

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

**RESERVED ON : 29th MARCH, 2016
DECIDED ON : 22nd APRIL, 2016**

+ CRL.A.538/2004

MOHD. AKLAQ Appellant

Through : Mr.Narender S.Yadav, Advocate.

versus

THE STATE (NCT OF DELHI) Respondent

Through : Mr.Raghuvinder Varma, APP.

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

S.P.GARG, J.

1. The appellant – Mohd. Aklaq has preferred the instant appeal to challenge the legality and correctness of a judgment dated 04.03.2004 of learned Addl. Sessions Judge in Sessions Case No. 207/01 arising out of FIR No. 208/01 PS Hauz Khas by which he was convicted for committing offence punishable under Section 376 IPC. By an order dated 05.03.2004, he was awarded RI for ten years with fine ₹5,000/-.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that on 15.03.2001 at around 09.00 a.m. the appellant kidnapped the prosecutrix 'X' (changed name) aged around fourteen years from the lawful guardianship of her father and took her to various places and

committed rape upon her till 12.08.2001. On 15.03.2001, 'X' left her home on the pretext to purchase vegetables but did not return. Her father made efforts to find her at various places but in vain. He lodged missing report vide Daily Diary (DD) No.37B (Ex.PW-2/A) without suspecting any individual in her kidnapping. The Investigating Officer lodged First Information Report under Section 363 IPC on 16.03.2001 by making endorsement (Ex.PW-14/A) over it. Subsequently, the prosecutrix was found in the company of the appellant. She was medically examined; her statement under Section 164 Cr.P.C. was recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellant for committing offences punishable under Sections 363/366/376 IPC. In order to establish its case, the prosecution examined nineteen witnesses. In 313 Cr.P.C. statement, the appellant denied his complicity in the crime and pleaded false implication. On appreciation of the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, acquitted the appellant of the charges under Sections 363/366 IPC. It is pertinent to note that the State did not challenge the said acquittal. Being aggrieved and dissatisfied, the instant appeal has been filed for conviction under Section 376 IPC.

3. I have heard the learned counsel for the parties and have examined the file. It is not disputed that the appellant and the prosecutrix remained together for about five months. During this period, physical relations took place between the two on several occasions.

4. On scrutinizing the statement of the prosecutrix and other material witnesses, it stands established that the prosecutrix, on her own, had

accompanied the appellant and had lived with him at various places for about five months. At no stage, she raised hue and cry. She never objected to her alleged kidnapping. She had left her father's home as he used to quarrel with her over trivial issues in the absence of her mother and other siblings who had abandoned him. It has come on record that the place where both the appellant and the prosecutrix lived together was occupied by the appellant's other family members. In the cross-examination, 'X' admitted that the appellant used to go to drive three wheeler scooter for livelihood and in his absence, she used to perform household work. During this period, she travelled along with the appellant in a three wheeler scooter to Jafrabad covering a distance of about 8 k.m. She did not inform any police official available on the way at red lights to seek their assistance. She continued to live with the appellant without any demur. The jhuggi was surrounded by other residential houses but no neighbour was ever informed. Apparently, the prosecutrix was consenting party throughout. Nothing has surfaced on record to infer if at the time of having physical relations, any resistance was offered by the prosecutrix. No injuries whatsoever were found on her body including private parts at the time of her medical examination.

5. X's age is crucial to infer the appellant's guilt. The Prosecution's claim was that 'X' was aged around fourteen years on the day of occurrence. In the complaint (Ex.PW-2/A), X's father had disclosed her age as fourteen years. Similar age finds mention in the MLC (Ex.PW-8/A) and statement under Section 164 Cr.P.C. (Ex.PW-1/B). 'X' was taken for ossification test and as per ossification report (Ex.PW-6/A), she was in between 12 – 14 years as on 12.08.2001. Even if margin of two years is

given, the prosecutrix was below 16 years of age on the day of occurrence which had taken place about five months prior to conducting of the ossification test. The Investigating Officer also collected photocopy of school leaving certificate (Ex.PW-14/J) showing her date of birth as 14.08.1986. It is true that the Investigating Officer committed gross irregularity in not collecting the original certificate and relevant school record showing the exact date of birth of the prosecutrix. So much so the concerned official from the school was not cited as a witness. The school record was not summoned and proved before the Court. Any how the appellant also did not bother to summon any such record from the school to falsify the Investigating Officer's claim. There are no sound reasons to disbelieve the age revealed by the prosecutrix.

6. Since the prosecutrix was below 16 years of age, her consent to have physical relations with the appellant was of no consequence. The impugned judgment, on that score, cannot be faulted and is affirmed. The appellant was awarded RI for ten years with fine ₹5,000/-. The sentence seems to be excessive considering the fact that the prosecutrix was a consenting party and had accompanied the appellant on her own without any enticement. For that reason, the Trial Court had acquitted the appellant of the commission of offences under Sections 363/366 IPC. No physical injuries were caused to the prosecutrix during her stay at the appellant's house. It is the appellant's plea that both of them had lived together as husband and wife. Since X's father was not agreeable to their marriage because of different religions, 'X' made a false statement to implicate him. Sentence Order records that the appellant was aged around 22 years and had old parents and three unmarried sisters to support; he was the only earning

member of the family and had clean antecedents. Nominal Roll dated 22.09.2006 reveals that he had already undergone five years, one month and nine days incarceration besides remission for nine months and five days as on 21.09.2006. His overall jail conduct was satisfactory. He was not involved in any other criminal case. His substantive sentence was suspended vide order dated 29.09.2006 on his furnishing personal bond in the sum of ₹25,000/- with one local surety in the like amount. He could not furnish the required surety bond and it was reduced to ₹15,000/- vide order dated 03.11.2006. Nothing has emerged if after suspension of sentence the appellant indulged in any criminal activity. No useful purpose will be served to send the appellant to jail as he has already suffered the ordeal of trial / appeal for around 15 years.

7. Considering the facts and circumstances of the case, Sentence Order is modified to the extent that the period already undergone by the appellant in this case shall be treated as substantive sentence. He shall, however, deposit the fine if still unpaid in the Trial Court within two weeks. Default sentence for non-payment of fine will be SI for one month.

8. The appeal stands disposed of in the above terms. 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

APRIL 22, 2016 / tr