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

DECIDED ON : 18th FEBRUARY, 2016

+ **CRL.A. 340/2004**

UMESH KUMAR @ TINKOO Appellant

Through : Ms.Astha, Advocate.

versus

THE STATE OF N.C.T. OF DELHI Respondent

Through : Mr.Vinod Diwakar, APP.
SI Ramesh Chand.

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

S.P.GARG, J.

1. Aggrieved by a judgment dated 02.08.2003 of learned Additional Sessions Judge in Sessions Case No.92/2001 arising out of FIR No.236/2001 registered at Police Station Kamla Market by which the appellant – Umesh Kumar @ Tinkoo was convicted under Section 366 IPC, he has preferred the present appeal. Vide order dated 14.08.2003, he was awarded RI for five years with fine ₹5,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that the appellant along with his associate – Deep Karan abducted/seduced the prosecutrix 'X' (assumed name) and 'Z' (assumed

name) before 21.06.2001 with an intention to compel or force them to have illicit intercourse. They thereafter, took them to different jhuggies at Madipur and established physical relations with them. Subsequently, 'X' was sold by Deep Karan to Zarina @ Razia. She along with her associates - Haseena and Bhagti Ram Pandey pushed her into prostitution at Kotha No.56, G.B.Road, Delhi, where they used to run a brothel. The prosecutrix 'X' was recovered from the said Kotha on 21.06.2001 at around 8.50 p.m.

3. On receipt of a secret information, raid was conducted by the police at Kotha No.56, G.B.Road and two girls 'X' and 'Y' (assumed name) were recovered from there. The Investigating Officer lodged First Information Report after recording statement of the victim 'X' (Ex.PW-1/A). 'X' and 'Y' were medically examined; they recorded 164 Cr.P.C. statements. Statements of the witnesses conversant with the facts were recorded. In the complaint, the victim (X) disclosed as to how initially rape was committed upon her and her friend 'Z' (assumed name) by Deep Karan @ Sonu and the appellant - Umesh Kumar @ Tinkoo in different jhuggies at Madipur after abducting them on their way to the park. Thereafter, 'X' was sent along with Zarina @ Razia at 56, G.B.Road for the purpose of prostitution by Deep Karan. Subsequently both Deep Karan and the appellant - Umesh Kumar @ Tinkoo were also arrested.

Upon completion of investigation, a charge-sheet was filed against all of them for commission of various offences. The prosecution examined twenty witnesses to establish its case. In 313 statement, the accused persons denied their involvement in the crime and pleaded false implication. The trial resulted in their conviction. Being aggrieved and dissatisfied, the convicts have filed various appeals; the present appeal pertains to the appellant – Umesh Kumar @ Tinkoo. State did not file any appeal to challenge appellant's acquittal under Section 376 IPC.

4. I have heard the learned counsel for the parties and have examined the file. The prosecutrix 'Z', who was allegedly kidnapped and raped by the appellant did not appear for examination before the Court. Adverse inference is to be drawn against the prosecution for withholding the crucial witness. In the MLC, no visible injuries were found on the victim's body including private parts. As per ossification test, 'Z' was opined to be more than 16 years but less than 17 years. Exact date of birth of the victim has not surfaced on record. It is unclear if she was below 16 years of age on the day of incident and her consent for physical relation (if any) had no relevance.

5. 'X' and 'Z' lived along with Deep Karan and the appellant – Umesh Kumar @ Tinkoo for around a month in different jhuggies at

Madipur. 'X' admitted in her Court statement that the physical relations took place between her and Deep Karan. At no stage, 'X' and 'Z' raised hue and cry to complain their forcibly abduction or rape. No implicit reliance can be placed on the testimony of 'X' as on her way to the jhuggi, she did not raise any protest and accompanied Zarina @ Razia on her own without demur. In the cross-examination, 'X' admitted that there were number of other jhuggies around the jhuggi where they were confined for about a month. On the advice of ladies in the said jhuggies, she had agreed to stay there. Admittedly, 'X' and 'Z' were not under restraint and were free to move anywhere. During this period, they did not contact their parents and never informed them about the incident. Their parents also did not lodge any missing person report to find them for so long. None from the neighbouring jhuggi was examined as a witness. It is unclear as to where 'Z' went after 'X' allegedly was sold for prostitution to Zarina @ Razia. No incriminating article was recovered from the said jhuggi.

6. Appellant's conviction is primarily based upon the testimony of PW-1 which was found deficient to base conviction qua other convicts – Zarina @ Razia, Haseena and Bhagti Ram Pandey.

7. Possibility of 'Z' to be a consenting party to have physical relations with the appellant can't be ruled out.

8. As per ossification test, 'X' was aged more than 15 years but less than 17 years; 'Z' was opined to be more than 16 years but less than 17 years. Exact dates of birth of the victims have not surfaced on record. It is unclear if both of them were below 16 years of age on the day of incident and their consent for physical relations (if any) had no relevance.

9. In the light of the above discussion, I am of the view that the prosecution has failed to prove its case beyond reasonable doubt. The appellant deserves benefit of doubt; the appeal is allowed. The conviction and sentence are accordingly set aside.

10. Bail bonds and surety bonds stand discharged. Trial Court record (if any) be sent back forthwith along with the copy of the order. Intimation be also sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

FEBRUARY 18, 2016 / tr