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

% *Date of Decision : December 20, 2017*

+ **CRL.A. 88/2011**

SUNIL KHAN @ GUDDU @ NIYAJ Appellant

Through: Mr.Jitender Mehta, Advocate
with appellant in person

versus

STATE Respondent

Through: Mr.Kewal Singh Ahuja, APP
for the State

PRATIBHA RANI, J. (Oral)

1. The appellant has preferred this appeal assailing the judgment dated 18th August, 2010 and order on sentence dated 23rd August, 2010 whereby he has been convicted for committing the offence punishable under Sections 363/366/376 IPC and sentenced as under:-

- (i) U/S 363 IPC : to undergo RI for three years with fine of ₹ 500/- and in default of payment of fine, to undergo SI for fifteen days.
- (ii) U/S 366 IPC : to undergo RI for four years with fine of ₹500/- and in default of payment of fine, to undergo SI for fifteen days.
- (iii) U/S 376 IPC : to undergo RI for seven years

with fine of ₹1000/- and in default of payment of fine, to undergo SI for one month.

2. The case FIR No.397/2008 was registered on the basis of the complaint made by Sh.Chander Prakash, father of the prosecutrix. In the complaint Ex.PW-1/A he reported that he was residing at Krishan Vihar, Delhi along with his family consisting of one son and three daughters. His youngest daughter 'K' (name withheld to conceal her identity) aged 13 years had left the house on 13th June, 2008 at 6:30 AM without informing anyone and had not returned thereafter. He tried to search for her with his relatives but on not being able to find her, he reported the matter to the police. After giving the description of 'K' the prosecutrix, he also expressed suspicion on the appellant/convict Guddu @ Sunil Khan @ Niyaj to be the person who might have enticed away/kidnapped his daughter and that Guddu was also missing from his house.

3. After registration of the case, efforts were made to search 'K' and Guddu. On 5th February, 2009, both 'K' and the convict were located at railway station Lucknow. When the convict was apprehended and 'K' was recovered, they disclosed their relationship to be as husband and wife. They also produced the proof of marriage i.e. Nikahnama and marriage agreement. Both of them were sent for medical examination. Thereafter, 'K' was produced for getting her statement recorded under Section 164 Cr.P.C. Since 'K' refused to accompany her parents and insisted to live with her husband (convict), being minor, she was sent to Nari Niketan. After completion of

investigation chargesheet was filed. Since the age of 'K', as per school record, was below the consenting age, the convict was charged for committing offence punishable under Section 363/366/376 IPC.

4. Prosecution examined 11 witnesses to prove the guilt of the convict. The convict during his examination under Section 313 Cr.P.C. denied the prosecution case to the extent that 'K' was kidnapped by him. He stated that both of them were in love but being from different religion, the family of the prosecutrix was not willing to accept this matrimonial alliance. Hence, 'K' left the house of on her own and compelled him to marry her. She embraced Islam and they performed Nikah. The physical relation between the two was with her consent as husband and wife.

5. Taking into consideration, the age of the prosecutrix to be 13 years i.e. below the consenting age of 16 years, the appellant herein was convicted for committing the offence punishable under Section 363/366/376 IPC and sentenced in the manner stated as above.

6. On behalf of the appellant it has been contended by Sh.Jitender Mehta, Advocate that right from the stage the prosecutrix and the convict were apprehended from Lucknow, they claimed their relationship to be that of husband and wife which was proved from Nikahnama. It is admitted case of the prosecution that Nikahnama and marriage agreement have been seized from the prosecutrix and the convict at the time of their apprehension. Attention of this Court has also been drawn to the statement of the prosecutrix during her medical examination vide MLC Ex.PW-5/B as well under Section 164 Cr.P.C. and also before this Court wherein she specifically stated that she left

the house of her own as she fell in love with the convict and they performed Nikah. The physical relation between the two was as husband and wife. Hence, no offence under SectionS 363/366/376 IPC can be said to have been proved against the convict and he may be acquitted.

7. Per contra, learned APP for the State has submitted that as per school certificate the date of birth of the prosecutrix is 29th September, 1996. She left the house on 13th June, 2008 and on that date she was a minor. Prosecutrix 'K' was Hindu and the convict is Muslim. She had not attained the age of majority so as to marry the convict or to give consent for physical relationship as wife, hence, the impugned judgment calls for no interference and the appeal may be dismissed.

8. MLC of the prosecutrix shows that not only the doctor who prepared the MLC but also the S.R. Gynecologist advised for medical examination to ascertain the bony age of the prosecutrix. Despite being recommended by two doctors, for the reasons which remained unexplained, her ossification test was either got not done or the report was not placed on record. In the FIR itself, which was registered on the basis of the complaint Ex.PW-1/A by father of 'K', it is clearly mentioned that 'K' had left the house of her own without informing her family members. She has been recovered after about eight months and till then she was residing with the convict as his wife and had also performed Nikah with him. For performing Nikah age of puberty is required to be considered which as per her MLC she had attained. Her LMP is mentioned in the MLC Ex.PW5/B. PW-8 Sh.Ram Nivas, Vice-Principal from MCD School, Krishan Vihar has specifically

stated that at the time of admission of 'K' no birth certificate was produced and date of birth was registered on the basis of the affidavit of her mother. At that time she undertook to file the date of birth certificate issued from MCD which she failed to file.

9. It is the statement of the prosecutrix 'K' (PW-2) and her father (PW-1) which holds the key.

10. PW-1 Sh.Chander Prakash, father of the prosecutrix 'K' had stated the following facts:

- (i) The convict Sunil Khan @ Guddu used to reside as tenant in his neighbourhood.
- (ii) When his daughter left home on 13th June, 2008, he suspected Guddu to be behind her missing and lodged the report Ex.PW-1/A.
- (iii) He did not remember the date of birth of any of his children including the eldest son.
- (iv) Date of birth of his daughter was disclosed and got recorded in the school on the basis of estimation.
- (v) His daughter 'K' was born in the house and no mid-wife or doctor was called.
- (vi) He was not having knowledge of the love affair between his daughter and the convict.

11. PW-2 'K' the prosecutrix has stated as under:

- (i) She fell in love with the convict and the affair was going on for a period of about one year prior to her leaving the house.
- (ii) She informed her parents to either get her married with the convict or she would run away from the house but she was given beating.

(iii) One day she ran away from her house and called the convict Sunil Khan @ Guddu through telephone and thereafter they got married and stayed at different places for different periods.

(iv) The convict Sunil Khan @ Guddu cohabited with her as his wife and with her consent.

12. In her statement under Section 164 Cr.P.C. also she expressed her desire to stay with her husband but was sent to Nari Niketan.

13. After staying in Nari Niketan she agreed to return to her parents home only on their assurance that no action would be taken against her husband/convict.

14. The photographs of the prosecutrix 'K' which were handed over to the police by her parents show that she is a grown up girl.

15. Her Nikahnama shows that she resided with the convict as his wife and was performing her matrimonial obligations.

16. Her photograph on the marriage agreement also shows her to be a grown up girl.

17. At the time of her examination before the Court on 22nd October, 2009 she had given her age to be eighteen years and stated that on the day of leaving the house on 13th June, 2008 she was about 17 years and few months old.

18. As regards the charges under Section 363/366 of the Indian Penal Code, the prosecution was required to prove that the convict had taken away or enticed the prosecutrix out of the keeping of the lawful guardian. If the minor leaves the parental home without any promise, offer or enticement from the accused, it cannot be said that offence of kidnapping is proved.

19. Section 366 IPC reads as under:

Kidnapping, abducting or inducing woman to compel her marriage, etc.—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; 1[and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid].

20. In order to succeed in a charge under Section 366 IPC prosecution was required to prove that the kidnapping of the prosecutrix was with the intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse.

21. In Bala Saheb vs. State of Maharashtra, 1994 Criminal Law General 3044, it was found that the prosecutrix, who as per school record was below 16 years of age, accompanied the appellant/accused from her village and stayed with him for two to three days. It was held that these circumstances clearly show that offence under Section 363 or 366 of I.P.C. was not made out.

22. In the instant case there is no evidence that the convict herein had either kidnapped PW-2 'K' or made an attempt to compel her to marry him. The deposition of the prosecutrix PW-2 'K' right from the stage of recovery till her deposition before the Court was consistent i.e. she left her house on her own to marry the convict, performed Nikah with him and lived with him as his wife till she was recovered by the police. Her categorical admission that she was in deep love with the convict is also reflected in the letter sent by her to the convict from Nari Niketan, expressing her love and full support to him in the situation in which they were placed. She even informed him that she had been medically examined to ascertain her bony age, which was estimated to be 18 years. Unfortunately, the Investigating Officer has preferred not to clarify the situation in this regard. From the statement of the prosecutrix it cannot be said that the convict took her with him from the lawful guardianship of her parents so as to force her or seduce her to illicit intercourse. The entire facts and circumstances of the case and the documentary evidence i.e. her marriage certificate, Nikahnama, the history given by her on MLC, her statement before the learned MM recorded under Section 164 Cr.P.C., her refusal to accompany her parents and preference to live in detention in Nari Niketan, communication from Nari Niketan to the Court in this regard and ultimately her agreeing to accompany her parents only on the condition that no harm would be caused to her husband/convict proved beyond reasonable doubt that it is a case of runaway marriage wherein she was yet to attain the age of majority

but left the house of her own, married the convict and lived with him as his wife and had physical relations with him as his wife.

23. Accordingly, Trial Court was not justified in convicting the appellant under Section 363/366 IPC. Thus, his conviction for the aforesaid offence is set aside.

24. Next comes the question as to whether the conviction of the appellant for the offence punishable under Section 376 is justified. The occurrence pertains to the year 2008. 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.

25. Exception 2 to Section 375 reads as under:

Exception 2 – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

26. Section 376 of Indian Penal Code provided punishment for rape. Section 376 (1) IPC reads as under:-

‘Whoever, except in the cases provided for in sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished

with imprisonment of either description for a term which may extend to two years or with fine or with both.'

27. In the instant case, it is the case of the prosecution that on the date of leaving the house she was aged about 13 year. Thus, at best, prosecution's case can be that the convict had physical relations with his wife who was below 15 years of age. For that he could have been held guilty under Section 376 IPC for committing rape on his wife who was below 15 years of age and the sentence provided for the said offence was imprisonment for a period of two years or with fine or with both.

28. For the reasons given in the preceding paragraphs, while acquitting the appellant Sunil Khan of the charges under Section 363/366 IPC, his conviction for committing the offence punishable under Section 376 IPC is maintained. However, in view of the fact that he had physical relations with his wife who was under 15 years of age, for which he could have been sentenced to a maximum period of two years, the substantive sentence of the appellant for committing the offence punishable under Section 376 IPC is modified to the extent that he is sentenced to undergo RI for two years. The sentence of fine awarded to the appellant for the offence punishable under Section 376 IPC is maintained.

29. As per the nominal roll received, as on 5th September, 2011 the appellant has undergone 2 years, 6 months and 23 days of sentence and has also earned the total remission of 4 months and 6 days. Thus, he has already undergone the modified sentence of two years awarded

to the appellant for committing the offence punishable under Section 376 IPC.

30. The appellant is on bail. His bail bond stands discharged.

31. The appeal stands allowed to the above extent.

32. LCR be sent back alongwith copy of this order.

33. A copy of the order be given dasti to learned counsel for the appellant and be also sent to the Jail Superintendent for information and updation of the record.

DECEMBER 20, 2017
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PRATIBHA RANI
(JUDGE)



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