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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : JULY 21, 2016

DECIDED ON : SEPTEMBER 30, 2016

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CRL.A. 840/2015

NARENDER KUMAR

..... Appellant

Through : Mr.Siddharth Yadav, Advocate with
Mr.Arvind Kumar, 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. Aggrieved by a judgment dated 08.07.2015 of learned Additional Sessions Judge in Sessions Case No.60/2014 arising out of FIR No.129/2014 registered at Police Station Sarai Rohilla whereby the appellant- Narender Kumar was convicted for committing offence punishable under Section 376 IPC, the instant appeal has been preferred by him. By an order dated 10.07.2015, he was sentenced to undergo Rigorous Imprisonment for seven years with fine ₹5,000/-.

2. Briefly stated, the prosecution case, as reflected in the charge-sheet, was that during the period from 3.5.2013 to 20.01.2014 in a rented accommodation at Sarai Rohilla, the appellant committed rape upon the

prosecutrix 'X' (changed name) repeatedly; she was forced to abort the pregnancy without her consent and was criminally intimidated. 'X' lodged complaint (Ex.PW-2/A) on 22.01.2014. The Investigating Officer after making endorsement (Ex.PW-5/A) lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C.statement. Statements of the witnesses conversant with the facts were recorded. The accused was arrested. Upon completion of investigation, a charge-sheet was filed against the accused for committing offence punishable under Sections 313/376/494/420/506 IPC. By an order dated 06.09.2014, the accused was charged under Section 376(2)(n)/313/506 IPC. In order to establish its case, the prosecution examined ten witnesses besides examining CW-1 (Vidhya Devi). In 313 Cr.P.C. statement, the accused denied his complicity in the crime and pleaded false implication. The trial resulted in his conviction under Section 376 IPC. It is apt to note that the acquittal under Section 313/506 IPC recorded by the Trial court was not challenged by the State. Aggrieved by the conviction and sentence, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file minutely. The facts are not in dispute. The appellant and the prosecutrix were acquainted with each other. Admittedly, the accused was already married to PW-6 (Uma) on 22.11.2008. PW-6 (Uma) in her testimony before the court disclosed that her marriage was never dissolved. It has further come on record that intimacy developed between the prosecutrix and the accused when 'X's parents took a rented accommodation near Railway Dispensary, Kishan Ganj, Delhi, where the accused used to live. Due to rumors about 'X' affairs with the accused, her parents shifted to

House No.283, Gali No.3, Bagh Kade Khan, Kishan Ganj after about two months. It is also not in dispute that subsequently the accused and the prosecutrix got married at Arya Samaj Mandir on 03.05.2013.

4. In her complaint (Ex.PW-2/A), the victim gave detailed account as to how and in what manner, the accused established physical relations with her on several occasions after performing marriage with her. He falsely misrepresented her that he had obtained 'divorce' from his previous wife- Uma. When she came to know that the accused had not taken any such divorce and she was sexually exploited, she lodged the complaint with the police. In her Court statement as PW-2, she disclosed that during their stay in the vicinity of the accused, intimacy developed between the two. In February/March, 2013, the accused informed her that he had taken divorce from his wife and proposed her for marriage. On 3.5.2013, she married him at Arya Samaj Mandir. In the last week of October 2013, they started living together in a rented accommodation at Daya Basti, Sarai Rohilla. The accused established physical relations with her and she became pregnant. The accused forced her to consume pills to abort her pregnancy. When she requested the accused not to force to consume pills, he told her that he had not divorced his wife. Thereafter, the accused left her alone in the rented accommodation and did not return. Finally, she went to her parents' house and apprised them of the occurrence. In the cross-examination, she disclosed that the accused and she were on friendly terms initially. In February, 2013, the accused took her to Agra and they stayed in a hotel. She came to know from the accused that his wife used to torture him due to her suspicious nature. She fairly admitted that her marriage with the accused on 3.5.2013 was without any pressure or coercion. She claimed that she had

asked the accused to show her divorce papers but he put it off and promised to show it later on. She further admitted that her marriage with the accused was against the wishes of her parents. She denied that the accused was falsely implicated to extort money. She further claimed that no physical relations were established with the accused before marriage.

5. On scanning the testimony of the prosecutrix, it emerges that both of them were acquainted with each other and had developed intimacy. Finally, they got married in a Arya Samaj Mandir, Jamuna Bazar. PW-7 (Pt.Dhananjay Duvedi) deposed that he performed their marriage on 3.5.2013 and issued a marriage certificate (Ex.PW-2/D). Entry (Ex.PW-7/A) was made in the Register at Srl.No.748/13. In the cross-examination, he also disclosed that affidavits of the accused and the prosecutrix annexed as sheet No.2 to 7 (Ex.PW-2/D) were prepared by them themselves.

6. Marriage between the two, in fact, has not been disputed by the accused. He, however, did not explain as to what forced him to marry 'X', a virgin, without getting divorce from his previous wife. In the affidavit filed by the appellant at the time of solemnizing the marriage, he declared himself to be 'unmarried'. Admitted fact is that the appellant never got divorce from his previous wife PW-6 (Uma), appellant's wife, claimed that her marriage was still subsisting. Apparently, the appellant had misrepresented the prosecutrix regarding his marital status at the time of performing marriage with her. It has further come on record after the marriage, the accused did not take the prosecutrix to his house. They both started living in a rented accommodation owned by CW-1 (Vidhya Devi). In her court statement, CW-1 stated that in December, 2013, she had let out a room on the first floor to the accused on a monthly rent of ₹1,000/-to live

along with his wife. One day, when she came to know that the accused and his wife used to quarrel, she got the rented accommodation vacated. In the cross-examination by the learned Additional Public Prosecutor, she stated that the accommodation might have been let out to the accused in October, 2013. In the cross-examination, though she admitted not to have seen the accused's wife but volunteered to add that one day during her visit to the tenanted room finding them quarrelling she asked them to vacate the room. The accused did not explain as to for what purpose the said accommodation was taken on rent from CW-1 (Vidhya Devi). He also did not explain as to why he did not shift his previous wife to the said accommodation or who else was residing with him that time.

7. PW-2 (the victim) categorically deposed that after performing marriage, physical relations were established and she became pregnant. No sound reasons exist to disbelieve 'X's statement. Soon after lodging of the report, 'X' was medically examined vide MLC (Ex.PW-8/A) at Hindu Rao Hospital. The alleged history recorded therein records consensual relationship between the two. The prosecutrix is consistent throughout. Despite lengthy cross-examination, no material discrepancies could be extracted. No ulterior motive has been assigned to the prosecutrix for making a false statement.

8. PW-3 (Sahib Singh), 'X's father and PW-4 (Archana), her paternal aunt, have corroborated her version in its entirety on relevant facts. There is no inconsistency between medical and ocular evidence.

9. Consent for physical relationship given by the prosecutrix was under bona fide belief that she was the legally wedded wife of the accused. In fact, it was not so. The accused had misrepresented the victim to have

divorced his previous wife. Apparently, the consent so obtained for physical relationship was vitiated and was not based upon true information. Marriage between the two was not a 'legal' marriage. The accused could not have lawfully married the complainant. The marriage had no sanctity in law and was void ab-initio. On that score, the findings of the learned Trial Court based upon fair appreciation of evidence convicting the accused under Section 376 IPC cannot be faulted.

10. In *Bhupinder Singh vs. U.T. of Chandigarh* 2008 (8) SCC 531, the Supreme Court in similar circumstances held:

11. *"Though it is urged with some amount of vehemence that when complainant knew that he was a married man, Clause 'Fourthly' of Section 375 IPC has no application, the stand is clearly without substance. Even though, the complainant claimed to have married the accused, which fact is established from several documents, that does not improve the situation so far as the accused-appellant is concerned. Since, he was already married, the subsequent marriage, if any, has no sanctity in law and is void ab-initio. In any event, the accused-appellant could not have lawfully married the complainant. A bare reading of Clause 'Fourthly' of Section 375 IPC makes this position clear. It is pointed out by learned Counsel for the appellant that the date of knowledge claimed by the complainant is 6.3.1994, but the first information report was lodged on 19.9.1994. The complainant has explained that she delivered a child immediately after learning about the incident on 16.4.1994 and, therefore, was not in a position to lodge the complaint earlier. According to her she was totally traumatized on learning about the marriage of the accused-appellant. Though the explanation is really not satisfactory, but in view of the position in law that the accused was really guilty of the offence punishable under Section 376 IPC, the delayed approach of the complainant cannot, in any event, wash away the offence."*

12. Considering the peculiar facts of the case, sentence order needs modification. The prosecutrix, was aware that the accused was already a 'married' man. She had developed intimacy with him even without his getting divorce from his wife. They used to meet each other frequently. When rumour about their affairs spread in the locality, her parents had to shift their residence somewhere else. Even thereafter, both of them continued to interact. PW-3 (Sahib Singh), 'X's father, disclosed that in November, 2013, his daughter went missing from the house and they tried to trace her. 'X' returned home on 21.01.2014. In the cross-examination, he further admitted that 'X' had gone missing in February, 2013 for two days. Before performing marriage at Arya Samal Mandir, Jamuna Bazar, 'X' did not take into confidence her parents. Even after performing marriage with the accused, she did not go to her matrimonial home or her parents' house. She even did not intimate them about her marriage with the accused. Only when the accused abandoned her, she opted to go to her parents' home in January, 2014. She did not bother to confirm or verify if accused had taken legal divorce from his previous wife before performing marriage at Arya Samaj Mandir clandestinely.

13. Nominal roll dated 21.09.2015 reflects that the appellant has undergone one year and ten days incarceration besides remission for eighteen days as on 21.09.2015. He is not a previous convict and is not involved in any other criminal case. His overall jail conduct is satisfactory. Considering all these mitigating circumstances, the sentence order is modified and the sentence is reduced/modified to Rigorous Imprisonment

for four years. Other terms and conditions of the sentence order are left undisturbed.

14. The appeal stands disposed of in the above terms. Trial Court record (if any) be sent back forthwith along with the copy of the order. Intimation be also sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

SEPTEMBER 30, 2016/sa

