

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

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Judgment reserved on: May 16, 2016

Judgment delivered on: May 17, 2016

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Crl.A. 945/2013

RAJU KUMAR VERMA @ RAJU

..... Appellant

Represented by: Mr.S.K. Sethi with Ms. Dolly
Sharma, Advs.

versus

STATE (GOVT. OF NCT) OF DELHI

..... Respondent

Represented by: Ms. Rajni Gupta, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By this appeal, Raju Kumar Verma @ Raju lays a challenge to the judgment dated October 12, 2012 for offences punishable under Sections 363, 366 and 376 IPC and the order on sentence dated October 25, 2012 directing him to undergo Rigorous Imprisonment for 10 years for offence punishable under Section 376 IPC and Rigorous Imprisonment each for 7 years for offences punishable under Sections 363 and 366 IPC with a fine of ₹10,000/- and in default of payment of fine to undergo Simple Imprisonment for one month on both counts.

2. Challenging the conviction, learned counsel for the appellant contends that as per the prosecution case, the prosecutrix left with the appellant on September 10, 2011 and stayed with him till March 19, 2012. It is the case of the prosecutrix that they resided at various places and at no place she made any hue and cry showing that she was not living willingly with the

appellant. The date of birth of the prosecutrix has not been proved in accordance with law. The fact that the prosecutrix was in love with the appellant is evident from her letters written which have been proved by the prosecution. Since the prosecutrix was a consenting party, she refused to get her gynaecological examination done when she was produced before the doctor. There are contradictions in the statement of prosecutrix. The identity of the appellant as the person who enticed the prosecutrix has not been established. Even as per the prosecutrix, the appellant had married her and thus the offences of kidnapping and rape are not constituted.

3. Learned APP for the State on the other hand contends that the age of the prosecutrix has been proved by the school leaving certificate according to which she was 13 years 9 months old at the when she was enticed away thus her consent, if any, is immaterial. The prosecutrix has clearly stated that it was the appellant who took her away contrary to her wishes and subjected her to sexual intercourse which is also evident from the fact that she was pregnant when she was recovered. Hence the appeal be dismissed.

4. Process of law was set into motion by Anita Devi PW-4 the mother of the prosecutrix who stated that her daughter 'S' was missing since she went to the school on September 09, 2011 and did not return in the afternoon. Since her husband had gone to the village, she took help of neighbours to search her but despite the same she could not trace her and hence she lodged the complaint on the intervening night of September 09-10, 2011. She suspected Raju Verma, who was working as Raj Mistry and resided opposite their house. Raju Verma who was the tenant in the house of Sher Singh was also missing since the time her daughter was missing. She had observed Raju Verma sitting on the roof of the house and staring with an evil eye on

her daughter. Before the Court, Anita Devi deposed in sync with her statement on the basis of which FIR was registered. After her husband returned, the house of Sher Singh was opened and they found some letters which were seized by the Investigating Officer vide seizure memo Ex.PW-4/B.

5. Version of Anita Devi was corroborated by the neighbour Sher Singh who scolded Raju for staring at the girls.

6. Prosecution has proved the date of birth of the prosecutrix as December 23, 1997 by producing Ms. Kamal, PW-3 the Vice Principal of the School in which the prosecutrix studied. In cross-examination, however this witness admitted that as regards the entry in the school record was on the basis of school leaving certificate issued by previous school and not by any other document.

7. Prosecutrix PW-9 in her deposition before the Court stated that Raju whose real name was Raj Kumar used to live opposite to their house since 1½ months prior to the incident. Raju used to write letters to her due to which she was carried away and also wrote letters to him. On September 09, 2011 while she was going to school in the morning Raju met her on the way and asked to accompany him however she refused to go with him. After school hours when she came out from the school building, Raju was waiting outside in an auto-rickshaw. He pulled her inside the auto-rickshaw stating that they would be going for sightseeing but he took her to the New Delhi Railway Station and from there to District Balia. After reaching Balia, Raju called his friend who gave one saree to him. Raju gave her the saree and put sindoor on her forehead. Thereafter they stayed together at a rented house in Balia for 15 days. They shifted to another house for about

2-3 months when people came to know that Raju had kidnapped her. Raju was compelled to vacate the room. Raju again brought her to Balia where they stayed for about 2 months. Thereafter police got the information and Raju was apprehended by the SHO. They were kept in the police station whereafter they were handed over to police of Varanasi from where Delhi Police and her father brought her to Delhi. She deposed that during this period, she tried to contact her mother from the mobile of Raju however Raju came to know about this from the log details of the mobile and he broke the SIM card of the mobile. She further deposed that Raju used to threaten her stating that if she told anything to her parents, he would give poison to her. She further deposed that Raju repeatedly made physical relations with her during this period. When she was recovered, she was pregnant for two months. She further stated that since she did not want the child, she aborted the child. The only cross-examination of the prosecutrix is to the extent that Raju never tried to make any physical relations with her prior to this incident and that she did not make any complaint to her parents regarding Raju staring at her. She further volunteered that she did not raise any alarm when Raju took her in the auto-rickshaw or at Railway Station or in Balia.

8. From the evidence on record, the prosecution has proved beyond reasonable doubt that prosecutrix was of 13 years 9 months of age at the time of incident and Raju having allured and enticed the prosecutrix. Thus, her consent was immaterial for the reason she was a minor.

9. Supreme Court in the decision reported as (1973) 2 SCC 413 Thakorlal D. Vadgama Vs. The State of Gujarat reiterating the law laid down in the decision reported as (1973) 1 SCC 544 State of Haryana Vs.

Raja Ram held-

“The expression used in Section 361, I.P.C. is “whoever takes or entices any minor”. The word “takes” does not necessarily connote taking by force and it is not confined only to use of force, actual or constructive. This word merely means, “to cause to go”, “to escort” or “to get into possession”. No doubt it does mean physical taking, but not necessarily by use of force or fraud. The word “entice” seems to involve the idea of inducement or allurements by giving rise to hope or desire in the other. This can take many forms, difficult to visualise and describe exhaustively; some of them may be quite subtle, depending for their success on the mental state of the person at the time when the inducement is intended to operate. This may work immediately or it may create continuous and gradual but imperceptible impression culminating after some time, in achieving its ultimate purposes of successful inducement. The two words “takes” and “entices”, as used in Section 361, I.P.C. are in our opinion, intended to be read together so that each takes to some extent its colour and content from the other. The statutory language suggests that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence as defined in Section 361, I.P.C..”

10. The contention of learned counsel for the appellant that the date of birth has not been proved deserves to be rejected for the reason the date of birth mentioned in the school record is sufficient proof of the age of the prosecutrix when nothing in cross-examination of PW-3 has been elicited showing that there was manipulation in the record or the same has not been recorded properly. Learned counsel for the appellant has not been able to point out any improvement in the deposition of the prosecutrix before the Court as compared to her statement recorded under Section 164

Cr.PC. Further mere elaboration of facts which do not go to the root of the case cannot be treated as material improvements.

11. Learned counsel for the appellant in the alternative contends that since from the letters of the prosecutrix it is apparent that she was a consenting party having an affair with the appellant, the sentence of the appellant be reduced.

12. Section 376 IPC prior to the amendment carried out w.e.f. February 03, 2013, provided that the offence of rape of a woman under 16 years of age with or without her consent was punishable with imprisonment of not less than seven years but which may extend for life or for a term which may extend to ten years and payment of fine, provided, the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

13. Since the consent of a girl below the age of 16 years is immaterial, the same cannot be treated as a mitigating circumstance so as to award a sentence lesser than 7 years rigorous imprisonment however on the facts and circumstances of the case, the sentence of Rigorous Imprisonment for 10 years for offence punishable under Section 376 IPC and Rigorous Imprisonment for 7 years each for offences punishable under Sections 363 and 366 IPC is on the higher side. Thus, sentence of the appellant is modified to one for Rigorous Imprisonment for 7 years for offence punishable under Section 376 IPC with a fine of ₹10,000/- and in default of payment of fine to undergo Simple Imprisonment for one month. The sentences for offences punishable under Sections 363 and 366 IPC is also modified to Rigorous Imprisonment for 4 years with a fine of ₹2000/- on both counts and in default of payment of fine to undergo Simple

Imprisonment for one week on both counts. The sentences would run concurrently.

14. Appeal is disposed of.

15. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

16. TCR be returned.

CM No.8042/2016

By this application, the appellant seeks modification of the order on sentence praying that he be released on the sentence already undergone.

As per Section 376 IPC, the minimum sentence prescribed for the offence of rape of a minor below 16 years is 7 years and hence the sentence of the appellant cannot be reduced to the period already undergone.

Application is dismissed.

(MUKTA GUPTA)
JUDGE

MAY 17, 2016
‘v mittal’