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

% **Date of decision: 16.05.2019**

+ CRL.A. 42/2011

MOHD ANWAR

Through Ms. Inderjeet Sidhu, Adv. (DHCLSC)
with appellant in person.

..... Appellant

versus

STATE

Through Mr. Tarang Srivastava, APP with SI
Dinesh Kumar, PS Gokalpuri.

..... Respondent

CORAM:

HON'BLE MR. JUSTICE A.K.CHAWLA

J U D G M E N T

A.K. CHAWLA, J. (ORAL)

By the instant appeal, the appellant assails the judgment dated 04.08.2010 and the order on sentence dated 09.08.2010 passed by the Id. ASJ on the trial of the offences under Sections 363/365/376/506 IPC.

2. Concisely, the facts giving rise to the appeal are that the appellant was charge-sheeted for the commission of the offences under Sections 363/365/376/506 IPC on the allegations that 31.07.2009 at about 10.30 a.m., he enticed and took away the prosecutrix-aged about 14-15 years from the lawful guardianship of her parents at D-145, Nehru Vihar, Delhi without

their consent and confined her at Jaipur and after criminally intimidating her, committed acts of rape on her. Based on the allegations and the material on record, the appellant was charged for the commission of the offences under Sections 363/365/376/506 IPC, to which he pleaded not guilty. In support of its case, the prosecution examined the prosecutrix as PW1; PW2 Sajida Begum; PW3 Mohd. Islam; PW4 Dr. Shagun Sinha; PW5 Lady. Ct. Noorjahan; PW6 Dr. P.K. Saha; PW7 Sh. Satish Kumar, Sub-Registrar; PW7 Ct. Jamil Abbas; PW9 HC Balraj Singh; PW10 ASI Tejawati; PW11 Ct. Munish Kumar; PW12 Ct. Sanjay Kumar; and, PW13 SI Babu Prasad Jha. The incriminating material on record was put to the appellant in his statement under Sec. 313 Cr.P.C., which he denied. Vide the impugned judgment, the trial court, acquitting the appellant of the offences under Secs. 363/365/506 IPC, convicted him for the commission of the offence under Sec. 376 IPC and vide the impugned order on sentence awarded imprisonment for 07 years with fine of Rs.5,000/- ID 02 months.

3. During the course of hearing, Ms. Sidhu, ld. counsel for the appellant, on instructions, submits that the challenge in the appeal is restricted to the impugned order on sentence. In her submissions, the prosecutrix, who was aged about 15 years, not only joined the company but involved into the acts of sexual intercourse with the appellant of her own volition. As per the birth record Ex.PW3/F, the prosecutrix was born on 03.09.1994 and as on the occurrence of the incident(s), she was about 14 years and more than 10 months of age. To buttress her submissions, Ms. Sidhu points out that on trial, the appellant was acquitted of the charges for the commission of the offences under Secs. 363/365/506 IPC, which acquittal, the State did not

challenge. In her submissions, the appellant was not a previous convict and, by himself, was of young age of about 23 years and that both the prosecutrix and the appellant are now living their own respective married lives and the fact that the prosecutrix was a consenting party for the sexual intercourse and the occurrence of the incident is prior to the amendment carried out in Section 376 w.e.f. 03.02.2013, the proviso attached to Section 376, than in vogue, was attracted. In her submissions therefore, sentence for the period undergone by the appellant, would meet the ends of justice. In that direction, advertent to the nominal roll of the appellant, it comes to be pointed out that as on 13.11.2013, the appellant had undergone 04 years, 03 months, and 03 days incarceration and earned total remission of 01 year and 01 day and that the unexpired period of sentence was 01 year, 08 months and 26 days. In support of her such submissions, reliance was placed upon **Brij Pal @ Baiju vs. State**, 2011(3) JCC 1773 and **Atiqur Rehman vs. Govt. of NCT of Delhi**, 2017 (1) JCC 703.

4. Mr. Srivastava, ld. Addl. PP on his part however sought to contend that the appellant had enticed the prosecutrix from her house and have had sexual intercourse with her when she was less than 16 years and therefore, deserves to undergo the entire period of the sentence.

5. Acquittal of the appellant for the offences under Secs. 363/365/506 IPC, which Mr. Srivastava, ld. Addl. PP concedes was not challenged, by itself, leads to the conclusion that the prosecutrix joined the company of the appellant and have had sexual intercourse with him of her own volition. Appellant has come to be convicted for the offence under Sec.376 IPC only on account of the prosecutrix being less than 16 years when the appellant

have had sexual intercourse with her. During the course of hearing, nothing comes to be pointed out for the appellant having any criminal antecedents, and, the fact, the appellant by himself was aged about 23 years only, but, for the rigors of law, acted with any malice. He has been facing trial of the offences and as of now more than 12 years have gone by.

6. It does not require any elaboration that the quantum of sentence has to be considered and decided on the basis of facts and circumstances and the mitigating factors of each case. Thus, taking into account the totality of the facts and circumstances, the court does not see any reason as to why in view of the proviso to Sub-Section (1) of Section 376 IPC in vogue at the time of the commission of the offence, sentence of imprisonment for a term lesser than 07 years be not sufficient and thereby, the impugned order on sentence be modified.

7. In view of the foregoing, the appeal is allowed partly and while maintaining the judgment of conviction for the commission of the offence under Section 376 IPC, the impugned order on sentence is modified to the period of imprisonment already undergone. Appeal stands disposed off accordingly.

A.K. CHAWLA, J.

MAY 16, 2019

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