

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

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Decided on: 31st January, 2017

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CRL.A. 273/2002.

KAUSHAL KUMAR

..... Appellant

Represented by: Mr. S.H. Ansari, Adv. with
appellant in person.

versus

STATE

..... Respondent

Represented by: Mr. Ravi Nayak, APP.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. Non-bailable warrants have not been executed, however the appellant is present in Court with counsel.
2. Arguments have been addressed in the appeal by learned counsel for the appellant and learned APP for State.
3. Kaushal Kumar challenges the impugned judgment dated 9th October, 2001 convicting him for offences punishable under Section 366/376 IPC and the order on sentence dated 12th October, 2001 directing him to undergo rigorous imprisonment for a period of four years and to pay a fine of ₹1,000/- for the offence punishable under Section 366 IPC and rigorous imprisonment for a period of seven years and to pay a fine of ₹1,000/- for the offence punishable under Section 376 IPC.
4. The prosecution case is solely based on the testimony of PW-4 prosecutrix who deposed as under-

“I studied in Ngr. Nigam School and passed 9th class. My father is a generator mechanic. 3/4 persons used to work with them i.e.

Raju, another Raju also and Satish and one Kaushal accused present in the court today. My father used to take liquor and my mother and father used to quarrel with each other. My father wanted separation from my mother. My mother did not give divorce and went to my maternal uncle (Mama's) house. I used to live in Kanjhawala Village with my mother at Mama's house. I don't know my date of birth. I was in love with accused Kaushal. On 14th Oct, 1999 I told him that I love him. On 30.9.99 I told Kaushal atmosphere of my house because of quarrel between my mother and father is not good. I went with Kaushal to Bihar at Kaushal's house. There at my instance accused married with me. On 4.10.99 we got married with each other in Bihar and then we started living in Patna as husband and wife. I know what is marriage and I am aware what happens after marriage. During this period my relation with accd. Kaushal remained as husband and wife. While returning back to Delhi on 12.2.2000 we were apprehended by police. Police recorded my statement and enquired from me. I told police that we had married with each other and were living as husband and wife. After making statement to the police I gave my statement u/s 164 Cr.P.C. to the police. In that statement before court my age as 18 and half years. Perhaps my statement before the court on 14.2.2000. After some time my statement was again recorded by the Court in which I was asked where I was want to go. Where I stated that I want to go with accused Kaushal. At that time also I gave my age as 18 and half years."

5. With respect to the offence punishable under Section 366 IPC, PW-4 prosecutrix has stated in her testimony that she had asked the appellant to take her away and she wanted to go with the appellant. In the decision of Supreme Court reported as AIR 1965 SC 942 S. Varadarajan v. State of Madras, it was held that in a case where the prosecutrix voluntarily joins the accused, the accused cannot be said to have taken her away from the keeping of her lawful guardian. The relevant extract of the report are:

"9. It must, however, be borne in mind that there is a distinction

between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.”

6. Thus, on the deposition of the prosecutrix who was fed up with the atmosphere in the home where her parents were constantly quarrelling with each other and on her insistence, the appellant took her to his village offence punishable under Section 366 is not made out against the appellant.

7. Insofar as the offence of rape is concerned, as per the prosecutrix, the relationship was with her consent, however if she was a minor at the time of alleged incident, her consent was immaterial, Thus the relevant factor to be looked into is the age of the prosecutrix at the time of the alleged incident. To prove the age of the prosecutrix, the prosecution has placed on record documents and also the report as per the ossification test. PW1 Sarla Devi deposed that the prosecutrix was admitted in her school on 13th July 1999 in 8th Standard and as per Ex. PW-1/C which is the school leaving certificate of the prosecutrix, the date of birth was 24th April, 1987. She further deposed that the prosecutrix attended the school till 29th September, 1999 and her

name was struck on 30th October, 1999. Thus this is neither the age of the prosecutrix as per the school first attended nor the matriculation certificate. Moreover it is also not clear on what basis the date of birth was recorded in the school. Thus the said certificate cannot be relied upon to ascertain the age of the prosecutrix. Therefore, the medical evidence for determining the age of the prosecutrix has to be looked into. As per the testimony of PW-8 Dr. Sangeet Ghai, Senior Radiologist, Department Radio Diagnosis, AIIMS, who examined the x-ray plate of the prosecutrix, the bone age was between 14.9 to 15.8 years. He further stated that there is a margin of plus and minus two years and there is a possibility on either side. If the margin of two years is taken into consideration, the bone age of the prosecutrix is 16.9 years. Considering the age of the prosecutrix to be approximately 16.9 years at the time of the incident, she could consent for the relationship. Since she had deposed that the relationship between the appellant and her was consensual, therefore, the offence punishable under Section 376 IPC is also not made out against the appellant.

8. Consequently, the impugned order of conviction and order on sentence are set aside. The appellant is acquitted of the offences punishable under Section 366/376 IPC. Bail bond and surety bond of the appellant are discharged.

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

10. Appeal is disposed of. TCR be returned.

(MUKTA GUPTA)
JUDGE

JANUARY 31, 2017/'ga/vkm'