
(2011) 11 DEL CK 0427

In the Delhi High Court

Case No : Criminal Appeal No. 478 of 2010 and Criminal M.B. 1638 of 2011

Mohd Alim @ Gulab

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 29-11-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 341, 354, 361, 363, 366

Citation : (2011) 10 AD 557 : (2012) 1 JCC 88

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : G.B. Sewak, for the Appellant; Mukesh Gupta, APP for State with S.I. Gianender Singh, P.S. Nabi Karim, for the Respondent

Final Decision : Disposed Off

Judgement

Hon"ble Ms. Justice Mukta Gupta

1. The present appeal is directed against the judgment dated 23rd March, 2010 convicting the Appellant for offences under Sections 363/511 IPC, 366/511 IPC and 341/354/506 IPC and the order on sentence directing him to undergo Rigorous Imprisonment for five years and a fine of Rs. 5000/- for offences u/s 366/511 IPC, in default of payment of fine to further undergo Simple Imprisonment for six months, Rigorous Imprisonment for three years and fine of Rs. 1000/- for offence u/s 363/511 IPC, in default of payment of fine to further undergo Simple Imprisonment for one month, 15 days Simple Imprisonment for offence u/s 341 IPC, Rigorous Imprisonment for one year and fine of Rs. 500/- for offence u/s 354 IPC, in default of payment of fine to further undergo Simple Imprisonment for 15 days and Rigorous Imprisonment for one year and a fine of Rs. 500/- for offences punishable u/s 506 IPC, in default of payment of fine to further undergo Simple Imprisonment for 15 days. The sentences were directed to run concurrently.

2. Learned counsel for the Appellant contends that even taking the allegations of

the prosecutrix on the face of it, the only allegation against the Petitioner is that he gagged the mouth of the prosecutrix and picked her up. When she bit him, he released her. There is no allegation that the Appellant took her away and thus the necessary ingredients of Sections 366/363 IPC are not made out. Though prosecutrix in her statement in the FIR had stated that the Appellant took her at some distance and kissed her, however no such statement has been made in the witness box. The statement made to the Police cannot be relied upon and no conviction can be based thereon. In the absence of any conviction permissible u/s 366 read with Section 511 IPC, even accepting the other offences the Appellant is entitled to be released as he has already undergone nearly two years of imprisonment along with remissions.

3. Learned APP on the other contends that the prosecutrix was a minor girl aged 9 years whom the Appellant molested, misbehaved, picked her up and attempted to kidnap. In the witness box she has withstood the test of cross-examination and her testimony is consistent throughout. In view of the fact that the Appellant attempted to kidnap a 9 year old girl and molested her, no leniency should be shown and the appeal be dismissed.

4. Briefly PW5, the prosecutrix in her statement before the Court has stated that around one and a half year ago her parents sent her to the market for taking ice in the evening when it was dark. The Appellant followed her and hit his hand on her thigh from behind. However, the prosecutrix proceeded further. Thereafter, the Appellant picked her up in his lap from behind and gagged her mouth. The prosecutrix bit his palm on which the Appellant released her. The prosecutrix immediately went to her house and called her mother and her elder brother while the Appellant was in the STD shop. PW6 Tassvur, the alleged eye-witness has turned hostile. PW4 Bobby is the father of the prosecutrix who has stated that he had sent his daughter to get ice from the market at about 6.20 PM on 27th May, 2007. At about 7.00 PM she returned back weeping. She told him that one person hit his hand at her back and picked her up in his lap and started kissing her and took her towards a graveyard. His daughter bit the hand of the accused and raised alarm on which the said person released her. It may be noted that the statement of this witness is hearsay and thus not admissible in evidence. The factum of taking towards the graveyard and kissing have not been stated by the prosecutrix in her deposition. From the perusal of the evidence of the prosecutrix on record the offences punishable under Sections 341 and 354 IPC are clearly made out. As regards the offence of 506 IPC, there is no allegation of intimidation and hence the Appellant is acquitted of the said charge.

5. Coming to the issue of whether the present case falls within the ambit of attempt to kidnapping, it would be essential to consider the ingredients proved by the prosecution. As per the prosecutrix the only allegation against the Appellant is that he picked her up in his lap from behind and gagged her mouth and on the prosecutrix biting his palm, the Appellant released her. Section 361 IPC reads as under:

Section 361. Kidnapping from lawful guardianship

Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation

The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception

This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

6. Thus the essential ingredients of the offence are taking or enticing any minor or any person of unsound mind out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian. The words taking or enticing have been interpreted by the Hon"ble Supreme Court to mean "to cause to go", "to escort" or "to get into possession" in *Thakorlal D. Vadgama Vs. The State of Gujarat*, . Thus, taking away would not only include moving forward or backward but also taking into possession the physical body of the minor or person of unsound mind.

7. From the facts of the case it is clear that the Appellant had picked up the prosecutrix and gagged her mouth. Thus, he had taken her into his possession. By this act the ingredients of an attempt to kidnapping are clearly made out. Thus, the Appellant has been rightly convicted for the offence punishable u/s 363/511 IPC.

8. As regards the offence u/s 366/511 IPC it may be noted that in view of the testimony of the prosecutrix recorded in Court there is nothing on record to show that the Appellant attempted to kidnap or abduct with intent that she may be compelled to marry any person, or force, or seduce to illicit intercourse. Thus, I find no case for conviction u/s 366/511 IPC is made out. The Appellant is acquitted of the charge u/s 366/511 IPC.

9. Thus on the facts of the case proved the conviction of the Appellant is modified to one for offences u/s 363 read with Section 511 IPC, 354/341 IPC. The Appellant has been awarded a sentence of imprisonment for a period of three years and fine of Rs. 1,000/- and in default Rigorous Imprisonment for one year for offence u/s 363/511 IPC and for Section 354 IPC Rigorous Imprisonment for one year. The Appellant has already undergone the sentences awarded for offences u/s 354/341 IPC. The Appellant has been in custody for two years. In

view of the fact that the Petitioner is not involved in any other offence and is a first time offender, I deem it fit to reduce the sentence of the Appellant for offence u/s 363/511 IPC to the period already undergone. Superintendent Tihar Jail is directed to release the Appellant forthwith if not required in any other case.

10. Appeal and application are accordingly disposed.