

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

RESERVED ON : 13th JANUARY, 2016

DECIDED ON : 1st FEBRUARY, 2016

+ CRL.A.570/2005

SARVAR JAHANGIR @ RAJA Appellant

Through : Ms.Sangita Bhayana, Advocate.

versus

STATE (NCT OF DELHI) Respondent

Through : Ms.Meenakshi Dahiya, APP.

AND

+ CRL.A.549/2005

AMEEN Appellant

Through : Mr.J.K.Singh, Advocate.

versus

STATE Respondent

Through : Ms.Meenakshi Dahiya, APP.

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

S.P.GARG, J.

1. Challenge in these appeals is to a judgment dated 21.04.2005 of learned Addl. Sessions Judge in Sessions Case No.161/01 arising out of FIR No.146/2001 PS Mayur Vihar by which the appellant – Sarvar

Jahangir @ Raja (A-1) was held guilty for committing offences under Sections 363/366/376 IPC and appellant – Ameen (A-2) was held guilty for committing offences under Section 363/366/34 IPC. By an order dated 23.04.2005, they were awarded various prison terms with fine. The sentences were to operate concurrently.

2. Briefly stated, the prosecution case as stated in the charge-sheet was that on 11.06.2001 during day-time, the appellants along with their associate – Munna Khan (since acquitted) kidnapped the prosecutrix ‘X’ (assumed name) aged around 14 ½ years from the lawful guardianship of her parents. Subsequently, A-1 committed rape after criminally intimidating her. On 11.06.2001, ‘X’ went missing from her home; her parents searched her at various places but in vain. ‘Missing Person Report’ was lodged on 12.06.2001 and the investigation was assigned to ASI Nahar Singh. Since ‘X’ was un-traceable, the Investigating Officer lodged FIR on 15.06.2001. On 16.06.2001, ‘X’ was found in A-2’s company. A-1 was arrested on 18.06.2001. ‘X’ was medically examined; she recorded her 164 Cr.P.C. statement. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination.

Upon completion of the investigation, a charge-sheet was filed against A-

1, A-2 and Munna Khan. To prove its case, the prosecution examined twenty witnesses. In 313 Cr.P.C. statements, the accused persons denied their involvement in the crime and pleaded false implication. DW-1 (Shamida) appeared in their defence. After considering the rival contentions of the parties and on appreciation of the evidence, the Trial Court, by the impugned judgment, convicted the appellants – A-1 and A-2 for the above said offences and acquitted Munna Khan of all the charges. It is relevant to note that State did not challenge his acquittal. Being aggrieved and dissatisfied, the appellants have filed the instant appeals.

3. I have heard the learned counsel for the parties and have examined the file. Learned counsel for A-1 would submit that ‘X’ and A-1 were in love. ‘X’ wanted to marry him and for that purpose had visited him with cash and jewellery at his house. When his mother objected to that relationship, A-1 was falsely implicated when he was going to leave ‘X’ at her house. Counsel further urged that ‘X’ was ‘major’ on the day of incident. Reliance on the birth certificate to determine her age by the Trial Court is misplaced as there are material discrepancies in it. Counsel for A-2 urged that no role was assigned to him in the crime and he was convicted merely because of his presence along with A-1. Learned Addl.

Public Prosecutor urged that no sound reasons prevail to disbelieve the prosecutrix.

4. From the very inception, it was the prosecution's case that 'X' was aged around 14 ½ years and her date of birth was 25.12.1986. In DD No.14A (Ex.PW-12/A) recorded on 12.06.2001, the informant disclosed the age of her missing daughter around 14 years. In the FIR (Ex.PW-1/A) and in the MLC (Ex.PW-13/A), X's age was shown as 14 years. She was a student of 9th standard on the day of incident. During investigation, X's father Rakesh Kumar produced photocopy of a birth certificate (Mark 'Y') where her date of birth was recorded as 25.12.1986. He elaborated that the original had been deposited by him in ASM Public School, Samachar Apartments, Mayur Vihar phase-I. 'X' in her Court statement as PW-3 recorded on 21.05.2003 gave her age as 16 years. Material testimony is that of PW-18 (Dr.Meenu Sehgal), Jr.Asst., NDMC, Mandir Marg, New Delhi, who brought the record regarding birth of a female child registered at registration No.11328. As per record, a female child was born on 25.12.1986 and her birth was registered on 27.01.1987. She further disclosed that father's name of the female child was Rakesh Goel and mother's name was Anita; they were resident of 18/400, Trilokpuri, Delhi. Photocopy of the relevant entry was Ex.PW-18/A. She

further deposed that the particulars given in birth certificate (Ex.PW-18/B) were correct as per record. She was not cross-examined. Nothing was suggested to her that this birth certificate did not pertain to 'X'. Merely because, the father's name has been described as 'Rakesh Goel' which does not find mention in his testimony when he gave his name only 'Rakesh Kumar' is not sufficient to infer that the birth certificate does not pertain to 'X'. Nothing is on record to infer if PW-1 (Rakesh Kumar) and 'Rakesh Goel' whose name finds mention in the birth certificate (Mark 'Y') are two different individuals. No such clarification was sought by the appellants in the cross-examination from PW-1 (Rakesh Kumar). Rather it was suggested that the said certificate pertained to their daughter 'Mamta'. As per record, Mamta was junior in age to 'X'. This certificate was prepared long back when X's parents had not anticipated such an unfortunate incident to happen in future. There was no occasion for X's parents to manipulate her date of birth long back. The accused persons did not produce any document to show that 'X' was aged around 18 years or above 16 years. Since 'X' was below 16 years, her consent to have physical relations (if any) was of no relevance.

5. On scanning the testimonies of the prosecution witnesses, it stands established that A-1 and 'X' were acquainted with each other for

the last about 4 – 5 years and they used to remain in constant touch. On 11.06.2001, 'X' had gone at A-1's residence along with cash and jewellery articles without informing her parents. Thereafter, she accompanied the appellants without any demur at various places and remained in A-1's company till 15.06.2001. On 16.06.2001, she was found in A-2's company while going on a rickshaw. During this period, 'X' did not make any attempt to contact her parents; she did not raise hue and cry at any stage. She met A-1's relatives but did not complain about her alleged abduction / kidnapping. Physical relations took place between 'X' and A-1 during this period. She freely roamed in the company of the appellants even after establishing physical relationship without any complaint. Apparently, 'X' was a consenting party throughout. She and A-1 wanted to marry being in love. At the time of medical examination vide MLC (Ex.PW-13/A), no visible injuries were found on her body including private parts. There were no struggle marks to infer if physical relations were established forcibly against her wishes. The appellants were not armed with any weapon to create fear in her mind not to protest.

6. Undoubtedly, 'X' has exaggerated her version whereby she implicated Munna Khan and attempted to rope in one Raghav and A-1's mother assigning superficial role to them. However, during investigation,

they (Raghav and A-1's mother) were not found to be involved in the crime and were not charge-sheeted.

7. In 313 Cr.P.C. statement, A-1 admitted that he was in love with 'X' and they both wanted to marry. Since they belonged to different religions, their parents were not agreeable to their marriage. It is certain that A-1 had taken 'X' along with him at various places and had established physical relations with her. No valid reasons exist to disbelieve the statement of the prosecutrix on that aspect. MLC (Ex.PW-13/A) corroborates her version where X's hymen was found torn. A-1 had no reason to keep 'X', a minor, below 16 years with him without the consent and permission of her parents at a lonely place far away from their residence. He did not contact X's parents to inform her whereabouts during this period. Since 'X' was below 16 years of age, her consent to accompany A-1 or to have physical relations with him was of no consequence. A-1's conviction under Sections 363/366/376 IPC on that score cannot be faulted.

8. Regarding A-2, it is on record that he did not establish physical relation with 'X'. He was not instrumental in taking 'X' away from the lawful guardianship of her parents. No specific role was assigned to him if he enticed or instigated 'X' to accompany A-1. As observed

above, A-1 and 'X' were already known to each other since long and were in love; they wanted to marry. Merely because, A-2 was seemingly aware of their plan and did not inform X's parents, it cannot be inferred that he was involved in the crime. No threat whatsoever was ever extended by him to the victim and for that reason, he got acquittal under Section 506 IPC. A-2 had not provided any facility or support to A-1 in the accomplishment of crime. His conviction under Sections 363/366 IPC thus can't be sustained. He deserves benefit of doubt and is acquitted.

9. A-1 has been sentenced to undergo RI for ten years. Nominal Roll dated 31.07.2006 reveals that he has already undergone five years and eleven days incarceration besides remission for three months and ten days as on 29.07.2006. He is not involved in any other criminal case and is not a previous convict. He was granted interim bail from 25.12.2005 to 22.01.2006 and there are no allegations of its misuse. He was granted suspension of sentence vide order dated 08.08.2006. Nothing has come on record to show if after release, he misused the liberty or indulged in any such criminal activity. It is informed that A-1 aged around 36 years at present; got married in 2009 and is a father of two minor daughters aged around 7 years and 4 years. His father has already expired and his mother is suffering from various ailments. Prayer has been made to modify the

Sentence Order. Learned Addl. Public Prosecutor has no objection to consider the mitigating circumstances.

10. The victim, in this case, was aged around 14 ½ years on the day of occurrence. She was taken away by A-1 without any inkling to her parents and was kept away for about five days. During this period, physical relations were established with her albeit with consent. The Court can understand the trauma of X's parents who were not aware of her whereabouts for so long and continued to search her here and there. Considering the mitigating circumstances whereby A-1 suffered agony of trial / appeal for about 15 years; the fact that he is not involved in any other criminal case and is not a previous convict and the fact that 'X' was a consenting party, Sentence Order is modified and the substantive sentence of the appellant is reduced to Rigorous Imprisonment for seven years under Section 376 IPC. Other terms and conditions of the Sentence Order are left undisturbed.

11. A-2's appeal is allowed and he is acquitted of the charges. Bail bond(s) and surety bond(s) of A-2 stand discharged.

12. While maintaining A-1's conviction, the Sentence Order is modified to the extent that the substantive sentence under Section 376 IPC would be seven years instead of ten years. He will surrender on 10th

February, 2016 in the Trial Court to serve out the remaining period of sentence.

13. 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 01, 2016 / *tr*