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

RESERVED ON : JUNE 02, 2017

**DECIDED ON : JUNE 05, 2017**

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**CRL.A. 322/2016**

VIKAS

..... Appellant

Through : Ms.Aishwarya Rao, Advocate.

versus

STATE

..... Respondent

Through : Ms.Meenakshi Dahiya, APP.

**CORAM:**

**HON'BLE MR. JUSTICE S.P.GARG**

**S.P.GARG, J.**

1. Challenge in this appeal is a judgment 26.11.2015 of learned Additional Sessions Judge in Sessions Case No.211/2013 arising out of FIR No.55/09 at Police Station Vivek Vihar by which the appellant Vikas was held guilty for committing offences punishable under Sections 376/174A IPC. By an order dated 5.12.2015, he was sentenced to undergo Rigorous Imprisonment for seven years with fine ₹5,000/- under Section 376 IPC and Rigorous Imprisonment for one year with fine ₹1,000/- under Section 174A IPC. Both the sentences were to run concurrently.

2. Briefly stated the prosecution case as reflected in the charge-sheet was that on 1.4.2009 at about 9.00 a.m. the appellant in a vehicle in

front of Reliance Fresh, committed rape upon the prosecutrix 'X'(assumed name), aged around 14 years. The incident was reported to the police on 4.4.2009. After recording statement of victim's mother Rekha (Ex.PW-3/A), the Investigating Officer lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. The exhibits collected during investigation were sent for Forensic Science Laboratory for examination. Efforts were made to arrest the appellant but he could not be found. Finally, he was declared 'Proclaimed Offender' on 16.12.2010. A charge-sheet was filed on 3.6.2011 and after recording statements of the witnesses under Section 299 Cr.P.C., the file was consigned to the record room. On 15.4.2013, the appellant was arrested at Sawai Madhopur in Rajasthan. He was brought to Delhi on 16.4.2013. On completion of investigation, a supplementary charge-sheet was filed against him in the court. In order to establish its case, the prosecution examined nineteen witnesses. In 313 statement, the appellant denied his involvement in the crime and pleaded false implication. He did not examine any witness in defence. The trial resulted in conviction, as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file. Appellant's counsel urged that the prosecutrix and the appellant had affairs which were not liked by the victim's parents. They have falsely implicated the appellant for commission of rape though no such incident had taken place. The prosecutrix used to write love letters to him. She further urged that 'X' was more than 18 years of age on the day of occurrence. Learned Additional Public Prosecutor urged that no valid

reasons exist to disbelieve the statement of the prosecutrix who was aged around 14 years on the day of occurrence.

4. Admitted position is that the prosecutrix and the appellant were acquainted with each other prior to the incident. The prosecutrix in cross-examination admitted that she was familiar with the appellant for the last more than a year. PW-12 (Raj Kumar), victim's father has also talked about his acquaintance with the appellant. The occurrence took place on 1.4.2009 when the prosecutrix 'X', studying in 6<sup>th</sup> class, at Avinash Chaddha Rajkiya Kanya Vidhlaya, Jhilmil Colony, had gone to collect her result at around 8.00 a.m. Allegedly, the appellant met her on the way and offered her lift in his tempo/Vikram. It is alleged that subsequently, the appellant took the prosecutrix in the said tempo in front of Reliance Fresh and committed forcible rape upon her in the back portion of the vehicle covered from all sides. The prosecutrix, thereafter, went to her school to collect her result. She came to know that her father had already collected the result. She came back to her home but did not narrate the incident to her parents. The information about the occurrence was conveyed to the police by the victim's mother on 3.4.2009 and DD No.43B (Ex.PW-6/A) came to be recorded at 9.05 p.m. at Police Station Vivek Vihar. In her complaint (Ex.PW-3/A) Rekha, victim's mother implicated the appellant for the commission of rape upon her daughter when she had gone to collect her result. The FIR was lodged on 4.4.2009. Apparently, there was considerable delay in lodging the FIR which has remained unexplained. There is contradictory statements by the victim's parents as to when they had come to know about the crime. PW-3 (Rekha) disclosed that after collecting her result, 'X' came to home; she used to remain mum. When she enquired as to why she was avoiding

talks, she apprised her about the commission of rape by the appellant after two days of the incident. PW-12 (Raj Kumar), victim's father in the cross-examination informed that he had already collected victim's result from the school. When the prosecutrix returned to home, he enquired as to why she was late. Then she narrated the entire incident to him. The FIR was lodged after due consultation when the victim's parents came to know about appellant being the author of the crime.

5. In 164 Cr.P.C. statement (Ex.PW-7/B), 'X' informed the learned Presiding Officer that on 1.4.2009, she had gone to collect her result. At Kasturba Nagar Chowk the appellant to whom she knew before met and asked her to sit in his vehicle. He, thereafter, took her to Reliance Fresh and parked the vehicle in front of park. He committed rape upon her forcibly on the back portion of the vehicle. He asked her not to disclose the incident to anyone. Thereafter, she was brought back at Kasturba Nagar Chowk and from there she went to her school to collect result. When her father inquired as to why she was late, she did not disclose him anything due to fear. When he forced her to tell, she divulged the incident to him. She further disclosed that it was on 3.4.2009.

6. In her court statement, she reiterated the version given to the learned Presiding Officer and implicated the appellant to have committed rape upon her against her wishes. In the cross-examination, she admitted that she had not sustained any injury on her body. She did not make noise when she was dropped after the crime at Kasturba Chowk. She denied to have written any love letters to the appellant.

On perusal of the statements of the prosecution witnesses including that of the prosecutrix, it can clearly be inferred that physical

relationship (if any) between the two was with consent. Both the appellant and the victim were acquainted with each other. On the day of occurrence, the prosecutrix had gone alone to collect her result. She did not reach the school. On the way, the appellant met and took her in his vehicle to the spot where physical relations between the two took place. At no stage, the prosecutrix raised any alarm. Even after the physical relations, the prosecutrix conveniently went to her school to collect her result without raising any hue and cry. After return to home, when she was enquired as to why she was late, she did not divulge the incident to her parents. She maintained complete silence for three days. Only on 3.4.2009, the matter was reported to the police where the appellant was named to be the perpetrator of the crime. On that very day, the prosecutrix was medically examined vide MLC (Ex.PW9/A). No injuries, whatsoever, were found on her body to infer forcible rape. Seemingly, the prosecutrix was afraid of her parents to disclose about the occurrence. It appears that when the victim's parents came to know about it, the FIR was lodged.

7. There is no substance in the appellant's plea that no such incident had taken place or that his false implication was due to previous quarrels with victim's parents over his love affairs with the prosecutrix. The prosecutrix has given graphic detail as to how and under what circumstances she met the appellant and how he took her in his tempo to Reliance Fresh and there established physical relations with her in the vehicle. The prosecutrix, aged around 14 years is not expected to tell a lie about physical relations to bring herself in disrepute. It can, thus, be inferred that physical relationship with the prosecutrix (if any) was with her free consent.

8. 'X's age is relevant to find out the appellant's guilt. Throughout, the prosecution case is that the victim was below 16 years of age on the day of occurrence. The victim's age as 14 years finds reflection in the Rukka (Ex.PW-10/B); statement under Section 164 Cr.P.C. (Ex.PW-7/B); and MLC (Ex.PW-9/A). In her statement as PW-1, the prosecutrix claimed that she was aged around 14 years on the day of occurrence; her date of birth being 12.8.1995; she had passed 6<sup>th</sup> class on that day. In the cross-examination, no other date of birth was suggested to her. PW-3 (Rekha), victim's mother corroborated her version saying that 'X' was of 18 years on the day of her examination on 22.7.2014. PW-12 (Raj Kumar) also informed that the victim was studying in class 6<sup>th</sup> on the day of occurrence. Crucial testimony is that of PW-11 (Devender Singh Bhandari), Sub-Registrar, Birth and Death, Shahdara South Zone, EDMC, who proved the record Ex.PW-11/A and Ex.PW-11/B. He deposed that as per record, birth certificate No.3144992 dated 1.8.2008 was issued to the prosecutrix (Ex.PW-11/A) vide order dated 30.07.2208 (Ex.PW-11/B) showing her date of birth as 12.8.1997. The occurrence took place on 1.4.2009. Victim's parents did not anticipate any such unfortunate incident to take place in future to manipulate her date of birth in the official record in July, 2008. Thus, date of birth recorded in the birth certificate cannot be suspected or doubted despite there being minor discrepancies in the statements of the prosecution witnesses. It is relevant to note that that appellant has not suggested any other specific date of birth of the prosecutrix. He has also not produced on record any document to show if she was above 16 years of age on the day of occurrence. He did not ask for ossification test of the prosecutrix during investigation.

9. Since the prosecutrix was below 16 years of age on the day of occurrence, her consent for physical relationship was of no consequence. 'X' aged around 14 years was unable to understand the consequences of the act for which consent for physical relationship was given by her. She was unable to take any informed decision due to immature age. The consent, thus, given was vitiated and is of no relevance in the eyes of law.

10. There is ample evidence on record that after the commission of crime, the appellant could not be arrested and finally he was declared 'Proclaimed Offender' after completing due procedure. He has been rightly convicted under Section 174 A IPC.

11. Conviction recorded under Sections 376/174 A IPC based upon fair appreciation of evidence cannot be faulted; the conviction is upheld. Nominal roll dated 28.6.2016 shows that the appellant has undergone three years, two months and seven days incarceration besides remission for twenty five days as on 24.6.2016. The appellant has clean antecedents; he is a first time offender. He is not involved in any other crime case. His overall conduct in jail is satisfactory.

12. Since the prosecutrix was aged around 14 years on the day of occurrence and physical relationship was with her consent, there are sufficient reasons to award sentence less than seven years which is minimum one.

13. Sentence Order is modified to the extent that the appellant shall undergo RI for five years under Section 376 IPC. Other terms and conditions of the sentence order are left undisturbed.

14. The appeal stands disposed of in the above terms. Pending application also stands disposed of. Trial Court record be sent back

forthwith with the copy of the order. Intimation be sent to the Superintendent Jail.

**(S.P.GARG)**  
**JUDGE**

**JUNE 05, 2017/sa**

