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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : NOVEMBER 15, 2016

DECIDED ON : DECEMBER 08, 2016

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CRL.A. 536/2013

ATIQUR REHMAN

..... Appellant

Through : Mr.M.Rais Farooqui with
Mr.S.A.Abdi, Advocates.

versus

GOVT. OF NCT OF DELHI

..... Respondent

Through : Mr.Akshai Malik, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 14.01.2013 of learned Additional Sessions Judge in Sessions Case No. 02/13 emanating from FIR No. 85/11 registered at Police Station Sadar Bazar by which the appellant-Atiqur Rehman was held guilty for committing offences under Section 376/366A/506(II) IPC. By an order dated 15.01.2013, he was sentenced to undergo rigorous imprisonment for ten years with fine of ₹10,000/- under Section 376 IPC; rigorous imprisonment for ten years with fine of ₹5,000/- under Section 366A IPC; and, rigorous imprisonment for

seven years with fine of Rs. 5,000/- under Section 506 (II) IPC. All the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that on 18.06.2011, at about 7:30 p.m. the appellant kidnapped the prosecutrix 'X' (assumed name), aged around 16 years, from the lawful guardianship of her parents; wrongfully confined her at Jaipur, committed rape upon her without her consent and criminally intimidated her. The incident was reported to the police on 20.06.2011. Efforts were made to find the whereabouts of the prosecutrix but to no effect. First Information Report was lodged under Section 363 IPC after recording statement of victim's father (Ex. PW-16/A). On 23.06.2011, the prosecutrix was brought to Delhi; she returned to her home. Her father took her to the Police Station. She was medically examined; she recorded her 164 Cr.P.C. statement. The accused surrendered before court on 11.07.2011 and then was formally arrested vide arrest memo (Ex.PW-6/A); he was taken for medical examination. Statements of witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent for examination to Forensic Science Laboratory. Upon completion of investigation, a charge-sheet was filed against the appellant in the court. The prosecution examined twenty witnesses to substantiate its case. In 313 statement the appellant denied his involvement in the crime and pleaded innocence. He examined two witnesses in defence. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and correct perspective and fell in grave error to base conviction on the testimonies of interested witnesses.

There was inordinate delay of two days in lodging First Information Report which created doubt about the trustworthiness of the prosecution case. The prosecution was unable to establish the true and correct age of the prosecutrix. Reliance has been placed on *Thulika Kali v. State of Tamil Nadu*, 1972 (3) SCC 393; *Maharaj Singh v. State of UP*, 1994 (5) SCC 188; *Thanedar Singh v. State of MP*, 2002 (1) SCC 487; *Rajeevan v. State of Kerala*, 2003 Cri.L.J. 1572; *State of Rajasthan v. Gurmail Singh*, 2005 (3) SCC 59 & *Sujoy Sen v. State of West Bengal*, 2007 (6) SCC 32.

4. Learned Addl. Public Prosecutor controverting the appellant's contention urged that there are no sound reasons to disbelieve the prosecutrix aged around sixteen years.

5. Admitted position is that the appellant and the prosecutrix were familiar with each other as they both lived in the same vicinity. In her statement, the victim claimed that the appellant used to follow her for the last about two years. However, at no stage 'X' lodged any complaint against the appellant's conduct and behavior to her parents or other family members.

6. On perusal of the statement of the prosecutrix and other relevant witnesses, it stands established that 'X' was a consenting party throughout. They were acquainted with each other prior to the incident. 'X' remained in the company of the appellant at a far away place for about six days and at no stage she raised any alarm protesting her alleged forcible kidnapping.

7. In her statement as PW-1 she deposed that on 18.06.2011, at about 7:00 p.m. she left her house to fetch medicine. Her paternal uncle was ahead of her and she was walking behind him. When she was going to take medicine, the accused held her hand and asked her to accompany him to

Bombay to marry her. When she declined to do so, he threatened to kill her parents, brother and sisters and she agreed to accompany him due to fear. The accused took her to Jaipur; kept her at his relative's house and committed rape upon her there. She was brought back to Delhi on 23.06.2011 and was kept at his friend's place at Seelampur. The accused and his friend used to ask her to marry the accused but she declined to do so without the consent of her parents. She was brought back to Bara Hindu Rao and left there. Despite giving an opportunity, the appellant did not opt to cross-examine her.

8. On perusal of the statement of the complainant it can well be inferred that the prosecutrix was a willing and consenting party. She did not raise alarm when she was threatened to accompany the accused. Admittedly, the witness's paternal uncle was going ahead of her at the time of alleged incident. She did not raise any voice to attract his attention. She willingly accompanied the accused who was unarmed to create real apprehension in her mind to kill her parents. During the period, she remained in the company of the appellant at various places, she never protested. Physical relations took place between the two on several times. She did not offer any resistance any stage. No injury or violent marks were found on her body including the private parts at the time of her medical examination vide MLC(Ex. PW-8/A). She did not complain about the physical assault to appellant's family members and did not try to escape the spot. It has come on record that they had stayed for about three days in Jaipur in a hotel. PW-4 (Shailender Pal Singh), Manager of the Comfort Paying Guest House, Jaipur, proved the entry at Serial No.1298 in the register where both the appellant and the victim had stayed for about three

days. The victim did not complain about the conduct and behavior of the appellant to any hotel staff that time. She did not bother to contact her parents. Needless to say, it was a case of elopement with consent. All these facts and circumstances lead to an irresistible conclusion that the prosecutrix voluntarily accompanied the appellant and established physical relations with him out of her free will. There was, otherwise, no cogent reason to remain mum for a considerable time.

9. Age of the prosecutrix is relevant to infer the appellant's guilt. Throughout, the prosecution case was that 'X' was aged less than 16 years on the date of occurrence. PW-10 (Anjna Kumari), brought the school record as per which 'X' got admission in class 3rd vide admission no. 3749. Her date of birth was recorded as 03.07.1995 vide document Ex. PW-10/A. A birth certificate was issued by the competent authority (MCD) as per which date of birth of victim is 03.07.1995. There are no reasons to disbelieve the date of birth recorded in the School records as 'X' parents never anticipated such an incident to happen in future to manipulate her age that time. The appellant has not suggested any other date of birth of the prosecutrix. Since the prosecutrix was below 16 years of age on the day of incident, her consent to have physical relations with the appellant was of no relevance. 'X' being an immature girl of tender age was incapable to take informed decision and to submit herself for sexual relations without understanding its consequences. Contrary to that, the appellant was a mature man, aged around 35 years, and was aware of the consequences of his act. Though the prosecutrix was in love, the appellant aged around 35 years had no occasion to take her to a far away place without the consent or permission of her parents. Not only that, he established physical relations without

performing legal marriage with her. Apparently, the prosecutrix 'X' was exploited by an elderly mature person taking advantage of her immaturity.

10. Nominal roll dated 28.05.2016 reveals that the appellant had undergone four years, ten months and thirteen days in custody besides remission for nine months and twenty seven days as on 28.05.2016. He is not involved in any other criminal case. His overall conduct in jail was satisfactory. He was not a previous convict and was aged around 35 years on the date of occurrence. The prosecutrix was a consenting party. The appellant was not aware of her exact date of birth. He is a first time offender.

11. Considering these mitigating circumstances, the sentence order requires modification. I am of the view that there exist special and adequate reasons to award sentence less than seven years as mandated under Section 376 IPC. In *Sanjay vs. State* 2014 (1) C.C. Cases (HC) 326, this Court held:

"The legislature in its wisdom made a provision for awarding a sentence of less than seven years when there are special and adequate reasons for the same. I have before me the prosecutrix's testimony. It goes without saying that the prosecutrix merrily proceeded with the Appellant most willingly. She travelled with him in a bus and then in a train to Lucknow. The prosecutrix was brought back to Delhi by the Appellant himself where the Appellant and the prosecutrix were apprehended at New Delhi Railway Station by the police. Thus, although the Appellant does not want to contest the appeal on merits, it is borne out from the record that it was a case of consensual intercourse with the prosecutrix. While awarding punishment, the Court has to take into consideration the mitigating and aggravating circumstances. The prosecutrix was aged 15 years and eight months and she was incapable of giving the consent eight months and she was incapable of giving the consent for

sexual intercourse. I have seen numerous cases where the girls sometimes less than 16 years of age take a lead in eloping with a boy, enters into a marriage with the boy and have sexual intercourse with him. Such a predicament was noticed by this Court in several cases including in two *judgments* passed by the Division Benches of this Court, namely, *Manish Singh v. State Govt. of NCT & Ors*, AIR 2006 Delhi 37 and *Bholu Khan v. State of NCT of Delhi & Ors.* (W.P.(Crl.)1442/2012 dt.01.02.2013."

12. Considering the age of the prosecutrix and the facts narrated above, in my view, it is a fit case where sentence less than the minimum should be awarded. Similar view was taken and sentence less than minimum was awarded by a learned Single Judge of this Court in *Brij Pal v. State* (Crl.Appeal No. 278 of 2000) decided on May 31, 2011.

13. In the light of the above discussion, while maintaining conviction, the sentence order is modified and the period already undergone by the appellant in this case is taken as substantive sentence. Of course, he will deposit the fine (if any) and for non-payment of it shall undergo default sentence for fifteen days. Copy of this order be sent to the concerned Jail Superintendent for information and necessary action. Trial court record be sent back along with a copy of this order.

(S.P.GARG)
JUDGE

DECEMBER 08, 2016/sa