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

% *Date of decision: September 01, 2023*

+ **CRL.A. 249/2007**

KALLU @ KALWA

..... Appellant

Through: Mr. Archit Upadhyay, Advocate
(DHCLSC) with appellant in person.

versus

THE STATE OF NCT DELHI

..... Respondent

Through: Mr. Utkarsh, APP for State with Insp.
Lalit Chauhan, P.S. Gulabi Bagh.

CORAM:

HON'BLE DR. JUSTICE SUDHIR KUMAR JAIN

J U D G M E N T (oral)

1. The present appeal is filed under section 374 (2) Cr.P.C. to impugn the judgment dated 02.12.2006 and order on sentence dated 04.12.2006 passed by the court of Sh. Rajneesh Kumar Gupta, ASJ, Tis Hazari Courts, Delhi whereby the appellant was convicted.

2. As per the prosecution, the complainant Hari Singh on 11.03.2005 lodged a missing report of his daughter who is stated to be aged about 11 years with the police, which was recorded vide DD no. 13-A. Thereafter, on 02.04.2005, the complainant Hari Singh made a complaint to the police that his daughter i.e. the prosecutrix/victim was taken away by the appellant with



the help of co-accused Pappi and his wife Anju (the actual name is Manju). The FIR bearing no. 0069/2005 was accordingly registered at P.S. Gulabi Bagh on the basis of complaint made by Hari Singh. During investigation, the appellant as well as the prosecutrix were apprehended within the jurisdiction of P.S. Ronahi, Faizabad and were brought to Delhi. The statement of the prosecutrix was recorded under section 164 Cr.P.C.

3. The prosecution made out the case that on 09.03.2005, the appellant along with co-accused Pappi and Manju, kidnapped the prosecutrix and took her to Peeragarhi by administering some intoxicating material, where the appellant committed rape with the prosecutrix thereafter, she was taken to Lucknow, where she was raped again. The prosecutrix was taken from Lucknow to Faizabad, where the appellant and the prosecutrix lived for about 1.5 months and the appellant committed rape with the prosecutrix again. After conclusion of investigation, the charge-sheet was filed for the offences punishable under sections 363/376/366/328/34 IPC. The accused Pappi and Manju could not be arrested and were declared proclaimed offenders. Subsequently during the trial, charge-sheet for the offences punishable under sections 363/376/366/325/34 IPC was framed against the appellant, to which the appellant pleaded not guilty and claimed trial.



4. The prosecution had examined 24 witnesses. The statement of the appellant was also recorded under section 313 Cr.P.C. wherein he pleaded innocence and denied the incriminating evidence against him. The appellant preferred not to lead defence evidence. To prove the age of the prosecutrix, the prosecution examined Prem Lata, Principal, MCD Primary School as PW 18, who deposed that as per the school record, the prosecutrix was admitted in the school on 25.09.2003 and as per the record, her date of birth is 01.09.1996. The relevant records were exhibited as Ex. PW 18/A and Ex. PW 18/B.

5. The prosecution also examined the prosecutrix as PW 3, who deposed that the appellant was residing along with his sister near to her house and the co-accused Pappi and Manju were also residing near her jhuggi. The prosecutrix as PW 3, deposed that on 09.03.2005, she was taken to Pratap Nagar and thereafter to Peeragarhi, where the appellant committed rape with her against her wishes. The prosecutrix/PW 3 was also taken to Lucknow, where she was kept in a hotel and where the appellant again committed rape with her against her will and consent. The prosecutrix was further taken to District Faizabad, Lucknow where the appellant again committed rape with her.



6. The trial court vide impugned judgment dated 02.12.2006, convicted the appellant for the offences punishable under sections 363/34 IPC, 366/34 IPC, 328/34 IPC and 376 IPC. The trial court vide order on sentence dated 04.12.2006, sentenced the appellant as under:-

“Keeping in view the seriousness of offence, accused is sentenced to Rigorous Imprisonment (RI) for a period of three years and a fine of Rs. 1,000/- U/s 328 IPC and in default of payment of fine accused is directed to undergo SI for a period of 15 days.

Accused is also sentenced to RI for a period of two years and a fine of Rs. 500/- U/s 363 IPC and in default of payment of fine accused is directed to undergo SI for a period of 10 days.

Accused is also sentenced to RI for a period of three years and a fine of Rs. 1,000/- U/s 366 IPC and in default of payment of fine accused is directed to undergo SI for a period of 15 days.

Accused is also sentenced to RI for a period of seven years and a fine of Rs. 2,000/- U/s 376 IPC and in default of payment of fine accused is directed to undergo SI for a period of one month.

All the sentences shall run concurrently.”

7. The counsel for the appellant during the course of arguments, advanced oral arguments and also submitted written submissions. He argued that the prosecutrix was major at the time of the alleged incident. He further argued that there are many contradictions and improvements in the story of the prosecution, which creates doubt towards the credibility of testimony of the prosecutrix as PW-3. The appellant is entitled for acquittal.
8. The perusal of impugned judgment dated 02.12.2006 reflects that the



trial court has relied upon the testimony of prosecutrix as PW-3 and observed that the evidence of the prosecution proves that the prosecutrix has not gone with the appellant with free consent but she was taken away by the appellant. The trial court believed the testimony of prosecutrix/PW-3 that the appellant used to commit rape with her and has committed rape at different places i.e. Peeragarhi, Lucknow and Faizabad. The trial court also observed that the testimony of the PW-3/prosecutrix has corroborated by the statement recorded under section 164 Cr.P.C. exhibited as PW 3/A. The perusal of impugned judgment dated 02.12.2006 reflects that the trial court passed the impugned judgment after proper appreciation of the evidence brought on record by the prosecution and the impugned judgment is reasoned and does not call for any interference. Accordingly, the impugned judgment dated 02.12.2006 is upheld.

9. Vide order on sentence dated 04.12.2006, the appellant was sentenced to rigorous imprisonment (RI) for a period of three years along with a fine of Rs.1,000/- and in default of payment of fine to undergo SI for a period of 15 days U/s 328 IPC. The appellant was also sentenced to RI for a period of two years along with a fine of Rs.500/- and in default of payment of fine to undergo SI for a period of 10 days under section 363 IPC. The appellant was



further sentenced to RI for a period of three years along with a fine of Rs.1,000/- in default of payment of fine to undergo SI for a period of 15 days under section 366 IPC. The appellant was also sentenced to RI for a period of seven years and a fine of Rs.2,000/- in default of payment of fine to undergo SI for a period of one month under section 376 IPC. All the sentences were directed to run concurrently.

10. The counsel for the appellant argued that as per the unamended section 376 IPC, any person accused of offence punishable under section 376 IPC is liable to be punished which shall not be less than seven years but may be for life or for a term which may extend to 10 years and shall also be liable to fine. However, as per the proviso clause, the court may for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment for a term less than seven years. He further argued that as per the nominal roll, the appellant had already undergone 03 years 10 month and 18 days imprisonment and further he has earned remission of 10 months and 02 days. The appellant is stated to be a poor person and belongs to the lower strata of the society, who has to maintain his sister as his parents have already passed away. It is further stated that the appellant has already suffered sufficient punishment as such, as per the



proviso clause attached with the section 376 IPC, the appellant be sentenced to imprisonment for the period already undergone.

11. The Additional Public Prosecutor for the State/respondent stated that under the given facts and circumstances, the appellant is not entitled for any concession from this Court. The appellant was punished for the offence punishable under section 363/376/366/328/34 IPC and the manner in which the offence was committed, no leniency can be shown to the appellant.

12. The appellant has already undergone the punishment for about four years including the period of remission. The antecedents of the appellant are clear. The appellant is not a previous convict and after the present offence, he never indulged in any criminal activity. The appellant is a poor person and he has to maintain his family comprising of his sister as his parents have already passed away. After considering all facts, the order on sentence dated 04.12.2006 is modified to the extent that the appellant is sentenced to undergo the period he has already undergone subject to the deposition of fine within a period of one month from today before the concerned trial court. In case the appellant fails to deposit the fine imposed vide order on sentence dated 04.12.2006, in that eventuality, the order on sentence dated 04.12.2006 shall revive completely.



13. The present appeal along with pending applications, if any, stands disposed of.

14. Copy of this order be sent to the concerned trial court for information.

(DR. SUDHIR KUMAR JAIN)
JUDGE

SEPTEMBER 01, 2023

N/AK