

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

% *Judgment Reserved on: October 27, 2017*
Judgment Delivered on: November 02, 2017

+ **CRL.A. 828/2017**

DILIP KUMAR Appellant

Through: Ms. Sonika Tyagi, Advocate

versus

STATE Respondent

Through: Ms. Rajni Gupta, APP for the
State with SI Azad Singh PS
Ranhola

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

1. By way of this appeal filed under Section 374(2) Cr.P.C., the appellant assails the judgment dated 29th November, 2016 and order on sentence dated 5th December, 2016 whereby the appellant has been convicted for committing the offence punishable under Section 363/366 of IPC & Section 6 of POCSO Act and sentenced as under:-

- (i) Under Section 363 IPC R.I. for a period of 3 years with fine of ₹ 3,000/- and in default, to undergo SI for fifteen days
- (ii) Under Section 366 IPC R.I. for a period of 5 years with fine of ₹ 3,000/- and in default, to undergo SI for fifteen days

- (iii) Under Section 6 of R.I. for a period of 10 years with
POCSO Act fine of ₹ 5,000/- and in default, to
undergo SI for one month

All the sentences were directed to run concurrently.

2. The facts which are relevant for adjudication of the present appeal are that on 15th December, 2012 DD entry No.32-A was lodged on the complaint of Sh.Yudhister Kumar, who personally visited Police Station Ranhola and informed that his daughter 'S' (name withheld to conceal the identity) aged about 16 years, who was a student of class-X in a Government School, had been missing from home since 12th December, 2012 from 2.00 AM. He was searching for her at his own level but as he could not find her, he came to lodge the report. On the basis of his complaint Ex.PW3/DA, case FIR No.279/2012 under Section 363 IPC was registered at PS Ranhola.

3. On 10th January, 2013, the prosecutrix was recovered from the house of the appellant. She was sent to DDU hospital for her medical examination. Thereafter she was produced before the learned Metropolitan Magistrate for getting her statement recorded under Section 164 Cr.P.C. The appellant/accused was also arrested and sent for medical examination. On the basis of statement made by the prosecutrix 'S', Section 366/376 IPC and Section 4 of POCSO Act were also added. After completion of the investigation, charge-sheet was filed and on committal of the case to the Court of Sessions, the accused was charged for committing the offence punishable under Sections 363/366/376 of IPC & Section 4 of POCSO Act.

4. The appellant on being charged for committing the offence punishable under Section 363/366 IPC and under Section 4 of POCSO Act, pleaded not guilty. The prosecution examined 14 witnesses in all to prove its case. At the stage when the case was fixed for examination of the accused under Section 313 Cr.P.C., on the application filed by the State, the charge was amended to the extent that he was charged for committing the offence punishable under Section 6 of POCSO Act. An alternate charge for committing the offence punishable under Section 376 IPC was also framed against the appellant.

5. After appreciating the testimony of the prosecutrix, her father and the report of the medical examiner, the appellant was convicted for committing the offence punishable under Section 363/366 IPC and under Section 6 of POCSO Act and sentenced in the manner referred to above.

6. At the outset, Ms.Sonika Tyagi, learned counsel for the appellant, on instructions from the appellant who was produced from custody on 24th October, 2017 pursuant to the productions warrants issued, submitted that the appellant is not challenging his conviction for committing the offence punishable under Section 363/366 IPC. Learned counsel for the appellant submitted that the appellant is questioning the legality of his conviction under Section 6 of POCSO Act on the ground that the charge was amended at the stage of his examination under Section 313 Cr.P.C without giving him an opportunity to recall the material witnesses for cross examination. Even the application filed by the appellant to recall material witnesses for cross examination was dismissed by the learned Trial Court. It has

also been contended that the appellant is a psychiatric patient and he is undergoing treatment at IHBAS which fact is clear even from the examination of CW-1 Dr. Deepak Kumar and CW-2 Dr. Amit Garg who were members of the Medical Board which examined the appellant. As per the statement of CW-1 Dr. Deepak Kumar and CW-2 Dr. Amit Garg, the appellant is suffering from psychiatric illness in the form of Moderate Depressive Episode, which in scientific term, is a 'treatable' and 'not curable' clinical condition subject to regular treatment. Learned counsel for the appellant has further submitted that it is a case where the prosecutrix was 16 years old and had left her house to marry the appellant and was a consenting party. Since the offence has taken place prior to amendment by the Criminal Law (Amendment) Act, 2013 and clause sixthly to Section 375 IPC provided the consenting age to be 16 years, the prosecutrix being 16 years of age on the date of occurrence, she had attained the consenting age. It has also been contended that the appellant promised to marry her as though married, the appellant was single as his wife eloped with some other person. But when the prosecutrix came to know about he having a son (aged about 6 years), she was not inclined to marry him. Thereafter under the pressure of her family, the appellant has been falsely implicated in this case.

7. Ms. Rajni Gupta, learned APP for the State has submitted that from the statement of the prosecutrix 'S' it is proved beyond any doubt that it is a case of repetitive aggravated penetrative sexual assault hence the charge has rightly been amended and the Court was empowered to amend the charge even at the stage of examination of

the accused under Section 313 Cr.P.C. Learned APP for the State has further submitted that from the testimony of the prosecutrix, it is proved that she had been raped by the appellant during the period of 28 days she stayed with him and this fact has also been proved from her MLC, hence the appeal may be dismissed.

8. I have considered the rival contentions and carefully gone through the evidence adduced by the prosecution and other record.

9. So far as the conviction of the appellant under Section 6 of POCSO Act is concerned, the charge has been amended without compliance of Section 217 Cr.P.C. Section 217 CrPC, which deals with recall of witnesses when charge is altered, reads as under:-

“217. RECALL OF WITNESSES WHEN CHARGE ALTERED

Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed-

1. to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

2. also to call any further witness whom the Court may think to be material.”

10. Compliance of Section 217 CrPC is mandatory and conviction under Section 6 of POCSO Act without giving an opportunity to the accused to cross examine prosecution witnesses or to produce further evidence cannot be sustained.

11. Here in the instant case, perusal of the Trial Court Record reveal that when the application filed by the prosecution to amend the charge was allowed, the accused was not even questioned as to which witness he wanted to recall for further cross examination after amendment of the charge. Not only that, the appellant after amendment of charge filed an application to recall the prosecutrix for cross-examination but even the said application was also dismissed by the Court being devoid of merits.

12. As the conviction of the appellant for the offence punishable under Section 6 of POCSO Act has been after amendment of the charge at the stage of recording statement of the accused but without giving him an opportunity to recall the material witnesses for cross-examination, the conviction of the appellant for the offence punishable Section 6 of POCSO Act and the sentence awarded thereunder is set aside.

13. Since the appellant, in the alternate, has also been charged for committing the offence punishable under Section 376 IPC and plea of the appellant is that of a consent and also that the prosecutrix had already attained the consenting age, it is required to be examined whether it is a case of consent or consent being given under misconception of fact.

14. From the statement of PW-4 'S' – the prosecutrix, it is evident that she had left the house of her own after midnight (2.00 am) on 12th December, 2012 voluntarily which fact has been duly reported by her father i.e. PW-3 Sh.Yudhister Kumar at the time of registration of FIR.

15. PW-4 'S' – the prosecutrix during her cross examination by learned APP for the State has admitted the following suggestions to be correct:-

'It is correct that accused also made a false promise of marriage to me. Vol. Accused has stated that he would marry me in a Court but he did not fulfill his promise. I have forgotten this fact earlier.'

16. During her cross examination by learned defence counsel, PW-4 'S' - the prosecutrix has admitted that at the time when accused asked her to talk, she did not wake up any of her family member though they were very much present in the house and that the main door is just adjacent to the room where her father and brother were sleeping. She also stated that the accused tried to establish physical relation with her in the plot having a boundary adjacent to her house. She did not make any complaint when her father woke up and she saw him closing the main door of the house. She has also admitted that she did not inform even the family member of the accused that he had established physical relations with her forcefully. She also admitted that during her stay of 28 days at the house of accused, she had been moving freely and even going to the market but never informed anyone that accused was having forcibly sexual intercourse with her.

17. In the MLC Ex.PW10/A of the prosecutrix also she has stated that accused gave promise to marry her and had physical relations with her. He also put 'sindoor' in her hair and told her for Court marriage but did not marry.

18. From the statement of PW-4 'S' – the prosecutrix, it has been proved that she left her house of her own to marry the appellant/accused and had physical relations with him on his promise to marry her.

19. From the testimony of the prosecutrix and her father it is proved beyond any doubt that the appellant was a regular visitor to their house and even used to have dinner with them on regular basis. The prosecutrix had gone missing from her house on 12th December, 2012 at 2.00 A.M. It is nowhere stated by her father PW-3 Sh.Yudhister that somebody knocked the door on that night at that odd hour i.e. 2.00 A.M. and she was sent or she went out to open the door in response to the knocking of door and then kidnapped by the appellant. Had there been any knocking of door, the brother and father of the prosecutrix who were sleeping in a room near the main door, would have responded the call. In a chilly winter night in mid December, the prosecutrix had left the house of her own which fact is even proved from the first information report lodged by her father. It is necessary to mention here that in her statement under Section 164 Cr.P.C. Ex. PW4/A she has stated that after the sexual act which was done in the close vicinity of her house, she saw her father closing the door but instead of rushing towards her house or calling her father she preferred to go by the advice of the appellant that after the physical relations with the appellant, her family might not accept her.

20. The prosecutrix has lived with the appellant for about 28 days. She was willing to marry him and was not ready to wait for a period of one month when she was asked to wait for one month before

solemnization of the marriage. From her testimony it appears that the factum of the appellant being father of a child was something which could not be accepted by her hence she preferred to return to her family. It has come in her statement Ex.PW4/A that when her sister came to meet her, the appellant was not at home but she refused to accompany them as she wanted her parents to take her back.

21. It is apparent from the record that the appellant played fraud with the prosecutrix and took her alongwith him by luring her and telling her that he would marry her without disclosing that he was already married and also having a son aged about 6 years. He could not legally conduct a second marriage. It is settled that consent obtained by deceit is no consent and in the present case it is apparent that the consent of the prosecutrix, was obtained by fraud and deceit. The Hon'ble Supreme Court in the case Yedla Srinivasa Rao vs. State of Andhra Pradesh 2007 (1) CC (Cri.) 557 observed as under:-

'9. The question in the present case is whether this conduct of the accused apparently falls under any of the six descriptions of Section 375 IPC as mentioned above. It is clear that the prosecutrix had sexual intercourse with the accused on the representation made by the accused that he would marry her. This was a false promise held out by the accused. Had this promise not been given perhaps, she would not have permitted the accused to have sexual intercourse. Therefore, whether this amounts to a consent or the accused obtained a consent by playing fraud on her. Section 90- of the penal code says that if the consent has been given under fear of injury or a misconception of fact, such consent obtained, cannot be construed to be a valid consent. Section 90 reads as under:-

90. Consent known to be given under fear or misconception. – A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or [Consent of insane person] if the consent is given by a person, who from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or [Consent of child] unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.’

22. It is a case of consent being given by the prosecutrix on promise to marry. The appellant despite being already married though his wife left him, concealed this fact from the prosecutrix. Thus, the consent given by the prosecutrix to have physical relations was under misconception of fact that appellant was a bachelor and was going to marry her.

23. Learned counsel for the appellant does not dispute that the appellant was already married at the time when the prosecutrix accompanied him to marry her and that he did not disclose the factum of being already married and having a son. In these circumstances though the prosecutrix who had attained the consenting age was consenting party but the consent was given under misconception of fact, the appellant is convicted for committing the offence punishable under Section 376 IPC.

24. The appellant has been in custody since the date of his arrest. As per the report of Medical Board Ex.CW1/A the appellant is suffering from psychiatric illness in the form of Moderate Depressive Episode, which in scientific term, is a 'treatable' and 'not curable' clinical condition subject to regular treatment.

25. In the given facts and circumstances, it would meet the ends of justice if the appellant is sentenced to the minimum sentence of seven years for committing the offence punishable under Section 376 IPC.

26. Accordingly, the appellant is sentenced to undergo RI for seven years with fine of ₹5000/- for committing the offence punishable under Section 376 IPC and in default of payment of fine, he shall undergo SI for one week.

27. The conviction and sentenced awarded to the appellant for committing the offence punishable under Sections 363/366 IPC is maintained.

28. The appeal stands disposed of in above terms.

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

30. Copy of this order be sent to the concerned Jail Superintendent for information.

31. Appellant be also informed through the concerned Jail Superintendent.

PRATIBHA RANI
(JUDGE)

NOVEMBER 02, 2017

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