

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on : 13th June, 2018

Date of decision : 15th June, 2018

CRL.A 394/2005

KISHAN PAL

..... Appellant

Through: Mr. Salman Hashmi, Advocate
(DHCLSC).

versus

THE STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Ms. Kusum Dhalla, APP for the
State with SI Shailender, PS
Gokul Puri.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT

ANU MALHOTRA, J.

1. The appellant Kishan Pal s/o Sh. Sant Ram in the instant case vide the impugned judgment dated 29.11.2004 of the then learned Additional Sessions Judge, Karkardooma Courts, Delhi in S.C. No. 97/03 of the FIR No. 71/03, PS Gokalpuri was convicted qua the commission of the offences punishable under Sections 363/366 of the Indian Penal Code, 1860 but was not convicted for the commission of the offence punishable under Section 376 of the Indian Penal Code, 1860 and was acquitted in relation thereto.

2. Vide the impugned order on sentence dated 30.11.2004, the convict Kishan Pal s/o Sh. Sant Ram was sentenced to rigorous

imprisonment for a period of 5 years for each of the offences under Section 363 and 366 of the Indian Penal Code, 1860 with both the sentences having been directed to run concurrently and he was also sentenced to pay a fine of Rs.5,000/- for each of the offences failing which he would undergo simple imprisonment for 6 months.

3. Vide the impugned order on sentence, it was also directed that the convict would be entitled to the benefit of Section 428 of the Criminal Procedure Code, 1973, the appellant being in judicial custody since 02.03.2003 as stated in the impugned order on sentence.

4. In terms of the proceedings dated 04.06.2008, the nominal roll was received from the Superintendent, Central Jail No. 10, Rohini Delhi, which indicates that the appellant was released from the jail on 28.07.2007 after expiry of his sentence on getting remission of 9 months and 27 days after depositing of the fine of Rs.10,000/- in the jail on 28.07.2007. The appellant did not put in appearance and could not be traced out also by the State. Though efforts have been made since 26.02.2010 for tracing out the appellant, he has not been traced out. Thus as laid down by the Hon'ble Division Bench of this Court in ***Mukesh Vs. State and Suresh Vs. State 2008 (3) JCC 1986*** and as laid down in ***Bani Singh Vs. State of U.P. (1996) 4 SCC 720***, if the appeal is not dismissed summarily, then the Appellant Court shall, after perusing the records, hear the appellant or his pleader but that the law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent and it can dispose of the appeal after perusing the record and judgment of the Trial Court and that if the appellant is in custody thus as it is the duty of the Appellant Court

i.e. this Court to examine the appeal and the judgment under challenge and to consider the merits of the same which aspect is not dependent on the appellant or his counsel appearing before this Court to trace the appellant, it has been considered appropriate to take up the appeal for consideration.

5. Arguments were thus addressed on behalf of the appellant by the learned counsel for the appellant and on behalf of the State by the learned APP for the State.

6. The charge of the allegations levelled against the appellant was to the effect that on 30.01.2001, he kidnapped Ms. X, the prosecutrix a minor child from the lawful custody of her guardian / parents from the House No. C-135/A, Bhagirathi Vihar, Delhi within the jurisdiction of PS Gokalpuri with intent or knowing it to be likely that she would be compelled or forced or seduced to illicit intercourse and thereafter after kidnapping her sexually assaulted her and thus committed an offence punishable under Sections 363/366/376 of the Indian Penal Code, 1860.

7. The appellant through the instant appeal submits that he has been falsely implicated and contends that as per the prosecution version Sh. Nand Lal, the father of the prosecutrix lodged a complaint to the police on 03.02.2003 to the effect that his daughter Ms. X, aged about 14 years was missing since 30.01.2003 and that the explanation given by Sh. Nand Lal has two prongs that he had been searching his daughter during all these days and on the day of lodging the report, he came to know that his tenant Kishan Pal i.e. the appellant herein had enticed away his daughter and that the complainant along with the

Investigating Officer SI Kailash Chand, Constable Ram Kishore and Constable Narender went to Nardoli District, Etah, UP and recovered the prosecutrix from the house of Kishan Pal i.e. the appellant on 02.03.2003 and after seeing the police, the accused i.e. the appellant swiftly took wing and made good his escape and thereafter the appellant was arrested on 26.05.2003 at Delhi at the instance of the complainant i.e. the prosecutrix.

8. The appellant has further submitted that as per the prosecution version itself, the prosecutrix was produced for medical examination but she in the presence of her mother refused to get herself medically examined and thereafter the statement of the prosecutrix under Section 164 of the Code of Criminal Procedure, 1973 was recorded where she deposed that she had gone to Nardoli District Etah, UP with Kishan Pal of her own accord and explained that they had performed marriage there and she contended that whatever was done with her by the appellant was done with her consent and that she was not raped and she did not want any proceedings to be done against the accused that she did not want any proceedings to be taken against the accused i.e. the appellant herein and that she wanted to stay with her parents.

9. It has been submitted further through the appeal that the appeal be allowed. During the oral submissions made on behalf of the appellant it was contended that the ingredients of the commission of the offences punishable under Section 363/366 of the Indian Penal Code, 1860 were not brought forth remotely in as much as the prosecutrix was above the age of 18 years on the date of the alleged commission of the offence in as much as the birth certificate of the

prosecutrix produced by the Investigating Agency which showed the date of birth of the prosecutrix as being 31.07.1988 was not proved and had not been verified by the Investigating Agency.

10. In the instant case, it is essential to observe that the MLC of the prosecutrix put forth her age as being 14 years and her birth certificate Ex.PW5/C as issued by the Sub-Registrar of Births and Deaths, 572, Gokulpuri, Shahdara Zone showed the date of birth of the prosecutrix as being 31.07.1988 which birth was registered on 04.08.1988.

11. As rightly held vide the impugned judgment though the said certificate was admittedly not verified by the Investigating Officer, the said date of birth certificate Ex.PW5/C being the public document is *per se* admissible in evidence and there is nothing to indicate that it was not so issued. The prosecutrix thus on the date of the commission of the offence has to be held to be a minor and having been thus traced out from the custody of the appellant without notice to her natural guardian, apparently the offence punishable under Sections 363 of the Indian Penal Code, 1860 is made out against the appellant.

12. In her testimony recorded on oath on 30.08.2003, the prosecutrix testified to the effect that the convict herein had taken her from her house to Nadoli, UP with the plea that he would take her to a room for picnic purposes and at the house at Nadoli, the accused had raped her four times and the accused used to beat her and had threatened her not to disclose anything to her family members and that she had not married to the accused and that on 08.03.2003 along with her father the police came to Nadoli at the house of the accused and on seeing the police, the accused ran away from his house and that the

prosecutrix has put forth her aged at 14½ years.

13. On being cross-examined, the prosecutrix stated that when the accused took her to his house, he told her that he will take her to the zoo but he did not take her to zoo and took her to his native place in a Maruti Car so she did not have chance to make raise an alarm and that she had not noted down the number of the Maruti Car nor could she tell the colour of the said car. Through her cross-examination, the prosecutrix admitted that she had stated at the time of recording of her statement under Section 164 of the Code of Criminal Procedure, 1973 recorded on 10.03.2003 that she had gone alongwith the convict of her sweet will at Nadoli District, Etah where they had solemnized the marriage and all the acts were done by her with her consent and she did not want any action against the appellant. Through the said statement of the prosecutrix under Section 164 of the Code of Criminal Procedure, 1973, she had stated further that the appellant had not done anything with her forcibly. However in her cross-examination recorded on 30.08.2003, the prosecutrix has categorically denied that the appellant had not raped her or had not kidnapped her and thus she had not got her medical examination conducted.

14. Taking thus the totality of the circumstances of the case into account where the prosecutrix through her testimony on oath states that there was no marriage with the appellant herein and also categorically states that she was raped by him, it is held that there is no infirmity in the impugned judgment dated 29.11.2004 of the then learned Additional Sessions Judge, Karkardooma Courts, Delhi in S.C. No. 97/03 of the FIR No. 71/03, PS Gokalpuri convicting the

appellant for the commission of the offences punishable under Sections 363/366 of the Indian Penal Code, 1860 in as much as the prosecutrix was a minor on the date when she was taken out from the custody of her natural guardian / parents without their consent or their knowledge on 30.01.2003 and that furthermore, the prosecutrix had been so kidnapped with the knowledge and intent that she would likely to be compelled to be subjected to illicit intercourse against her will. The available record thus establishes the commission of the offences punishable under Sections 363/366 of the Indian Penal Code, 1860. The appellant has already undergone the impugned sentence as imposed vide order dated 30.11.2004.

15. Nothing more survives in the instant appeal bearing no. CRL.A 394/2005, which is thus dismissed.

ANU MALHOTRA, J.

JUNE 15, 2018/mk