her body including private parts to give indication of forcible rape against her wishes. She was brought back to Delhi by the appellant without having any inkling about their apprehension at the railway-station. Apparently, it was a case of elopement with consent. Photograph (Ex.D-1) confirms it. 'X' did not explain as to when and under what circumstances, she photographed along with the appellant. Undisputedly, the petitioner and the prosecutrix were acquainted with each other since long and the appellant had visiting terms at her residence.

5. Victim's age becomes relevant and crucial to ascertain the appellant's guilt (if any). On scanning the evidence on record, I am of the view that the prosecution has failed to establish if the victim was below 16 years of age on the day of incident. In the complaint (Ex.PW-2/A),

Sangeeta did not disclose as to what was the victim's age on the day she went missing. In the 164 Cr.P.C. statement (Ex.PW-17/C) and in MLC (Ex.PW-3/A), her age was recorded as 16 years. PW-2 (Sangeeta) in the cross-examination admitted that she had told victim's age to the doctor as 16 ½ years. As per ossification report (Ex.PW-4/A), her age was estimated to be above 14 years and below 16 years as on 30.10.2006. Despite the victim to have studied till 9th standard, the Investigating Officer did not collect school record to ascertain as to what date of birth of the prosecutrix was recorded therein. PW-2 (Sangeeta) admitted in the cross-examination that 'X's age was wrongly given as five years as it was the minimum age for getting admission in a school and for that purpose, a 'janampatri' in which her age was reflected as 5 years was got prepared. No such 'janampatri' has been produced on record. PW-9 (Rajesh Kumar) in the cross-examination admitted that he had not produced birth certificate (of Safdarjung Hospital) or school certificate of the prosecutrix. It is emphasized that the date of birth of the prosecutrix is 28.11.1990 as recorded in the document (Ex.PW-15/A) proved by PW-15 (S.S.Rawat) from Safdarjung Hospital. This document shows birth of a female child on 28.11.1990 at 09.20 p.m. at Sl.No.1122. The mother's name of the infant has been shown Smt.Laxmi w/o Sh.Rajesh R/o A-76, Amrit Puri, New

Delhi. PW-15 (S.S.Rawat) admitted in the cross-examination that the documents relating to the admission and discharge of Smt.Laxmi have been disposed of as per rules and are not available in the record. The certificate to that effect is Ex.PW-15/D1. PW-16 (Sh.Pawan Kumar), Sub Registrar, Death and Birth, NDMC, proved document (Ex.PW-16/A); a photocopy of entry No.12066 dated 11.02.1990 showing that Smt.Laxmi had given birth to a female child on 28.11.1990 in Safdarjung Hospital. Again, this witness admitted that he had not brought the original certificate; he was not the author of the entry. It is urged that the victim's mother's name was Laxmi before her marriage and after that, it was changed to 'Sangeeta'. However, no worthwhile evidence has surfaced to prove if Laxmi and Sangeeta are one and the same individuals. The documents (Ex.PW-15/A and Ex.PW-16/A) are not cogent and authentic documents to establish with certainty that 'X' was the child who was born to Sangeeta and Rajesh on 28.11.1990. Again, it has not been established that both Sangeeta and Rajesh lived at A-76, Amrit Puri, New Delhi, for any particular duration. Even if this age is taken into consideration, apparently, the victim was on the verge of attaining the age of 16 years. She was a student of 9th standard and admittedly had failed twice in 8th standard. Considering these circumstances, it cannot be said firmly that

the victim was below 16 years of age on the day of incident. The appellant deserves benefit of doubt on that score.

6. Since the prosecution has failed to establish that the victim was below 16 years of age on the day of incident, conviction and sentence awarded by the Trial Court under Section 376 IPC cannot be sustained as seemingly the prosecutrix was a consenting party throughout.

7. In the light of above discussion, the appeal is allowed. Conviction and sentence awarded by the Trial Court are set aside. The appellant shall be released forthwith if not required to be detained in any other case. Pending application also stands disposed of.

8. 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 / compliance.

(S.P.GARG)
JUDGE

FEBRUARY 11, 2016 / tr