

(2016) 05 DEL CK 0030
In the Delhi High Court
Case No : Crl. A. 28 of 2015

Phoolwati

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 31-05-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 363, 366, 376, 376

Citation : (2016) 3 JCC 1643

Hon'ble Judges : Mr. S.P. Garg, J.

Bench : Single Bench

Advocate : Mr. Krishan Kumar, Advocate with Ms. Sunita Arora, Advocate, for the Appellant; Mr. Vinod Diwakar, APP, for the Respondent

Final Decision : Disposed Off

Judgement

S.P. Garg, J.—Aggrieved by a judgment dated 25.11.2014 of learned Addl. Sessions Judge in Sessions Case No.25/13 arising out of FIR No. 718/07 PS Nangloi whereby Phoolwati (A-1), Anil @ Lillu (A-2) were convicted for committing offences punishable under Sections 363/366 IPC and Pradeep @ Lala (A-3) was convicted for committing offences punishable under Sections 363/366/376 IPC, they have filed the instant appeals. By an order dated 27.11.2014, they were awarded various prison terms with fine. The sentences were to run concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 22.08.2007 at about 11.00 a.m. near Dispensary Shiv Vihar, Nangloi, Delhi, A-1 and A-2 in furtherance of common intention with A-3 kidnapped the prosecutrix ?X? (changed name) aged around 15 years out of lawful guardianship of her parents. Thereafter, she was taken in a van to Rajasthan where A-3 committed rape upon her during the period from 22.08.2007 to 09.09.2007.

3. On 22.08.2007 at around 11.00 a.m. ?X? went missing from her house. Efforts were made by her parents to search her at various places but to no effect. On

24.08.2007, they lodged a 'missing person' report (Ex.PW- 6/A); 'X' was untraceable. On 09.09.2007, she on her own went to Police Station Punjabi Bagh. ASI Mahender Singh from Police Station Nangloi arrived there. After recording victim's statement (Ex.PW-4/A), he lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellants in the Court. The prosecution examined nineteen witnesses to establish its case. In 313 Cr.P.C. statements, the appellants denied their involvement in the crime and pleaded false implication. The trial resulted in their conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeals have been preferred. It is relevant to note that accused Prahlad who could not be arrested during investigation was kept in column No.2 of the charge-sheet. It is further to be noted that initially A-1 and A-2 were not charge-sheeted and their names were also reflected in column No.2. Subsequently, they were summoned under Section 319 Cr.P.C. on the application moved by the State.

4. I have heard the learned counsel for the parties and have examined the file. Learned counsel for the appellants urged that the Trial Court did not appreciate the evidence in its true and proper perspective. Vital discrepancies emerging in the statements of the prosecution witnesses were ignored without cogent reasons. The prosecutrix was a consenting party and physical relations with A-3 were with her consent. A-1 and A-2 were falsely implicated as they had rendered assistance to the parents of one Preeti with whom the victim's brother had eloped. Learned Addl. Public Prosecutor urged that no sound reasons prevail to discard the testimony of the minor prosecutrix.

5. On 22.08.2007, the prosecutrix had left her house at around 11.00 a.m. without informing her parents and other family members. X's parents did not lodge any report with the police promptly. Only on 24.08.2007 a 'missing person' report (Ex.PW-6/A) was lodged without suspecting involvement of any individual. 'X' was untraceable. She remained in A-3's company for about nineteen days. On 09.09.2007, she on her own went to Police Station Punjabi Bagh to lodge complaint. From there she was referred to Police Station Nangloi. In her statement (Ex.PW- 4/A), 'X' gave detailed account as to how and in what manner, she along with A-3 had gone in a van to Rajasthan. She fairly disclosed that since both of them wanted to marry, she had gone with A-3 willingly for that purpose. Later on, when A-3 declined to marry her, she lodged the instant FIR. She alleged that physical relations with A-3 at Madhopur (Rajasthan) were against her wishes. A-3 had 'taken' her on the false promise to marry and had committed rape upon her.

6. In her Court statement as PW-4, the prosecutrix was confronted with the version narrated by her in her complaint (Ex.PW-4/A). She reasoned that her statement (Ex.PW-4/A) was not recorded correctly; she was beaten by the

concerned police officers at the police station and was forced not to implicate A-1 and A-2, being police informers. This after thought reasoning is devoid of merit as at no stage the prosecutrix or her family members lodged any complaint against any such police officer for not recording her complaint correctly. Initially, in the complainant (Ex.PW- 4/A), the prosecutrix did not implicate A-1 and A-2 at all; no role whatsoever was assigned to them in her kidnapping. She rather admitted her acquaintance with A-3 who used to visit his Bua and Phupha living in the neighbourhood. She further admitted to be in touch with A-3 on his mobile 9210650643 from her mobile 9210780606. She further disclosed that both of them had decided to marry and pursuant to that, on 22.08.2007, she had accompanied him along with his friend Shashi Kant in a van to Neem Ka Thana (Rajasthan). From Neem Ka Thana, she was taken to Madhopur at Pappu's house, and thereafter, shifted to another house at some distance where they lived for five days. Finally, she was taken to Sahshikant's residence. About one week prior to the lodging of the FIR, A-3 leaving her there, returned to Delhi on the pretext to take care of his ailing parents. He did not return despite a telephone call given by Shashi Kant. Thereafter, on 08.09.2007 Shashi Kant and his father brought her to Delhi. On 09.09.2007 at around 04.00 a.m. she was taken to A-3's residence at Sultanpuri, Delhi by Shashi Kant where A-3 declined to marry her.

7. It is relevant to note that despite intimation by the police to victim's parents about her arrival at the police station, they did not come to meet her or to seek her custody; she was sent to Nari Niketan and her statement under Section 164 Cr.P.C. (Ex.PW-4/B) was recorded on 12.09.2007. In her 164 Cr.P.C. statement she introduced a new story and implicated A-1 and her son A-2 for her kidnapping. She accused A-2 to have administered her a stupefying substance, as a result of which, she became unconscious and on regaining, found herself in a room where she was sexually assaulted by A-3 and his driver Prahlad for 19 days. Finally, she was left at Mangolpuri where Shashi Kant met and assisted her to approach the police.

8. In her Court statement as PW-4, the prosecutrix claimed that the appellants were the perpetrators of the crime. She was detained in a room for nineteen days where A-3 and Prahlad used to have physical relations with her continuously. One day, when they came to know that the place was not safe, she was brought to Delhi in the van driven by Prahlad. When they reached Mangolpuri red light, she got an opportunity to escape. She was rescued by an individual and the accused persons fled the spot. After hiring a TSR, she went to the Police Station Punjabi Bagh.

9. On scanning the whole testimony of the prosecutrix, it appears that she has not presented true facts. No implicit reliance can be placed on her testimony as there are glaring infirmities between the versions given to the police at first instance (Ex.PW-4/A); in 164 Cr.P.C. statement (Ex.PW- 4/B) and the one given before the Court. She remained in A-3's company for nineteen days. At no

stage, she raised hue and cry or alarm to allege commission of rape. No injuries on her body including the private parts were found at the time of her medical examination. There were no struggle marks to infer if any time any resistance was offered by her to avoid commission of rape. Despite having mobile with her, at no stage, she attempted to contact her parents or any other family members. The investigating agency also failed to perform their duty and did not collect Call Details Record to ascertain the location of the prosecutrix at the relevant time. It is unbelievable that A-3 was not acquainted with the prosecutrix before the incident. The Investigating Officer did not record statement of A-3's relatives residing in the said locality. Crucial witness Shashi Kant who remained with the prosecutrix was not examined. It is unbelievable that Shashi Kant would meet all of a sudden to the prosecutrix at Mangolpuri red light to assist her to report to the Police Station Punjabi Bagh. Ex.PW-4/A shows that this man had accompanied A-3 from Delhi and finally had brought the prosecutrix to Delhi to ensure her marriage with A-3.

10. PW-15 (Babulal @ Pappu) in whose house admittedly the victim lived for certain duration deposed that on 25.08.2007, his cousin Vinod had brought two boys (identified as A-3 and one Shashi Kant) and a girl in a maruti van No.4053 at about 05.00 /06.00 a.m. and they wanted a rented room for stay. Due to non-availability of room at Shri Madhopur, a room at village Ranipura was rented out where they stayed for about 5/6 days. In the meantime, when he came to know that the boys had kidnapped the girl, A-3 along with the said girl vacated the rented accommodation. In the cross-examination, he disclosed that the A-3 and the girl had conversation with him and his family members during their stay with them for about two hours. He had offered them water and tea, etc. The said girl did not complain to her or any other person in village Ranipura. She told that her mother-in-law had shunted her out after retaining her anklets. He further deposed that the girl lived happily on her own at village Ranipura. Apparently, the prosecutrix's version about forcible kidnapping/rape was not corroborated by this independent witness. The prosecutrix did not explain as to why she did not complain her alleged kidnapping to PW-15. Misleading him, 'X' invented an excuse to leave the matrimonial house due to a quarrel with her mother-in-law. Obviously, 'X' was a consenting party.

11. Inconsistent version has been narrated by the prosecutrix and her parents regarding the manner in which she went missing from the house when X's parents were away to a doctor. PW-5 (Mamta) - victim's mother informed that she could not be examined; her father - PW-6 (Ram Tek) contradicting her claimed that the doctor took around one or one and a half hour in her medical examination giving medicine and prescribing other tests to be discharged at around 12.00 noon. The story presented by the prosecutrix that when her parents had gone to the doctor, A-1 came to her house and took her along with her on the pretext that her 'parents' were being beaten at the police station inspires no confidence. The prosecutrix did not contact her neighbours or her parents on mobile. A-1 and A-2 lived, admittedly, in victim's neighbourhood

since her childhood. There is no previous history of hostile relations between their families. A dispute had ensued over elopement of Preeti with victim's brother and in the police investigation, A-1 and A-2 had assisted Preeti's parents. Nothing is on record to infer if A-1 and A-2 had any contact whatsoever with A-3 during nineteen days when the prosecutrix remained away at Sikkar, Rajasthan. No proximity between A-1 and A-2 on one hand and A-3 on the other hand to force kidnapping at his instance has surfaced. A-1 and A-2 did not have any contact with A-3 on the day she was taken in a van. Moreover, when the prosecutrix herself was a willing and consenting party to accompany A-3, there was no occasion for A-1 and A-2 (mother and son) to entice her. No specific motive has been attributed or proved against A-1 and A-2 to force kidnapping. The prosecution was unable to produce on record any materials to infer conspiracy between A-1 and A-2 on one hand and Prahlad and A-3 on the other hand. The prosecutrix's assertion not to have answered the call of nature; to remain without food for long 19 days is beyond comprehension. It is highly unbelievable that the prosecutrix could survive for nineteen days under such harsh circumstances. She did not exhibit abnormal behaviour when she herself went to the police station in the TSR. Apparently, she was hand in glove with Sahshikant who allegedly had offered her cash to report the matter to the police station. The Investigating Agency did not find incriminating evidence against A-1 and A-2 to charge-sheet them. Only in her evidence when the prosecutrix in her statement involved A-1 and A-2, on State's application, they were summoned under Section 319 Cr.P.C. There is no cogent evidence except the victim's statement to implicate them. As observed above, victim's statement cannot be taken on its face value.

12. A-3 has fairly admitted that physical relations with the prosecutrix were established with her free consent. The circumstances referred above also lend credence to his version. Consent of the prosecutrix to have physical relations with A-3 is however of no consequence; she being below 16 years of age on the day of occurrence. From the very inception, prosecution's case is that 'X' was below 16 years of age on the day of incident. The prosecution examined PW-9 (Ram Singh Yadav), TGT, Govt. Sarvodaya Secondary School, who proved the photocopy of admission register (Ex.PW-9/A), admission form (Ex.PW-9/B) and school leaving certificate (Ex.PW-9/C). He also produced another school leaving certificate (Ex.PW-9/D) issued by Mr. Dilbagh Singh Gulia, the then Vice Principal of Sarvodaya Co-education Secondary School, Nilothi. As per school record, date of birth of the victim is 08.03.1992. This witness was not cross-examined and the facts stated by him remained unchallenged. The Trial Court after discussing all the relevant facts and law on the subject came to the conclusion that the prosecutrix was about 15 years, 5 months and 14 days as on 22.08.2007. This Court finds no valid reasons to deviate from the said findings. Since the victim was below 16 years of age her consent being immaterial, conviction under Section 376 IPC cannot be faulted and is affirmed.

13. In the light of above discussion A-1 and A-2 deserve benefit of doubt and

they are acquitted. Conviction recorded by the Trial Court qua A- 3 is affirmed.

14. A-3 was sentenced to undergo RI for seven years with fine Rs. 10,000/- each under Sections 363/366/34 IPC. He was further sentenced to undergo RI for ten years with fine Rs. 20,000/- under Section 376 IPC. Nominal Roll dated 19.08.2015 reveals that he has already undergone three years, six months and twenty-four days incarceration besides remissions for two months and five days. He is not a previous convict and is not involved in any other criminal case. His overall jail conduct is satisfactory. A-3 was working as a driver getting salary of Rs. 8,000/-. Sentence Order records that he is to support old widow mother; he is the sole bread earner of the family having no brother and sister.

15. Considering these circumstances, I am of the view that there exist special and adequate reasons to award sentence less than seven years as mandated under Section 376 IPC. In Sanjay v. State 2014 (1) C.C. Cases (HC) 326, this Court held:

"The legislature in its wisdom made a provision for awarding a sentence of less than seven years when there are special and adequate reasons for the same. I have before me the prosecutrix's testimony. It goes without saying that the prosecutrix merrily proceeded with the Appellant most willingly. She travelled with him in a bus and then in a train to Lucknow. The prosecutrix was brought back to Delhi by the Appellant himself where the Appellant and the prosecutrix were apprehended at New Delhi Railway Station by the police. Thus, although the Appellant does not want to contest the appeal on merits, it is borne out from the record that it was a case of consensual intercourse with the prosecutrix. While awarding punishment, the Court has to take into consideration the mitigating and aggravating circumstances. The prosecutrix was aged 15 years and eight months and she was incapable of giving the consent eight months and she was incapable of giving the consent for sexual intercourse. I have seen numerous cases where the girls sometimes less than 16 years of age take a lead in eloping with a boy, enters into a marriage with the boy and have sexual intercourse with him. Such a predicament was noticed by this Court in several cases including in two judgments passed by the Division Benches of this Court, namely, Manish Singh v. State Govt. of NCT & Ors, AIR 2006 Delhi 37 and Bholu Khan v. State of NCT of Delhi & Ors. (W.P.(Crl.)1442/2012 dated 01.02.2013."

Considering the age of the prosecutrix and the facts narrated above, in my view, it is a fit case where sentence less than the minimum should be awarded. Similar view was taken and sentence less than minimum was awarded by a learned Single Judge of this Court in Brij Pal v. State (Crl.Appeal No.278 of 2000) decided on May 31, 2011. I accordingly, sentence the Appellant to undergo RI for four years and to pay a fine of Rs. 2,500/- for each of the offences under Sections 366 and 376 IPC, and in default of payment of fine, the Appellant shall undergo SI for one month each. Both the substantive sentences shall run concurrently."

16. In the light of the above discussion, while maintaining conviction under

Sections 363/366/376 IPC, the sentence order is modified and the substantive sentence of the appellant under Section 376 IPC shall be RI for five years instead of ten years with fine Rs. 10,000/-; default sentence for non-payment of fine would be SI for two months and under Sections 366/363 IPC shall be RI for three years each instead of seven years each with fine Rs. 5,000/- each; default sentence for non-payment of fine would be SI for one month. The substantive sentences shall run concurrently. Of course, A-3 shall be entitled to have benefit under Section 428 Cr.P.C.

17. The appeals stand disposed of in the above terms. Copy of this order be sent to the concerned Jail Superintendent for information/compliance. Trial court record be sent back along with a copy of this order.