

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

RESERVED ON : February 04, 2013

DECIDED ON : February 20, 2013

+ CRL.A.No.598/2000

RAJESH

..... Appellant

Through : Mr.M.L.Yadav, Advocate.

Versus

STATE OF DELHI

..... Respondent

Through : Mr.M.N.Dudeja, APP for the State.

CORAM:

MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant-Rajesh impugns his conviction in Sessions Case No.66/1999 arising out of FIR No.188/99 registered at Police Station Mansarovar Park by which he was found guilty for committing offence under Section 376 IPC and sentenced to undergo RI for ten years with fine of ₹5,000/-.

2. Allegations against the accused were that on 09.08.1999 at 10:30 A.M. at house No.C-26, Gali No.13, Nathu Colony, Shahdara, Delhi, he committed rape upon 'X' (assumed name) aged about three years. The prosecution examined 11 witnesses. In his statement under Section 313 Cr.P.C. the accused pleaded innocence. He stated that he was

falsely implicated as X's father was compelling his mother to sell their house to enable them to extend and rebuilt their house. On appreciation of the evidence and considering the rival contentions of the parties by the impugned judgment the accused was convicted and sentenced. Being aggrieved, the accused as preferred the present appeal.

3. Contention of the learned counsel for the appellant is that the Trial Court did not appreciate the evidence and documents on record in its true and proper prospective and fell in grave error to base its conviction on the sole testimony of X's mother. She did not claim that the prosecutrix was sexually assaulted. She did not clarify what she meant by '*gandi baat*'. No injuries were found on the body of the prosecutrix. Her hymen was intact. At the most, it could be a case under Section 354 IPC i.e. outraging the modesty of the child. No independent public witness was associated at any stage of the investigation. Learned Additional Public Prosecutor urged that the conviction does not call for any interference. There was no delay in lodging the report. Statement of the mother of the prosecutrix has been corroborated by medical evidence.

4. I have considered the submissions of the parties and have examined the record. The case of the prosecution is based upon circumstantial evidence. 'X' was not examined under Section 161 Cr.P.C.

Her statement under Section 164 Cr.P.C. was also not recorded. She was not produced in the court as she being a child was unable to understand the questions put to her and give rational answers. PW-6 (Kamlesh), 'X's mother, did not witness the occurrence.

5. The incident took place on 09.08.1999 at about 10:30 A.M. Daily Diary (DD) No.10/A (Ex.1/C) was recorded at 12:05 noon at Police Station M.S.Park on getting information that a child aged three years was raped and the person who had committed it was apprehended. The investigation was assigned to Head Constable Gyanender who with Constable Narender reached the spot and met 'X' and her mother. The accused was also present there. 'X' was taken to hospital for her medical examination. Statement of Kamlesh, 'X's mother, was recorded and Head Constable Gynender lodged First Information Report after preparing rukka (Ex.PW-1/A) at 02:30 P.M. There was no delay in lodging the First Information Report. In her statement (Ex.PW-6/A), Kamlesh gave detailed account as to how and under what circumstances Rajesh committed rape upon 'X'. Since the rukka was sent promptly there was least possibility of false fabrication.

6. PW-6 Kamlesh is a crucial witness. In her statement before the Court, she deposed that Rajesh was the son of her husband's maternal

uncle. On 09.08.1999 at about 10:30 A.M. she was present in the room on the ground floor. The accused went to the roof of her house for taking kite. While going upstairs, he took 'X' with him and returned after five minutes. Her daughter came down weeping. She consoled her daughter and inquired why she was weeping. She told her that Rajesh committed rape (uske saath gandi baat ki hai). At the first instance, she failed to understand. She again asked 'X' who repeated the same. Thereafter, she went upstairs and saw that bed sheet of the double bed in the bed room was lying folded/scattered. 'X' told her that Rajesh had done 'gandi baat' on the said double bed sheet. She immediately checked the undergarments of her daughter and found a little blood on it. She came down and went to the house of the accused and caught hold of him. She informed PCR at 100 number. She handed over his custody to police. Her statement (Ex.PW-6/A) was recorded. In the cross-examination, she disclosed that her daughter was three years old and used to speak without fluency (tutlakar). She used to understand what she said but others could not. She explained that on finding blood stains on the undergarments of the child, she doubted that the accused had committed rape. She denied that they wanted to purchase the house of the accused and due to enmity, she implicated him.

7. On scrutinizing the testimony of the prosecutrix's mother, it reveals that no material discrepancies have emerged to discard her version. No ulterior motive was attributed to her for falsely implicating the accused. Nothing has come on record that the relations between the accused and the family of the 'X' were hostile on any issue. On the day of incident PW-6 (Kamlesh) had permitted the accused to go upstairs of her house to get kite. She had not restrained her 'X's to accompany him. Apparently, she did not doubt the evil design of the accused. The accused was last seen with the child and within five minutes, the child sustained injuries on her body. During this period 'X' remained in the company of the accused and none else intervened. It was for the accused to explain under Section 106 of the Evidence Act as to how and under what circumstances the child sustained injuries on her private organ. The accused did not offer any explanation. PW-6 was specific that soon after the occurrence, 'X' told her that the accused had done 'gandi baat' with her. She explained that by 'gandi baat' she meant 'rape'. Material facts deposed by Kamlesh remained unchallenged and uncontroverted in cross-examination.

8. The prosecutrix was medically examined at 01:45 P.M. MLC (Ex.PW-8/A) mentions that the child was brought with the alleged

history of rape at 10:30 A.M. Name of the accused to be the perpetrator of the crime also finds mention. In the MLC (Ex.PW8/A), the doctor noticed '*laceration at the fourchette*'. PW-8 (Dr.Savita) proved the MLC prepared by her. She fairly stated that hymen was intact and the patient was not bleeding. She further admitted in the cross-examination that laceration wound could be caused because of friction on any rough surface like cot. The child was in the company of the accused when she got laceration at fourchette. The accused did not explain as to how 'X' got laceration on fourchette. As per Modi's 'A Textbook of Medical Jurisprudence And Toxicology 24th Edition', "the fourchette and posterior commissure are not usually injured in cases of rape, but they may be torn if the violence used is very great. The extent of injury to the hymen and the genital canal depends upon the degree of disproportion between the genital organs of both the parties and the violence used on the female. In small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum." There is thus no inconsistency between the oral and medical evidence. As per CFSL report (Ex.PW10/D-1, D-2 and D-3) human semen 'AB' group was detected on Ex.3b (Pant) which proved that

the accused had discharged at the time of committing the act. Blood was detected on Ex.1 (underwear), Ex.3a [one T-Shirt (Banian)], Ex.5 (bed sheet). The report of Central Forensic Science Laboratory is in complete consonance with the statement of the prosecutrix's mother. There is no substance in the submission that no sexual intercourse took place with the child. The fact that hymen was intact is not determinative either way. It cannot be said that no such act had taken place because hymen was intact. Intercourse in this case was with a small child aged three years. There might not be full penetration. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary.

9. I have no reasons to discard the statement of 'X's mother who had no ulterior motive to falsely implicate the accused who was their relative and with whom they had no animosity. Her testimony appears truthful and trust-worthy being without any embellishments and exaggerations. Her own daughter was ravished and her honour was at stake. It is improbable that 'X's parents would set up such a false case for alleged trivial benefit to buy the property of the accused. In the light of the above discussion, I am of the view that the conviction of the accused is based upon fair and cogent appraisal of the evidence and no interference

is called for. The appeal lacks merit and is dismissed. The conviction and sentence of the appellant are maintained. The appellant is directed to surrender and serve the remainder of his sentence. For this purpose, he shall appear before the Trial Court on 27.02.2013. The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment.

(S.P.GARG)
JUDGE

February 20, 2013

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