

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

**RESERVED ON : 10th MAY, 2016
DECIDED ON : 25th MAY, 2016**

+ CRL.A.1626/2013

FIROZ Appellant

Through : Mr.S.B.Dandapani, Advocate.

VERSUS

STATE (GNCT OF 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 11.01.2013 of learned Addl. Sessions Judge in Sessions Case No.17/11 arising out of FIR No.390/10 PS Narela by which the appellant Firoz was convicted under Sections 363/376 IPC. By an order dated 31.01.2013, he was sentenced to undergo RI for seven years with fine ₹5,000/- under Section 376 IPC and RI for three years with fine ₹3,000/- under Section 363 IPC. Both the substantive sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 16.09.2010 at around 7.30 p.m. the appellant in furtherance of common intention with one Munni (since acquitted)

kidnapped the prosecutrix 'X' (changed name), aged around 12 years, from the lawful guardianship of her parents from House No.E-291, JJ Colony, Bawana. The prosecutrix was, thereafter, taken to Aligarh where the appellant established physical relations with her during the period from 16.09.2010 to 18.09.2010.

3. On 16.09.2010 at about 07.30 the prosecutrix went missing from her house. Efforts were made by her family members to find her out but she could not be traced. Subsequently, they came to know that 'X' after being kidnapped by the appellant in connivance with Munni has been taken to Aligarh. 'X' was brought from there. Matter was reported to the police. The Investigating Officer after recording victim's statement (Ex.PW-4/A) lodged First Information Report on 19.09.2010. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. The accused was arrested. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against the appellant and Munni for commission of various offences. In order to establish its case, the prosecution examined seventeen witnesses. In 313 Cr.P.C. statements, the accused persons denied their involvement in the crime and pleaded false implication. DW-1 (HC Anil Kumar) and DW-2 (Mohd.Yusuf) were examined in defence. Upon appreciation of the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, found the appellant guilty of offences under Sections 363/376 IPC. It is relevant to note that co-accused Munni was acquitted of the charges and the State did not challenge her acquittal.

4. I have heard the learned counsel for the parties and have examined the file. Learned counsel for the appellant urged that the Trial

Court did not appreciate the evidence in its true and proper perspective. The prosecutrix was a consenting party and had willingly accompanied the appellant to perform marriage with him at Aligarh. Necessary documents were executed in support of performance of marriage at Aligarh. Counsel would further urge that the prosecutrix was aged around 20 years and it was so reflected in the document (Ex.PW-1/B). The date of birth recorded in the school record cannot be relied upon as it was not based upon any birth certificate. Learned Addl. Public Prosecutor urged that no sound reasons exist to disbelieve the prosecutrix.

5. The occurrence took place on 16.09.2010 when the prosecutrix went missing from her house at around 07.30 p.m. While leaving the house, she did not inform her family members. She accompanied the appellant on her own to Aligarh. Certain documents including Ex.PW-1/B were executed there with an intention to perform marriage. The prosecutrix and the appellant also established physical relations during this period. At no stage, the prosecutrix raised any alarm to allege forcible kidnapping or rape. No injuries whatsoever were found on her body including private parts at the time of her medical examination vide MLC (Ex.PW-5/A). The examining doctor did not see any struggle or violence mark on her body. Apparently, no resistance was offered by the prosecutrix at the time of having physical relations with the appellant. The prosecutrix had ample opportunity to attract the attention of the public or police officials during this period to complain her forcible kidnapping. However, she did not raise any hue and cry at any stage. She went along with the appellant to the Court and in the presence of a Notary Public got executed affidavit (Ex.PW-1/B). It has come on record that the appellant lived in the neighbourhood of the

prosecutrix. From Delhi, they travelled to Aligarh in a bus. In her examination-in-chief, the victim admitted that she had accompanied the appellant to the Court at Aligarh. However, her brother Shamshad arrived there and stopped their marriage; she was brought to Delhi by him.

6. It is pertinent to note that the prosecutrix had levelled allegations against Munni (since acquitted) for enticing her to accompany the appellant Firoz. She had even alleged that Munni had administered some stupefying substance to her in a drink, as a result of which, she had become unconscious on its consumption. The Trial Court, however, did not believe the prosecutrix and came to the conclusion that she was a willing and consenting party. In the cross-examination by learned Addl. Public Prosecutor, she admitted that in Aligarh the appellant had got prepared certain papers for marriage and she had put signatures albeit under force on those documents. In the cross-examination, the prosecutrix stated that there were 20 – 25 passengers in the bus and she did not raise alarm / noise to attract their attention. She remained for seven hours in the said bus. After alighting from the bus, they had gone to the appellant's jhuggi on foot and had met many persons on the way. From these circumstances, it can be inferred that the prosecutrix was a consenting party and physical relations, if any, with the appellant were with her free consent.

7. Prosecutrix's age is crucial to infer the appellant's guilt. Throughout, the prosecutrix and her family members had claimed that 'X' was below 14 years on the date of occurrence. In complaint (Ex.PW-4/A); statement under Section 164 Cr.P.C. (Ex.PW-4/C) and MLC (Ex.PW-5/A), the prosecutrix disclosed her age 14 years. The prosecution also examined PW-16 (Mrs.Vedwati), Principal, Govt. Girls Primary MCD School,

Bawana. She deposed that as per school record X's date of birth was 02.03.1998. She was admitted in the said school in 1st class. The photocopy of the admission register (Ex.PW-16/A), photocopy of admission form (Ex.PW-16/B) and photocopy of affidavit (Ex.PW-16/C) were proved on record. The witness fairly admitted that she was not the concerned principal at the time of X's admission. She also disclosed that at the time of seeking admission, victim's parents had not produced any birth certificate. Since this date of birth of the prosecutrix was recorded in 2004 much prior to the happening of the instant incident, no reason exists to disbelieve it. The victim and her parents had not anticipated such an incident to occur in future to manipulate her date of birth. Victim's mother, in her testimony, disclosed that she had not got prepare X's birth certificate at the time of her birth in village Saharsa, Bihar. The Investigating Officer could have asked for conducting ossification test to ascertain the approximate age of the victim. Since more reliable document regarding date of birth was available in the school record, it appears that Investigating Officer did not ask for ossification test. At the same time, the accused also did not demand any ossification test to ascertain and prove that 'X' was above 18 years of age on the day of incident. The appellant did not produce any document whatsoever to show that the prosecutrix was major on the day of incident. In affidavit (Ex.PW-1/B), the date of birth of the prosecutrix has been recorded as 20 years which is again not based upon any cogent evidence. Since both the parties intended to marry being in love, wrong date of birth seems to have been recorded in the affidavit (Ex.PW-1/B) to deceive the authorities. The appellant did not examine the executant of the document to prove if this age was disclosed by the victim. Moreover, this document does

not contain the exact date of birth i.e. month or date. In the absence of any other cogent document, age reflected in school record is to be taken as correct. Apparently, the prosecutrix was below 13 years of age on the day of incident and this conclusion arrived at by the Court below relying upon the judgment '*State of Chattisgarh vs. Lekhram*', 2006 (5) SCC 736 of the Apex Court cannot be faulted. Similar findings of Trial Court that no valid marriage took place between the appellant and 'X' are based on sound footing and no deviation is called for.

8. Since the prosecutrix was below 16 years of age, her consent to accompany the appellant and to have physical relations (if any) with him was of no consequence. Conviction under Sections 363/376 IPC stands affirmed.

9. Regarding sentence, it is to be noted that the appellant was aged around 20 years on the day of incident. He is not involved in any other criminal case and is not a previous convict; he has clean antecedents. The prosecutrix and the appellant were in love. 'X' was a consenting party throughout. Both of them wanted to marry but due to opposition by X's parents, they could not do so. The convict who was aged about 20 years at the time of commission of offence himself was not fully mature to understand the nature and implications of his act. Considering these circumstances, 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 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."

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. I accordingly, sentence the Appellant to undergo RI for four years and to pay a fine of Rs.2,500/- for each of the offences under Sections 366 and 376 IPC, and in default of payment of fine, the Appellant shall undergo SI for one month each. Both the substantive sentences shall run concurrently."

10. In the light of the above discussion, while maintaining conviction under Sections 376/363 IPC, the sentence order is modified and the substantive sentence of the appellant under Section 376 IPC shall be RI for five years instead of seven years with fine ₹5,000/-; default sentence for non-payment of fine would be SI for one month and under Section 363 IPC shall be RI for two years instead of three years with fine ₹3,000/-; default sentence for non-payment of fine would be SI for fifteen days.

11. The appeal stands disposed of in the above terms. Copy of this order be sent to the concerned Jail Superintendent for information. Trial court record be sent back along with a copy of this order.

(S.P.GARG)
JUDGE

MAY 25, 2016 / tr