

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

% *Date of Decision : 28th November, 2014*

+ CRL.A. 740/2013

WASIM

..... Appellant

Through : Counsel for the Petitioner.

versus

STATE

..... Respondent

Through : Mr.Neeraj Kumar Singh, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (Oral)

1. This criminal appeal has been filed by the Appellant impugning the judgment dated 21.02.2013 and order on sentence dated 22.02.2013 passed by the learned Addl. Sessions Judge, Delhi in Sessions Case No.47/2012 whereby the Appellant was convicted for committing the offence punishable under Section 376 IPC and sentenced to undergo RI for seven years with fine of Rs.10,000/- and in default, to undergo SI for six months.
2. Briefly stating, the case FIR No.42/2012 under Section 363/376 IPC was registered at PS Chandni Mahal on the basis of complaint made by Mohd. Rukhsar. As per the complaint Ex.PW2/A, the Complainant Mohd. Rukhsar went to Police Station on 27.03.2012 and stated before the police that his daughter 'N' (name withheld to conceal her identity) aged 14years had left the house in the morning without informing them. He suspected Wasim behind the missing of his daughter and prayed for legal action

against him.

3. During the pendency of investigation, on 02.04.2012 the Prosecutrix herself came to the Police Station Chandni Mahal and stated that on 27.03.2012, she herself left the house and called Wasim at Turkman Gate. She also stated that thereafter Wasim came to Turkman Gate in his car and took her to Kaliyar Guest House near Haridwar. They stayed in the Guest House and also slept on the same bed. She further stated that they left the Guest House on that morning and reached ISBT, Kashmere Gate where Wasim asked her to go Chandni Mahal and she reached Chandni Mahal Police Station in a TSR.

4. The Prosecutrix was got medically examined at LNJP Hospital and thereafter she was sent to Kilkari Rainbow Girl Home. The statement under Section 164 Cr.P.C. of the Prosecutrix was also got recorded before the MM. In her statement recorded under Section 164 Cr.P.C., the Prosecutrix has given her age as 15 years and stated that on 27.03.2012 at about 8.00/8.30 PM, her father scolded her as at that time she was watching T.V. Thereafter her father also slapped her and she got annoyed. Then she telephoned Wasim and called him as she was in love with him. Thereafter she alongwith Wasim went to Manali where they stayed for three days. After that they went to Haridwar and stayed at Kaliyar Sharif Guest House for three days. On 2nd of April, they came to Delhi. She also stated that she went of her own free will and that she wanted to stay with her parents and her parents may decide about her future.

5. During investigation, the Appellant Wasim was arrested and got medically examined. After completion of investigation, chargesheet was filed.

6. Needless to state that Appellant pleaded not guilty to the charges framed and claimed trial. The prosecution has examined 14 witnesses in all in support of its case. In his statement recorded under Section 313 Cr.P.C., the Appellant stated that he knew the Prosecutrix as she was in his relation and the Prosecutrix insisted him to come at Turkman Gate and when he refused to the same, she gave him *kasam*. He also stated that Prosecutrix insisted that if he would not accompany her to Roorkee, she would commit suicide. Thereafter, they went to Roorkee and the he made physical relations with the Prosecutrix with her consent.

7. On the basis of the evidence adduced by the Prosecution, the learned Addl. Session Judge has convicted the Appellant for committing the offence under Section 376 IPC and sentenced in the manner stated above.

8. On the last date of hearing i.e. 27.11.2014, the Prosecutrix had appeared before the Court alongwith her 1½ years daughter in her lap and her parents. In this case, the FIR has been lodged at the instance of Mohd. Rukhsar – father of the Prosecutrix. The parents of the Prosecutrix submit that earlier they were not accepting the marriage of their younger daughter with the Appellant, who was initially engaged with their elder daughter but their elder daughter unfortunately died. The relationship of the Appellant with their younger daughter being not acceptable to them, they opposed it tooth and nail. They further submit that now seeing her young age and the fact that she is made to take care of her 1½ year old daughter all alone, they want her to live peacefully with the Appellant.

9. On behalf of Appellant, it has been submitted that Appellant is not challenging his conviction under Section 376 IPC. However, it is a case where the Prosecutrix immediately after eloping with the Appellant,

performed *Nikaah* in Kaliyar (U.P.) but before *Nikaahnama* could be taken, the Appellant Wasim was arrested. As the family of the Prosecutrix was not ready to accept their marriage, the Prosecutrix being under constant pressure from her parents had to toe their lines. It is further submitted that it is a case where the Prosecutrix had left her home of her own. She is Muslim by religion and had attained the age of puberty at the time of eloping and performing *Nikaah* with the Appellant but the factum of *Nikaah* being performed could not be proved during trial because of the fact that Wasim remained in custody and Prosecutrix was not having the means to visit Kaliyar (U.P.) all alone to collect *Nikaahnama*. It is further submitted that interest of justice demands that Prosecutrix be allowed to live happily with the Appellant in her matrimonial home and the Appellant be dealt with leniently. It is also submitted that both the families belong to poor strata of the Society and not having enough means to pay fine of Rs.10,000/- imposed on the Appellant. It is further submitted that the period required to be undergone by the Appellant in default of payment of fine may also be reduced so that poverty does not come in the way of the Appellant to seek his release.

10. In the instant case, the date of occurrence is 27.03.2012. The Prosecutrix had throughout remained consistent that she compelled the Appellant to take her away and was never kidnapped by him. It was in view of her statement that the Appellant was acquitted of the charges under Section 363/506 IPC by learned Trial Court but convicted for committing the offence punishable under Section 376 IPC because the Prosecutrix was below the consenting age. Though not claimed earlier before this Court, the Prosecutrix stated about *Nikaah* being performed on the very next day and

now having a daughter out of this wedlock.

11. Now the question to be dealt with by this Court is only on the quantum of sentence to be awarded to the Appellant in this case. In the case of ***Virender Kumar vs. State Crl.A.367/2009***, a Coordinate Bench of this Court has taken a lenient view and reduced the sentence of the Appellant in that case to the period already undergone by him.

12. In the case of ***Virender Kumar vs. State, Crl.Appeal No.367/2009***, the Appellant Virender Kumar was convicted and sentenced by the learned Trial Court to undergo RI for a period of 07 years and to pay a fine of Rs.5,000/- and in default of payment of fine, to further undergo SI for 03 months. After filing appeal against his conviction and sentence before this Court, during the hearing of the appeal, the Appellant submitted that he did not challenge his conviction, but prayed for a lenient view in the matter. The Appellant further submitted that he (Appellant) has got married to the Prosecutrix and they are now living together happily. The Prosecutrix, who was present in Court, also accepted the above statement of the Appellant.

13. The learned Single Judge, while taking note of the fact that after the occurrence, which took place in the year 2005, the Appellant and the Prosecutrix had got married to each other and living together happily, reduced the sentence of the Appellant to the period already undergone by him in custody in that case. The learned Single Judge, while taking the said decision, placed reliance on the decision of the Hon'ble Supreme Court in the case of ***Sukhwinder Singh vs. State of Punjab (2000) 9 SCC 204***, wherein it was observed as under:-

“2. During the pendency of the proceedings in the High Court, the prosecutrix and the appellant appear to have compromised and a

compromise petition was duly filed in the Court. In the compromise petition, the prosecutrix has stated that she and the appellant belonged to neighbouring villages and she had since got married and that "she does not want that she should be put to further ignominy on account of this episode. She wants to put an end to the matter and settle happily with her husband".

3.

4. That the prosecutrix has since got married and she did not want the matter to be carried any further so as to lead a happy and healthy married life with her husband and had filed the compromise petition to that effect was an adequate and special reason to invoke the proviso (supra). While maintaining the conviction, the High Court ought to have for the reasons aforesaid, reduced the sentence to the period already undergone by the appellant. Such a course was in the interest of the prosecutrix herself.

5. In the peculiar facts and circumstances of this case, as noticed above, in our opinion, this matter should be now given a quietus particularly, when the alleged offence is stated to have taken place almost a decade ago."

14. Reverting to the present case, the Appellant Wasim has been convicted for committing the offence punishable under Section 376 IPC and sentenced to undergo RI for seven years with fine of Rs.10,000/- and in default, to undergo SI for six months.

15. As per the fresh nominal roll received today, the Appellant has undergone two years, five months and twenty nine days out of the total sentence of seven years and he has earned the remission of five months and eight days.

16. In view of the special reasons that have been brought on record by the Appellant in this case and the situation in which the Prosecutrix is placed and her plea to the Court to let her live happy and respectable life with the Appellant and 1½ years old daughter at her matrimonial home, it is ordered that while maintaining his conviction, the substantive sentence awarded to the Appellant by the learned Trial Court in this case is reduced to the period

already undergone by him in custody.

17. Prayer has also been made on behalf of the Appellant for reducing the period of sentence awarded to him in default of payment of fine. The issue of reducing the sentence awarded to a convict in default of payment of fine because of his financial condition has been dealt with by the Division Bench of Madras High Court in the case of ***M. Balasubramanian Vs. State* 2012 Cri LJ 2486**. The relevant portion of report is extracted herein below:-

“27. When a person is very poor and because of his poverty he could not pay the fine amount and is ordered to remain in jail even after the period of substantive sentence of imprisonment is over, a serious prejudice would be caused to the person. This principle has been laid down by the Apex Court in MANU/SC/3895/2007 : 2007 (11) SCC 243 (Shantilal vs. State of M.P.),

28. In the words of Justice V.R. Krishna Iyer, Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and the worth of the human person enshrined in Article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence.

It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of ' Daridra Narayanans' (land of poverty) is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the Covenant. But this is precisely the interpretation we have put on the proviso to

section 51, C.P.C and the lethal blow of Article 21 cannot strike down the provision, as now interpreted.”

18. Considering the facts and circumstances of the case and the submission made on behalf of the Appellant as well as the observations of the Madras High Court in ***M. Balasubramanian Vs. State*** (Supra), it is ordered that the period of sentence required to be undergone by the Appellant in default of payment of fine is also reduced to seven days.

19. Resultantly, appeal stands allowed to the extent that while maintaining the conviction of the Appellant under Section 376 IPC, the substantive sentence awarded to him is reduced to the period already undergone by him in this case. Further while maintaining the sentence of fine of Rs.10,000/-, the period of sentence required to be undergone by the Appellant in default of payment of fine is also reduced to seven days.

20. A copy of this order be also sent to the Jail Superintendent concerned with direction to release the Appellant after undergoing the above modified sentence, if not wanted in any other case.

Trial Court record be sent back along with copy of this order.

PRATIBHA RANI, J

NOVEMBER 28, 2014

‘st’