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IN THE HIGH COURT OF DELHI

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Date of Decision : 24.04.2009

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CRL.A.671/2003

RAJESH

...Appellant

Through : Ms.Poornima Sethi, Advocate.

versus

STATE

...Respondent

Through :Mr.Pawan Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

: PRADEEP NANDRAJOG, J. (Oral)

1. Vide impugned judgment and order dated 30.7.2003, the appellant has been convicted for the offence of raping Kumari 'M'. Vide order on sentence dated 31.7.2003 the appellant has been sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/-; in default of payment of fine he has been directed to undergo simple imprisonment for one year.

2. It is not in dispute that the appellant is the cousin of Kumari 'M'. It is also not in dispute that the appellant was

aged 19 years as on the date of the incident i.e. 16.2.2001 and Kumari 'M' was aged four years.

3. The MLC Ex.PW-10-/A evidences partial penetration into the vagina of Kumari 'M'. Though, hymen was intact but a bruise (two red spots) were noted on the left side of the hymen. The FSL report Ex.PW-12/C has reported that semen was detected on Ex.3 i.e. the pant which the appellant was wearing on the date of the incident which was seized the same day after the appellant was arrested when FIR Ex.PW-1/A was registered on 16.2.2001.

4. With reference to the testimony of Kumari 'M' finding partial corroboration thereto with reference to the testimony of her mother PW-2, the learned Trial Judge has convicted the appellant for the offence of raping Kumari 'M'.

5. Kumari 'M' aged five years on 7.5.2002 when she deposed, was obviously aged four years as on 16.2.2001. She was questioned by the learned Trial Judge to see whether she could understand the questions and answer them rationally. Finding rational answers given to seven questions put to Kumari 'M', the learned Trial Judge examined Kumari 'M' without oath. She stated that she knew Mamal who resided in the neighbourhood and one day took her to his house and firstly put his male organ in her mouth and thereafter into her

vagina. When he did so, she felt pain and cried and thereafter the appellant left her in her house. That she was bleeding from her vagina. She told about the incident to her mother. When her father came he took her to the hospital where her underwear was taken into custody by the doctor and that Ex.P-1 was her underwear.

6. In cross-examination she denied the suggestion that she sustained the injury in her vagina as a result of a fall. She denied that she was not speaking the truth and that on the day of the incident she did not tell her mother as to what had happened.

7. Moti Devi PW-2, the mother of Kumari 'M' deposed that on 16.2.2001 she and her husband had left for work. She used to sell vegetables. She had seven children. She returned home at around 3:30 / 4:00 PM and saw her daughter Kumari 'M' crying. She was bleeding through her vagina. She saw her come out of the house of the accused. Kumari 'M' told her that she was playing in the house of the accused and sustained the injuries when she fell down. When her husband returned to the house at 7:00 PM she told said fact to her husband who took Kumari 'M' to the police station to lodge a report. Moti Devi was declared hostile and was cross-examined by the learned Public Prosecutor and was confronted

with her statement recorded under Section 161 Cr.P.C. wherein it was recorded that her daughter had told her that the appellant had raped her. She denied having so stated.

8. Mohan PW-1 the father of Kumari 'M' deposed that the appellant was the son of his real brother and on 16.2.2001 he had lodged a complaint with the police. His daughter was bleeding through her vagina and she had told him that she had fallen down. Mohan was declared hostile by the learned Public Prosecutor and was confronted with his statement recorded in his complaint to the police wherein it was mentioned that his daughter had told him that the appellant had raped her. He denied having so stated before the police

9. As noted above, the learned Trial Judge has found the deposition of Kumari 'M' worthy of acceptance and has found corroboration to her i.e. Kumari 'M' being in the house of the appellant with reference to the testimony of her mother. In view of the MLC of Kumari 'M' as also the fact that the MLC Ex.PW-11/A of the appellant opines that the appellant was capable of performing sex and in view of the FSL report that semen was detected on the pant of the appellant, the learned Trial Judge has convicted the appellant.

10. Ms.Poornima Sethi, learned counsel for the appellant urges that the mother of Kumari 'M' has contradicted

the testimony of Kumari 'M'. Whereas Kumari 'M' has deposed that after committing the offence, the appellant left her at her house and she told what had happened to her mother in her house, PW-2 Smt. Moti Devi, the mother of Kumari 'M' has deposed that she saw her daughter come out of the house of the appellant and she saw that her daughter was bleeding from the vagina.

11. It is no doubt true that the mother and daughter are at variance as afore-noted. But, it cannot be ignored that either the daughter or the mother slipping on memory could be the result of the said discrepant statement. The said discrepancy is not of a nature which discredits the case of the prosecution.

12. We say so for the reason that the MLC of Kumari 'M' shows an injury in her vagina at two spots on the left side of the hymen. There is no injury on the external genitals of Kumari 'M'. We note that Dr.Chandu PW-10 who proved the MLC Ex.PW-12/A of Kumari 'M' was not even put a question by the learned counsel for the appellant, by way of a suggestion, that the injury was possible as a result of a fall. It is not the case of the appellant that he was married and was having a sex partner. He has not stated in his examination under Section 313 Cr.P.C. that he had a night fall (to explain semen

detected on the pant he was wearing). It is thus apparent that the appellant had indulged in some activity which resulted in his ejaculating semen.

13. We see no reason as to why Kumari 'M' would be speaking a lie. That her parents have violated the oath they took to tell the truth in Court is evidenced from the fact that if indeed, as deposed to by them, Kumari 'M' told them that she was bleeding from her vagina as she had fallen, it remains unexplained as to why PW-1, the father of Kumari 'M' went to the police station to lodge a complaint. Surely, nobody goes to a police station to lodge a complaint if his child falls and suffers an injury. We see no reason why the officer on duty who recorded the complaint would incorrectly record the statement of PW-1. We note that HC Jagdish PW-6 has deposed that he had recorded the statement of PW-1 in his handwriting and that on the basis of the same the FIR Ex.PW-1/A was registered. The witness has not been cross-examined. No suggestion has been put to the witness that he incorrectly recorded the statement of PW-1.

14. We accordingly hold that the learned Trial Judge has rightly convicted the appellant.

15. On the issue of sentence, learned counsel for the appellant urges that keeping in view the young age of the

appellant who was 19 years the sentence of imprisonment for life is excessive. Mr.Pawan Sharma, learned counsel for the State urges that keeping in view the young age of the victim, the sentence is adequate.

16. In our decision dated 23.3.2009 disposing of Crl.Appeal No.335/2005 Prabhu Nath vs. State we had referred to the law on the subject of sentence to be imposed in a child rape case and had opined as under:-

“5. In the decision reported as AIR 1974 SC 799 Ediga Anamma vs. State of A.P. it was opined that the young age of an offender is a mitigating factor while considering the quantum of sentence. The reason is obvious. A person is immature in his youth; meaning thereby the person cannot form a rational decision with respect to the culpability of his conduct, of course he knows that what he is doing is wrong. We have our doubt whether good conduct in jail is a mitigating factor. We find no precedent to support the same. Post offence conduct of remorse being shown by the accused is a mitigating factor as observed in the decision reported as Re. Rock 2008 All E.R. 290. The helplessness of the victim and that the victim is vulnerable i.e. a child being the victim is an aggravating circumstance on the quantum of sentence.

6. The penal code prescribes the maximum punishment for rape as imprisonment for life. Thus, the legislative intent is that in extreme cases of rape sentence to be imposed should be of imprisonment for life. Obviously, in cases less than the extreme, the sentence has to be less. What would be the instances of extreme cases of rape? First and foremost would be the acts of brutality which may accompany a rape. The second would be the trauma inflicted, other than the trauma of rape, for example where the rape victim is beaten or threatened with death, is battered etc. The third would be where the offender is in a

dominating position and breaches the confidence of a victim for example, in near relation of the victim being the offender.

7. Lack of previous criminal record is also a mitigating factor.

8. Noting that the appellant has no previous criminal record and was aged about 19 – 20 years at the time of the crime being committed, we are of the opinion that the sentence of imprisonment for life imposed upon the appellant needs to be reduced to rigorous imprisonment for 10 years.

9. In the decision reported as 2006 (1) JCC 404 Jagdish Vs. State, the prosecutrix was aged 11 years and the accused was a youth aged 19 years. Sentence to undergo imprisonment for life was reduced to 10 years and a fine of Rs.30,000/-; in default of payment of fine to undergo simple imprisonment for one year. In the decision reported as 2007 (97) DRJ 403 Virender Nanda vs State, the prosecutrix was aged 6 years and the accused was a youth, but age not recorded. Sentence to undergo imprisonment for life was reduced to 10 years and a fine of Rs.10,000/-; in default of payment of fine to undergo simple imprisonment for two years.”

17. The mitigating factors qua the order of sentence, in the instant case is the immaturity of the appellant who was aged 19 years when he committed the crime. He was not mature enough to understand the consequences of his act. Another mitigating factor is that the appellant has no previous criminal record. Though, what he has done is morally depraving but there is no evidence that he subjected Kumari ‘M’ to any brutality. There is no evidence that the appellant acted with premeditation and with a significant degree of

planning. Keeping in consideration these circumstances we are of the opinion that a sentence to undergo ten years rigorous imprisonment and pay the fine directed to be paid by the learned Trial Judge and in default of payment of fine to undergo further imprisonment as directed would be the appropriate sentence to be passed against the appellant.

18. Insofar the appeal challenges the impugned judgment and order convicting the appellant, the same is dismissed. Insofar the appeal challenges the order of sentence, the same is partially allowed. The order of sentence is modified. The appellant is sentenced to rigorous imprisonment for ten years and to pay a fine of Rupees Ten Thousand; in default of payment of fine to undergo simple imprisonment of one year. If the fine is realized the same shall be paid to Kumari 'M'. Needless to state, the appellant would be entitled to the benefit of Section 428 Cr.P.C.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

April 24, 2009

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