

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

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+ Crl.A. No.1002/2002

Date of Decision: 18.12.2019

GANESH

.....Appellant

Through: Mr. Sanjay Kumar, Adv. with
Appellant in Judicial Custody

versus

STATE

..... Respondent

Through: Ms. Meenakshi Dahiya, APP

AND

+ Crl.A. No. 798/2002

Date of Decision: 18.12.2019

KISMAT ALI

.....Appellant

Through: Mr. M.A. Rahman, Adv. with
Appellant in Judicial Custody

Versus

THE STATE (GNCTD OF DELHI)

..... Respondent

Through: Ms. Meenakshi Dahiya, APP

HON'BLE MS. JUSTICE ANU MALHOTRA

JUDGMENT (ORAL)

1. Learned counsel for the appellant Ganesh in Crl.A. No.1002/2002 submits that the appellant does not seek the appeal to be decided on merits and seeks that the appellant be released on the period of detention already undergone by him. To similar effect is the

submission made on behalf of Kismat Ali, the appellant of CrI.A. No.798/2002.

2. In as much as the prosecutrix i.e. the complainant of FIR No.251/2002 under Sections 366/376/34 of the Indian Penal Code, 1860 vide her affidavit dated 21.5.2019 which is placed on the records of the CrI.A. No.1002/2002 stated that she had got married to Ganesh, the appellant of CrI.A. No.1002/2002 on 1.1.2003 and lived with him for about two years which factum of the prosecutrix having wanted to get married to the appellant Ganesh is also borne out through proceedings dated 9.12.2003 in CrI.A. No.1002/2002 wherein the State too has stated that it had no objection to the grant of interim bail to Ganesh for the purpose of marriage with the prosecutrix and in relation to which the prosecutrix and the appellant Ganesh had filed their affidavits, the substantive sentence was suspended for a period of four months from the date of release of the appellant Ganesh on the terms and conditions as imposed vide order dated 4.12.2003. The proceedings dated 5.8.2004 in CrI.A. No. 1002/2002 indicate to the effect that the prosecutrix who was present in person on 5.8.2004 verifies that the appellant Ganesh had married her and she also prayed that the appellant may be released so that he may make arrangement for her stay and to set up their matrimonial home and Ganesh was released on bail for a period of three months as per terms and conditions imposed vide order dated 5.8.2004.

3. Vide the order dated 16.1.2006 the sentence of the appellant of CrI.A. No.1002/2002 was suspended on his execution of the personal

bond in the sum of Rs.20,000/- with one surety in the like amount. The appeals were thereafter taken up for final hearing on 29.3.2019 when the appellants did not come and thereafter non-bailable warrants were issued against them and the appellants were arrested and produced before the learned Metropolitan Magistrate who remanded them to judicial custody as indicated by order dated 6.5.2019 and thereafter the appellants appear to have been in custody.

4. The prosecutrix through her affidavit has submitted that after her marriage with the appellant Ganesh she lived with the appellant Ganesh for about two years and thereafter because of temperamental differences they consented to separate from each other and live their lives peacefully and thus after separation, the prosecutrix married Rajender Kumar son of Late Raj Kumar on 18.5.2006 who is presently residing at Malaysia and that the prosecutrix was blessed with a male child Karan born on 12.12.2007. The affidavit of the prosecutrix also reflects that after separation the appellant Ganesh in CrI.A. No.1002/2002 also got married with Reema and has been blessed with two children. The prosecutrix has further submitted that she is leading a peaceful life and has no grudge against the appellant and does not wish to see him serving the sentence any more and has no objection if the conviction of the appellant is reduced to the sentence undergone. She stated that the contents of the affidavit had been explained to her in vernacular. The proof of identity of the prosecutrix is attached with her affidavit dated 21.5.2019. The prosecutrix was

present on 3.9.2019 and was also represented by her counsel and on behalf of the State.

5. Vide her affidavit submitted by the prosecutrix she stated therein to the effect that she has no objection to the period of detention is being reduced to the period he has already undergone, in view of the factum that she has since re-married and that the appellant Ganesh has also re-married and they both have children and the State sought time for verification of the identity of the prosecutrix and SI Vinod Kumar who is present today and was also present on 3.9.2019 placed on record the status report dated 20.10.2019 whereby it was informed by the SI Vinod Kumar that he had contacted the prosecutrix on 3.9.2019 in the premises of this Court and had enquired qua her affidavit and during enquiry she acknowledged the affidavit and stated that she had signed the same and presently she is residing somewhere in Dehradun and refused to give her complete address and also asked to not to visit her addresses at Sangam Vihar, Delhi as it would affect her family life.

6. As per the status report submitted under the signatures of the SHO P.S. Kalkaji, the verification is stated to have been conducted by SI Vinod Kumar who in reply to a specific Court query now put to him states that as per the status report it is indicated that the prosecutrix has left the present spouse Mr. Rajender also who identified the copy of the aadhar card and the photograph of his wife and stated that he had married the prosecutrix and had two children

with her and that the prosecutrix had left him and his family since 2011 and that he is not aware of the present whereabouts of the wife.

7. The appellant in CrI.A. No. 1002/2002 Ganesh vide the impugned judgment dated 12.9.2002 of the learned ASJ, New Delhi in FIR No.251/2002 P.S. Kalkaji was convicted for the offences punishable under Sections 376(2)(g)/366/34 of the Indian Penal Code, 1860 and vide the impugned order of sentence dated 13.9.2002 was sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.3,000/- or in default to undergo simple imprisonment for a period of three months under Section 376(2)(g) of Indian Penal Code, 1860 and also sentenced to rigorous imprisonment for three years and to pay a fine of Rs.2000/- or to undergo simple imprisonment for two months in default under Section 366 of Indian Penal Code, 1860 read with Section 34 thereof.

8. Mr. Kismat Ali, the appellant of the appeal in CrI.A. No. 798/2002 was vide the same impugned judgment convicted under Section 376(2)(g) of the Indian Penal Code, 1860 read with Section 34 Indian Penal Code, 1860. However vide the impugned order on sentence dated 13.9.2002 the appellant Kismat Ali was observed to have personally not raped the prosecutrix and was thus held entitled to lesser sentence than that of the appellant Ganesh and thus he was sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.3,000/- or in default to undergo simple imprisonment for three months under Section 376(2)(g) of the Indian Penal Code, 1860 and the appellant Kismat Ali also was sentenced to rigorous

imprisonment for a period of three years and to pay a fine of Rs.2000/- or to undergo simple imprisonment for two months in default qua the offence punishable under Section 366 of the Indian Penal Code, 1860 read with Section 34 of the Indian Penal Code, 1860 with it having been directed that the period of detention already undergone both by Kismat Ali and Ganesh shall be set off against the sentence imposed on them with the sentences having been directed to be run concurrently.

9. The nominal roll of the appellant Ganesh as received from the Superintendent Jail, Delhi dated 30.1.2019 indicates that the appellant Ganesh had undergone a period of three years two months and 19 days of incarceration with remission as on 26.1.2006 being of 9 months and 15 days with the unexpired portion of sentence dated as on 30.1.2019 is two years eleven months and twenty six days.

10. The appellant of the CrI.A. No.798/2002 Kismat Ali as per the nominal roll dated 3.8.2019 is indicated to have undergone a period of 3 years 2 months and 16 days with remission earned for 8 months and 6 days as on the date 3.8.2019 with the unexpired portion of the sentence being one year one month and eight days.

11. In view of the affidavit that has been filed by the prosecutrix though only qua the appellant Ganesh, taking into account the impugned sentence which has granted a lesser sentence to Kismat Ali, it is considered appropriate that both the appellants are treated at par in view of the affidavit of the prosecutrix and the impugned order on sentence.

12. In view of the affidavit of the prosecutrix, contents of which have been verified by the Investigating Officer SI Vinod Kumar, it is considered appropriate in the interest of justice that both the appellants are allowed to be released on the period of detention already undergone by them and the deposit of the fine as imposed by the impugned order on sentence qua both the appellants is waived. It is made expressly clear that the peculiar facts and circumstances of the instant appeal, which bring forth the release of the appellant Ganesh vide order dated 9.12.2003 to arrange for his marriage with the prosecutrix, and the marriage of the prosecutrix with the appellant Ganesh, whereafter she lived with him for two years on suspension of sentence as on 16.01.2006 are germane and the cause of the reduction of the sentence imposed on the appellants in the present two appeals and the judgment hereinabove applies to the peculiar facts of the case alone.

Copy of this judgment be sent to the Superintendent Jail, Delhi.

DECEMBER 18, 2019

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ANU MALHOTRA, J