

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

**RESERVED ON : 4th OCTOBER, 2016
DECIDED ON : 18th OCTOBER, 2016**

+ CRL.A.523/2004

TEK CHAND

..... Appellant

Through : Mr.Biswajit Kumar Patra, Advocate.

VERSUS

THE STATE (GOVT. OF NCT) DELHI

..... Respondent

Through : Mr.Amit Gupta, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 16.01.2004 of learned Addl. Sessions Judge in Sessions Case No.71/03 arising out of FIR No.446/01 PS Anand Vihar whereby the appellant – Tek Chand was convicted for committing offences punishable under Sections 363/376/506 IPC. By an order dated 21.01.2004, he was awarded various prison terms with fine. The substantive sentences were to run concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 18.12.2001 at around 02.00 p.m. the appellant kidnapped the prosecutrix 'X' (changed name) aged around 14 years from the lawful guardianship of her father Kanhaiya Lal from House No.C-95, NSA Colony, Delhi. After kidnapping, 'X' was taken to Bhajanpura where rape was

committed upon her. The incident was reported to the police on 21.12.2001. The Investigating Officer after recording victim's statement (Ex.PW-2/A) lodged First Information Report. 'X' was medically examined. Statements of the witnesses conversant with the facts were recorded. Accused was arrested. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. In 313 Cr.P.C. statement, the appellant denied his complicity in the crime and pleaded false implication. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred by the appellant.

3. I have heard the learned counsel for the parties and have examined the file. Admitted position is that the appellant lived in the neighbourhood of the victim's parents and the parties were acquainted with each other. They were distantly related to each other; they had visiting terms at each other's residence.

4. The occurrence took place on 18.12.2001 when allegedly the appellant had enticed the prosecutrix to Bhajanpura at around 02.00 p.m. when she was alone at her residence. In her Court statement, the victim disclosed that she was taken to Bhajanpura and was confined in a room where she was sexually assaulted. At about 12 O'clock next day, she was brought to Nand Nagri and was confined there in a room. At around 07.00 p.m. the appellant brought her to bus stand chungli of Nand Nagri. When the appellant was busy talking with 3 – 4 boys, finding an opportunity, she escaped from there; came to her house and narrated the incident to her parents. In the cross-examination, specific suggestion was put by the appellant that she was in love with him and had accompanied him with her own free will.

5. On scanning the testimonies of the material witnesses, it reveals that the prosecutrix was a consenting and willing party. When the appellant had visited her residence on 18.12.2001 at around 02.00 p.m. she was alone. She accompanied the appellant without raising any alarm or protest to Bhajanpura. On the way, she did not raise any noise to attract the attention of the public at large. She remained in the company of the appellant on 18.12.2001 and 19.12.2001. At no stage, she protested her alleged kidnapping and maintained complete silence. Even when she returned to her home on 19.12.2001, she, on the way, did not raise any alarm. Her parents did not lodge report with the police promptly. PW-11 (SI Jagtar Singh), the Investigating Officer, informed that on 21.12.2001 at around 01.00 p.m. 'X' was brought by her father Kanhaiya Lal and mother Babli at the Police Station where after recording her statement (Ex.PW-2/A), FIR was lodged. No plausible explanation has been offered by the victim for inordinate delay in lodging the FIR. In the cross-examination, the Investigating Officer was asked specific question if he had enquired any reason for lodging the FIR after about two days of the commission of the offence from X's parents. Reply of the Investigating Officer was that the prosecutrix had disclosed incident to them after two days. It falsifies the victim's statement that soon after return to the residence, she had apprised the entire incident to her parents. PW-4 (Kanhaiya Lal) in his Court statement disclosed that on 19.12.2001, he had lodged the 'missing person' report. However, no such report has been placed on record.

6. On 21.12.2001, 'X' was medically examined by PW-8 (Dr.Kalpana Kumar) vide MLC (Ex.PW-8/A); no external injuries whatsoever were found on her body; no abnormality was detected on

systematic examination. Absence of any injury or scratch mark on her body corroborates the appellant's version that it was an elopement with consent.

7. Age of the victim becomes material / crucial to ascertain the appellant's guilt. Prosecution case was that at the time of occurrence, the victim was aged around 13 years, her date of birth being 28.11.1987. The Investigating Agency, however, did not collect any cogent and credible document to ascertain if the victim was below 16 years of age on the day of incident. Admittedly, the victim was a student of 8th class in Babu Ram Sarvodya Modern Vidyalya. The Investigating Officer did not collect any record from the said school to ascertain as to what age of the prosecutrix was recorded in the school record at the time of seeking her admission there. The Investigating Agency also did not get conduct any ossification test to find out the approximate age of the victim. No birth certificate from the competent authority was collected during investigation. The appellant, in the cross-examination of PW-11 (SI Jagtar Singh) produced a birth certificate (Ex.PW-11/DA) issued by MCD in the name of one Sushma Devi. The Investigating Officer admitted that this certificate was received by him. However, this certificate was not placed on judicial file and no witness was cited to prove its genuineness. The certificate (Ex.PW-11/DA) reveals that it pertained to one 'Sushma Devi'. Name of the victim is apparently not 'Sushma Devi'. Attempt was made to explain that earlier 'X' was called 'Sushma Devi' and an affidavit dated 07.05.2002 was placed on record whereby victim's father had stated that in a hurry 'X's name was recorded as 'Sushma Devi'. This explanation inspires no confidence. Affidavit dated 07.05.2002 has not been proved. PW-4 (Kanhaiya Lal), in the cross-examination, stated that he was unable to give the date of birth of

his daughter. He did not claim if any such affidavit was sworn and given by him to the Investigating Agency. Besides this, Ex.PW-11/DA discloses the name of the mother of the child as Sumitra. Victim's mother appeared as PW-3 and disclosed her name as 'Babli'. At no stage, she claimed that she was known by the name of 'Sumitra'. These vital discrepancies in the birth certificate create doubt about its correctness and genuineness. The original record has not been produced before the Court.

8. Since the prosecution was unable to establish beyond reasonable doubt that the victim was below 16 years of age on the date of incident, conviction under Section 376 IPC cannot be sustained.

9. In the light of above discussion, the appeal is allowed. Conviction and sentence recorded by the Trial Court are set aside. Bail bond(s) and surety bond(s) stand discharged.

10. 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.

(S.P.GARG)
JUDGE

OCTOBER 18, 2016 / *tr*