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

Date of Hearing & Decision : 18th April, 2011

+ **CRL.L.P. 9/2011**

STATE

..... Petitioner

Through: Mr. Jaideep Malik, APP for the State.
versus

RAJENDER MADAL @ MAMA

.....Respondent

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE G. P. MITTAL

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

J U D G M E N T

S. RAVINDRA BHAT, J (OPEN COURT)

1. In this petition the State seeks leave to appeal against the judgment and order of the learned Addl. Sessions Judge dated 04.05.2010 in SC No.99/2010.

2. The respondent was accused of having committed the offence under Section 376 IPC. It was alleged that the prosecutrix, a minor girl of tender age was admitted in the Hospital and her medical certificate was obtained. The prosecutrix's father's statement was recorded; he stated that his daughter aged 4 years, was playing with one neighbour Kishan on the rooftop around 5:30 PM on the relevant date. His neighbour Chatri Devi brought the prosecutrix who was weeping; on enquiry he found blood on her undergarments. She was unable to disclose anything to her father as she was frightened. In these circumstances, she was taken to Hospital where the prosecutrix's father learnt that she has been

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raped. The Police investigated the allegation against the accused/ respondent and sent him for trial. Charges were framed. Respondent entered the plea of not guilty and claimed trial.

3. The prosecution relied mainly on the testimony of victim and PW-19 the IO of the case, as well as the father's deposition. After considering the evidence on the record, the Trial Court acquitted the respondent of the rape charge. The relevant part of the discussion is as follows: -

“9. Coming to the deposition of the prosecutrix as PW1. On the basis of question/ answer put to the witness by the Ld. Predecessor of this court, the child being of tender age was not examined on Oath. In her deposition, the prosecutrix has deposed that one day she was playing on the roof and she was living at the time on the ground floor and that she knew the accused Rajender Mandal as he was residing on the upper floor of her house and that the accused told her that he would give her a chocolate and thereafter she went to the accused and the accused put his hand over her vagina and due to which there was bleeding and that one Kishan, her neighbor, was also playing on the roof who informed her that there was bleeding from her person and that the accused did wrong act with her by putting his hand over her private parts where there was bleeding and that her parents were present at the house to whom she told about the incident and that she was wearing underwear and the shirt which she identified as Ex. P1 and Ex. P2 respectively.

10. In her cross-examination, she was asked about her tutoring to which she denied. She could not tell as to how she came down to the ground floor after the incident. She replied that she did not know any lady by the name of Chatri Devi.

11. Her said deposition has been corroborated by PW2 namely Kishan who deposed that he and the prosecutrix were playing on the roof of the house and he knew the accused present in court but he did not know the name of the accused and that the accused lifted the prosecutrix and took her in the room and that he (the witness) remained on the roof and that when the prosecutrix came out from the room, he saw bleeding over her leg and she was taken by her mother. In his cross-examination also nothing came on the surface against his deposition being false.

12. *The medical evidence i.e. MLC Ex. PW10/A even if it is taken as it is, go to show that sexual assault cannot be ruled out but the question before the court is as to whether the rupturing of the vagina of the prosecutrix was due to the act of sexual intercourse by the accused or by penetration of some external object such as finger etc. and further question is as to whether the accused has been linked to the act of penetration of the penis, howsoever little it may be, in the vagina of the prosecutrix.*

13. *Even if I consider the prosecutrix to be of such a tender age as is reflected in the case, but there is no circumstantial evidence even to connect the accused with the actual act or even act of attempt to rape. As such, the accused is entitled to the benefit of doubt towards the offence u/s 376 IPC.*

14. *However, a female may be a child of tender age, she may be under anesthesia, she may be of unsound mind, but no person has a right to outrage the modesty of the female. The female possesses the modesty by virtue of her birth as a female and as such, it cannot be contended against her that she was a child not understanding the modesty. In the present case, pointing out of PW1 towards the accused, her deposition regarding her inducement by way of chocolate and her following and coming near to the accused and deposing that accused put his hand over her vagina and that was the wrong act committed by the accused with her, is without any exception and has been proved beyond reasonable doubt. As such, taking help of sub clause (2) of Section 222 of the Code of Criminal Procedure, the accused is hereby found guilty and convicted u/s 354 IPC although he has not been charged with the same.”*

4. As is evident from the above discussion, the Court found that the evidence was insufficient to find the accused/ respondent guilty of Section 376 IPC. However, in exercise of power under Section 222 (2) of Cr.P.C., the Court found that materials were sufficient to convict the accused under Section 354, doing so and sentenced him to punishment; a direction that the period undergone was to be adjusted was made by virtue of Section 428 Cr.P.C.

5. The learned APP for the State argued that the prosecutrix was so scared of the incident that when she was produced before the learned Metropolitan

Magistrate (Mr. Vinod Yadav PW-17) to record her statement under Section 164 Cr.P.C., she was crying and her statement could not be recorded. The learned APP argued that the medical evidence, i.e. MLC Ex. PW-10/A shows tear introitus (L) side, the prosecutrix was found bleeding per vagina, which would be sufficient to hold the respondent guilty of the offence punishable under Section 376 IPC.

6. This is true that as per the MLC Ex. PW-10/A, the doctor found a small tear over introitus. The prosecutrix was also found bleeding per vagina. Dr. Renu Sehgal, who examined the prosecutrix opined that an attempt to sexual assault could not be ruled out.

7. When the prosecutrix was produced before the learned Metropolitan Magistrate for recording her statement under Section 164 Cr.P.C., she was found crying. Considering her tender age (of about 4 years) she was not found fit to make statement. The Metropolitan Magistrate observed that even with a reference to the *mama* (nick name of the respondent) the prosecutrix went into a state of shock and started weeping uncontrollably.

8. To form an opinion regarding commission of an offence of sexual assault the Court has to correlate the testimony of the prosecutrix with the medical evidence. The prosecutrix as PW-1 stated *“One day I was playing on the roof. I live on the ground floor. I know accused Rajender Mandal present in the court. He lives on the upper floor of my house. The accused told me that he would give me chocolate then I went to accused. The accused put his hand over my vagina and due to which there was bleeding. One Kishan, my neighbourer was also playing on the roof. He told me that there was bleeding from my person. The accused did wrong act with me by putting his hand over my private parts which there was bleeding. My parents were present in our house. I told them the incident, as narrated by me”*. Thus, the prosecutrix had described the act of respondent to be “wrong act” as the respondent had put his hand on the private

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parts, which resulted into bleedings per vagina. Unfortunately, the law as it stands now does not cover the offence within the definition of rape as defined in Section 375 IPC. In *Sakshi v. Union of India*, AIR 2004 SC 3566, the Supreme Court observed that all forms of penetration such as penile/ vaginal penetration, penile/ oral penetration, penile/ anal penetration, finger/ vaginal and finger/ anal penetration and object/ vaginal penetration could not be interpreted to include within the provisions of Section 375 IPC. On the basis of the observations of the Supreme Court in *Sakshi v. Union of India*, the Criminal Law (Amendment) Bill 2000 has been prepared, which is pending consideration before the Parliament. Thus, the trial court rightly concluded that there was insufficient evidence to find that the respondent had committed the offence of rape, as alleged by the prosecution. The trial court rightly convicted the accused for the offence of indecent assault punishable under Section 354 IPC.

9. The legislature has advisedly not granted an appeal to the State where an accused is acquitted of the offence. The State has to seek leave to prefer an appeal. The standard for entertaining and granting leave has been presented and applied for over five or more decades. The Court has to be satisfied that there is a substantial error or there should be a compelling reason to take a second look into the impugned judgment. Having regard to the overall circumstances, this Court is of the opinion that the findings of the trial court regarding the guilt of accused/ respondent on the charge of having committed rape has not been made out, is correct. The petition, for these reasons has to fail, and is dismissed.

S. RAVINDRA BHAT, J

G. P. MITTAL, J

APRIL 18, 2011/hs