

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

% *Judgment Reserved on: September 21, 2017*
Judgment Delivered on: September 25, 2017

+ **CRL.A. 429/2017**

BABUL Appellant

Through: Mr.S.K.Sethi, Advocate with
brother of the appellant

versus

STATE (NCT OF DELHI) Respondent

Through: Ms.Kusum Dhalla, APP for the
State with ASI Jaiveer Singh PS
Khajuri Khas

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

1. The present appeal is directed against the judgment dated 25th May, 2016 and order on sentence dated 26th May, 2016 whereby the appellant has been convicted for committing the offence punishable under Section 363/366/377 IPC and sentenced as under:-

- (i) Under Section 363 IPC R.I. for a period of 7 years with fine of ` 2,000/- and in default, to undergo SI for one month
- (ii) Under Section 366 IPC R.I. for a period of 7 years with fine of ` 2,000/- and in default, to undergo SI for one month

- (iii) Under Section 376 IPC R.I. for a period of 7 years with fine of ` 2,000/- and in default, to undergo SI for one month

All the sentences were directed to run concurrently.

2. The case FIR No.307/2011 was registered on 24th September, 2011 when Sh.Ali Ahmed, father of the prosecutrix reported that his daughter 'S' (name withheld to protect the identity) aged 14 years had been missing since 23rd September, 2011 and he suspected his neighbour Babul (appellant herein) to be behind missing of his daughter and that he might have enticed her away. Initially the FIR was registered under Section 363 IPC. School leaving certificate as age proof of the prosecutrix was produced by her father wherein her date of birth has been recorded as 6th July, 2000. On 27th September, 2011, Sh.Munna, father of the appellant produced his son as well the daughter of the complainant before the Investigating Officer SI Anuj Kumar (PW-8) after bringing them to Delhi from Moradabad, UP. The prosecutrix 'S' was sent for medical examination and also produced for getting her statement Ex.PW2/A recorded under Section 164 Cr.P.C.

3. After the medical examination of the prosecutrix was conducted and her statement under Section 161 CrPC was recorded, Sections 366/376 IPC were also added. After the completion of investigation, chargesheet was filed against the appellant/accused.

4. On the basis of evidence adduced by the prosecution, the appellant has been convicted for committing the offence punishable

under Sections 363/366/376 IPC and sentenced in the manner stated above.

5. Challenging the conviction of the appellant under Section 363/366/376 IPC and the order on sentence, learned counsel for the appellant submitted that the prosecutrix left the house of her aunt of her own as her father wanted to sell her to some other person but she was in love with the appellant. Fearing that she might be sold to a stranger, she left her house of her own to perform Nikaah with the appellant and had consented to have physical relations with him. Learned counsel for the appellant has referred to the statement Ex.PW2/A made by the prosecutrix under Section 164 Cr.P.C. wherein she has specifically stated about the reason of leaving her house and the physical relations with the appellant were made by her with free consent. Even on her MLC Ex.PW9/A prepared by PW-9 Dr.Divya Pandey the alleged history given by PW-2 is of having physical relations with consent. Learned counsel for the appellant has also submitted that the appellant as well as the prosecutrix both belong to Muslim community where the age of Nikaah is the age of attaining puberty. It has also been contended that though the Nikaah was performed but the appellant is not having the proof as he is in judicial custody. In view of the statement of the prosecutrix about being a consenting party and leaving the house of her own to accompany the appellant, the appellant could not have been convicted under Section 363/366/376 IPC.

6. On behalf of the State, learned APP has contended that as per the School Leave Certificate seized vide memo Ex.PW1/B, the date of

birth of the prosecutrix is 6th July, 200 which proved her age to be 11 years at the time of incident. The prosecutrix being minor at that time, the consent, if any, given by her is immaterial. Learned APP has also submitted that during her examination before the Court as PW-2 she has stated that the physical relations with her was without her consent and in view thereof the impugned judgment and the order on sentence may be upheld.

7. I have considered the rival contentions and carefully gone through the record. The prosecution examined 13 witnesses in all to substantiate the charges. The material witnesses are the PW-1, the father of the victim and complainant of this case; PW-2, the prosecutrix and PW-8, SI Anuj Kumar who conducted the investigation.

8. In the instant case the main issue that arises for consideration is the age of the prosecutrix (PW-2, 'S') PW-8, SI Anuj Kumar has proved the following facts:-

(i) Investigation of case FIR No.307/2011 under Sections 363/366/376 IPC PS Khajuri Khas, which was registered on 24th September, 2011 on the statement made by the complainant Ali Ahmed, PW-1 was conducted by him.

(ii) The copy of the school leaving certificate of the victim was handed over to him by the complainant on 26th September, 2011 which was seized by him vide seizure memo Ex.PW-1/B. As per the school leaving certificate the date of birth of the prosecutrix is 6th July, 2000. On 27th September, 2011 the appellant/accused as well as the prosecutrix were produced before him by the father of the

accused/appellant. After informing her parents, he (the Investigating Officer –PW-8) interrogated them in the presence of a lady Constable Santosh and Constable Hawa Singh. Thereafter, both of them were sent for medical examination. PW-2 was also produced before the learned Magistrate on 28th September, 2011 for recording her statement under Section 164 Cr.P.C. which is Ex.PW-2/A.

(iii) Thereafter, the prosecutrix was produced before the CWC on 29th September, 2011 and under the order of CWC she was handed over to her parents.

9. Statement of prosecutrix under Section 164 Cr.P.C. is Ex.PW-2/A wherein she has stated that she was in deep love with Babul, the accused but her Chachi did not let her meet Babul. After taking `10 from her Chachi and without telling anybody, she accompanied Babul to Moradabad, UP as they wanted to perform Nikaah. She also stated that she had physical relations with him with her consent and wanted to live with him but her parents were against this Nikaah. They had even gone to the Court but she being below 18 years of age, their Court Marriage could not be solemnized. She specifically stated that physical relations were made by the appellant/accused with her consent.

10. At the time of her medical examination at GTB Hospital while mentioning her age to be 14 years she has given the history to the following effect:-

“14 years old girl Sahruha brought by W.Constable Santosh 1376 NE PS K.Khas accompanied by mother Nasreen.

*Alleged h/o missing from home since 23/9/11 to 26/9/11.
Brought for medical examination
H/o sexual contact with a boy from neighbourhood,
contact made with her consent- As told by the girl.
Last contact made 2 days back. Patient has taken bath,
passed motion & passing urine after last contact.”*

She refused for her internal medical examination which was duly informed to her mother, who accompanied her to the hospital.

11. Since the appellant/accused is also not disputing that the prosecutrix had accompanied him to Moradabad, UP and he had physical relations with her consent and further that both of them were brought from Moradabad to Delhi and produced before the police by his father, the only issue that is relevant for deciding this appeal is the effect of consent by a girl under 16 years of age. First of all it is necessary to mention that no Nikaahnama is on record on the basis of which the appellant could have taken the plea that the age of puberty is relevant for performing Nikaah and she having attained the age of puberty her consent has to be given weightage.

12. No doubt as per the date of birth recorded in the School Leaving Certificate she was about 11 years of age at that time but her father at the time of lodging missing report vide DD No.5A Ex.PW-11/A has given the age of his daughter to be 14 years and **before the Court he has also stated that he got married in 1996 and the prosecutrix was born in the year 1997 which shows that she was about 14 years of age at the time of accompanying the appellant.** While making statement under Section 164 CrPC, the prosecutrix has given her age to be 14 years and the same is recorded on MLC. So at best

appellant can claim that the prosecutrix was not 11 years old but 14 years old at the time of occurrence which is below the consenting age.

13. The appellant has been convicted for the offence punishable under Section 363/366/376 IPC. As regards, charges under Section 363/366 IPC are concerned, the prosecution was required to prove that the appellant had taken or enticed the prosecutrix out of the lawful guardianship of her parents. Kidnapping is defined under Section 361 of the Indian Penal Code with the object to protect the minor children from being seduced for inappropriate purposes as well to protect the rights and privileges of the guardians having lawful custody of their minor children. If the minor leaves her parental home without any promise, efforts or enticement, it cannot be said that an offence of kidnapping is proved. In the instant case the prosecutrix was at the house of her aunt. She had specifically stated in her statement under Section 164 Cr.P.C. that she took ₹10 from her aunt and left her house without telling anyone. She has also stated that she had left her house to perform Nikaah with the appellant with her free will as her father wanted to sell her to some other person for the reason that the accused was not having the financial capacity to pay ₹2 lakhs demanded by her father as a condition to perform her Nikaah with him. Not only at the time of her medical examination but also while making statement under Section 164 CrPC before the learned Metropolitan Magistrate, she narrated the above facts.

14. It is a matter of record that prosecutrix was handed over to her parents by the Child Welfare Committee. Thereafter when she appeared as a witness and examined as PW-2, she had given entirely

different version which has no foundation as it appears to be under parental pressure or an afterthought. Her deposition before the Court is in contrast to her version before the learned Magistrate recorded in the statement under Section 164 CrPC Ex.PW2/A.

15. In order to prove a charge under Section 366 Indian Penal Code the prosecution was required to prove that the kidnapping of the prosecutrix was with intent that she may be compelled to marry any person against her will or that she may be forced to seduce to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse. It is a case where the prosecutrix has admitted that she was in deep love with the accused and wanted to marry and live with him. They even tried to perform Court marriage but she being under 18 years of age, it could not be registered. Thus, the three reasons given by her to leave her home without inducement and accompanying the accused to Moradabad (U.P.) are as under:

- (i) She being in love with the accused;
- (ii) The accused being not able to meet the demand of ₹2 lakhs as a condition to perform Nikaah;
- (iii) Her father's intention to perform her Nikaah against her will with some other person for monetary consideration.

16. Therefore, it cannot be said that the appellant kidnapped/taken the prosecutrix with him out of the lawful guardianship of her parents/aunt so as to force her or seduce to illicit intercourse. The facts and circumstances of the case and even her MLC proved that she was a consenting party to sexual intercourse with the appellant.

17. The conviction of the appellant for the offence punishable under Section 363/366 IPC cannot be sustained in view of the legal position laid down in the various decisions of this Court. In the case Chida Ram vs. State 1992 Criminal Law Journal 4073, the prosecutrix went to the P.S. and lodged report that she had gone with the petitioner/accused, of her own accord. However, during trial, she deposed that she was forced by the accused/petitioner to go to the police station. She had also given statement before a Magistrate after lodging report with the police and in that statement she did not say that she was forced by the accused/petitioner to go to the Police Post and lodged the report. A learned Single Judge of this Court observed that she had ample opportunity to say before the Magistrate, before whom she was produced at the first instance, that she was forced by the accused to go to the Police Station and lodged report. The story set up by her during trial was considered to be an afterthought and was not believed. It was found that she was a consenting party in eloping from her house with the accused/petitioner. It was held that it could not also be called a case of kidnapping.

18. In the decision reported as Mahabir vs. State 55 (1994) DLT 428, the appellant and the prosecutrix were known to each other. The appellant took the prosecutrix to a place outside Delhi where they stayed for about fifteen days and had sexual intercourse with each other. The appellant was convicted under Sections 366 and 376 of I.P.C. A learned Single Judge of this Court noticed that she had gone to Railway Station, had stood there with the appellant who also went to purchase tickets and then she had travelled with him in a

compartment shared by other persons. She had then gone to a house in a tonga and yet she did not lodge any protest and made no attempt to flee despite having ample time and opportunity. The learned Single Judge noted that on the day of reckoning, she surely had crossed mark of sixteen years and since she was all along a willing party, the appellant was acquitted of both the charges against him. Thus, despite the prosecutrix being less than eighteen years of age, the appellant was acquitted not only of charge under Section 376 but also of the charge under Section 366 of I.P.C.

19. In the case Bala Saheb vs. State of Maharashtra 1994 Criminal Law General 3044, it was found that the prosecutrix accompanied the appellant/accused from her village and stayed with him for two to three days. It was held that these circumstances clearly show that offence under Section 363 or 366 of I.P.C. was not made out.

20. Reverting to the facts of this case, the appellant and the prosecutrix were staying at Moradabad, UP from where the father of the appellant brought them to Delhi and produced before the IO. Neither of them tried to run away anywhere except to settle at the native place of the appellant nor showed any resistance when father of the appellant wanted them to accompany him and produced them before the IO as FIR was registered in this case. Thus, it is a case where no offence under Section 363/366 IPC can be said to have been proved against the appellant. Hence, he is acquitted of the above charges.

21. Section 376 IPC prior to the amendment carried out w.e.f. February 03, 2013, provided that the offence of rape of a woman

under 16 years of age with or without her consent was punishable with imprisonment of not less than seven years but which may extend for life or for a term which may extend to ten years and payment of fine, provided, the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

22. The age of the prosecutrix being 14 years at the time of occurrence, charge for the offence under Section 376 IPC stands proved against the appellant/accused. She was less than 16 years of age at that time hence her consent was immaterial.

23. Learned counsel for the appellant has submitted that keeping in view that it was a case where the prosecutrix voluntarily accompanied the appellant to be his wife but there is no proof available with the appellant that Nikaah was performed, it can be considered as a special reason to award a sentence lesser than the minimum prescribed under Section 376 IPC.

24. This Court in the decisions reported as Mahabir Vs. State 55 (1994) DLT 428; Mohd.Imran Khan and Jamal Ahmed Vs. The State 2010 Cri LJ 1756; Bunty Vs. State (GNCT) of Delhi MANU/DE/0964/2011 wherein the prosecutrix had accompanied the accused of her own sweet will and had sexual intercourse with consent despite the fact that she had not attained the consenting age, had considered it to be a special reason and discretion was exercised to award the sentence below the statutory minimum.

25. In the facts and circumstances of the case and the view taken by the coordinate Benches of this Court in the decisions referred to

above, while maintaining the sentence of fine of `2,000/-, the substantive sentence of 7 years awarded to the appellant for committing the offence under Section 376 IPC **is reduced to 5 years.**

26. The appeal stands disposed of in above terms.

27. LCR be sent back alongwith copy of this order.

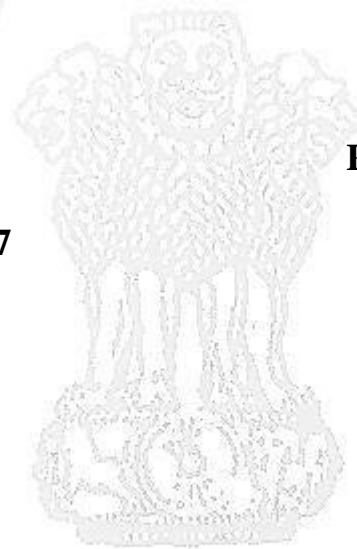
28. Copy of this order be sent to the concerned Jail Superintendent for information and compliance.

29. Appellant be also informed through the concerned Jail Superintendent.

**PRATIBHA RANI
(JUDGE)**

SEPTEMBER 25, 2017

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