

\$~14 (R-38 Part B)

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

Decided on:- 30th October, 2018

+ CRL. APPEAL No. 22/2002

SARVESH KUMAR

..... Petitioner

Through: Mr. U.A. Khan & Mr. Shahrukh
Khan, Advs. with appellant in
person.

versus

STATE (GOVT. OF NCT DELHI)

..... Respondent

Through: Mr. K.S. Ahuja, APP for the
State with SI Sonu PS
Seemapuri, Delhi.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER (ORAL)

1. On the basis of report (charge-sheet) under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C) submitted, upon conclusion of investigation into first information report (FIR) no. 62/2000 of police station Seema Puri, the appellant was put on trial in sessions case no. 100/2001, on the charge for offences under Sections 366 and 376 of Indian Penal Code, 1860 (IPC), the gravamen whereof was that on 28.02.2000 he had kidnapped the prosecutrix girl with intent to compel her for marriage and thereafter had committed rape against her during the period 28.02.2000 to 15.03.2000. By judgment dated 13.11.2001 he was held guilty and convicted, as charged, and by order passed on the same date he was sentenced to rigorous imprisonment for five years on the first count and for seven years on the second count with fine of Rs. 1,000/- each.

2. Feeling aggrieved, the convict came to this court with the present appeal challenging the above-said judgment of conviction and order on sentence.

3. The trial court record would show that the prosecutrix (PW-7) was a student of 10th standard in a government girl school during the relevant period. The school records (Ex.PW-8/B), on the basis of which her age has been certified (Ex.PW-8/A), revealed her date of birth to be 15.11.1981. There is no evidence gathered or adduced to the contrary, such school records having been proved by the vice principal of the school (PW-8) at the trial. In these circumstances, the prosecution does not refute the fact that the prosecutrix was more than 18 years old on the crucial date, her age having been indicated even by her mother (PW-2) in the initial input vide DD no. 46/B (Ex.PW-3/A) and by the FIR (Ex.PW-4/A) to be 18 – 19 years.

4. The evidence of the prosecution would show that on 29.02.2000, PW-2, the mother of the prosecutrix, had made a report vide DD no. 46/B (Ex.PW-3/A) indicating that her daughter had left home at about 11.am. for school but had not returned. The report was logged at 12.15 a.m., the mother stated that the girl was not traceable that she had no suspicion about involvement of any specific individual. The girl remained untraceable and, against this background, on 02.03.2000 i.e. two days after she having gone missing, the FIR (Ex.PW-4/A) was lodged for investigation into offence under Section 366 IPC, suspicion having been expressed about involvement of the appellant.

5. It is the prosecution's case that during the course of investigation, the prosecutrix (PW-7) had returned home and her statement (Ex.PW-7/DX) under Section 161 Cr.P.C. was recorded, this followed by her statement (Ex./PW-7/A) under Section 164 Cr.P.C. According to the version of the prosecutrix, forming part of these statements, the appellant being the younger brother of her *Phoopha* (husband of the father's sister) had accosted her on 28.02.2000 when she was going to the school and had taken her away in a three wheelor scooter (TSR) to Gurgaon on the pretext of paying a visit to her *Bua* (father's sister) promising to bring her back home soon. She alleged that, on 29.02.2000, the appellant had taken her to the court premises in Ghaziabad where, after getting her signatures, he had told her that they had got married and then he brought her to Gurgaon where he introduced her to others as his wife. She also stated that, in Gurgaon, the appellant committed sexual intercourse against her will several times. She stated that she had been seduced by the appellant, without her consent, and that finding opportunity, she had escaped and returned home.

6. During the course of trial, appearing as a witness (PW-7), the prosecutrix narrated the above-mentioned version adding certain facts which are material improvements, there being no basis or foundation in such regard in her original version. She testified that when she was going to school, the appellant had met her with the TSR which was driven by his elder brother Rakesh. She stated that she was offered a lift in the TSR which she had boarded. The TSR had, however, started moving in a direction other than that of her house. She alleged

that when she objected to this, she was told that the appellant, and his brother, had some work and that after finishing the same they would return. She stated that she was taken to an unknown place which she later learnt to be the city of Gurgaon. She also spoke about her signatures, and photographs, having been taken and upon her refusal, she having been given threats that she and her father would be killed.

7. Noticeably, all the above facts concerning presence of the brother of the appellant as the driver of the TSR, the pretext of going to Gurgaon for some work, the threats extended for her signatures and her photographs to be taken had not been mentioned by her during the course of investigation. These are material improvements which raise question marks as to the credibility of her testimony, particularly when seen against the fact that she was admittedly signatory to a document (mark PW-7/DX) and the manner in which she is shown to have posed with the appellant for at least two photographs (mark D-1 & 2).

8. The defence of the appellant during the trial was that the prosecutrix was involved in a love affair with him and that she had accompanied him of her own free will, both intending to get married. The prosecutrix, as noted earlier, had come of age, prior to she being reported missing on 29.02.2000. Her mother (PW-2) has admitted that the appellant used to visit her household frequently.

9. The prosecution case that the prosecutrix had escaped from the control and custody of the appellant to return home on 15.03.2000 leading to her statement being recorded first by the police, and then by the Metropolitan Magistrate, before arrest of the accused at her instance from a public place, is rendered false by the statement of PW-

2 (mother of the prosecutrix) who testified that she was present in the police station when both the appellant and the prosecutrix had come there on their own. If that were the correct version, the story of the prosecutrix having availed of an opportunity to escape from wrongful confinement is rendered untrue.

10. There is no explanation worth the name given by the prosecutrix as to why she had meekly gone in the TSR from Delhi all the way to Gurgaon without lodging a protest. There is no clarity as to where the prosecutrix was kept by the appellant during the period 28.02.2000 to 15.03.2000. There is no explanation offered as to why the prosecutrix could not lodge a protest, or raise alarm, at the place where she was kept in Gurgaon or at the time of visit to Ghaziabad Court Complex or on the way to Ghaziabad and return from there to Gurgaon.

11. The defence plea that the prosecutrix had gone with the appellant out of her own free will and volition cannot be trashed it being highly probable. The version of the prosecutrix, against this backdrop, does not inspire confidence.

12. For the foregoing reasons, and in the circumstances, the judgment of conviction returned by the trial court cannot be upheld. The said judgment and consequent order on sentence are, thus, set aside. The appellant is acquitted. The bail bonds stand discharged.

R.K.GAUBA, J.

OCTOBER 30, 2018/nk