

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

Reserved on: 28th February, 2013

Pronounced on: 5th March, 2013

+ **CRL.A. 371/2012**

SAJID @ SALMAN

..... Appellant

Through: Mr. Joginder Tuli, Adv. with
Mr. Tarun Nanda, Adv.
Ms. Ashu Sharma, Adv.
Ms. Neha Bahal, Adv.

versus

STATE

..... Respondent

Through: Ms. Jasbir Kaur, APP for the State.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. This Appeal is directed against a judgment dated 03.11.2011 and an order on sentence dated 15.11.2011 passed by the learned Additional Sessions Judge ('ASJ') whereby the Appellant was held guilty for the offences punishable under Sections 376/506(II) of the Indian Penal Code (IPC) and was sentenced to undergo Rigorous Imprisonment for seven years with fine of ₹2,500/- and in default of payment of fine to undergo Simple Imprisonment for six months under Section 376 IPC; and further to pay fine of ₹500/- and in default of payment of fine to further undergo SI for one month under Section 506 Part II IPC.
2. The facts of the case can be extracted from Paras 1 and 2 of the impugned judgment hereunder:-

"1. Case of the prosecution is that FIR No.159/2008 was registered u/s 376/506 IPC on 16.4.2008 in PS Okhla Industrial

Estate on the statement of the 16 year old prosecutrix (name withheld) that she is an illiterate girl. Sajid (accused) used to work as a Tailor in a factory in front of her house and he is her brother by a distant relationship. She became acquainted with him. About four months ago when her mother had gone to her village in Barrailly, She was alone in the house as her father and brother used to go out of house for work. Sajid, one day, came to her house when she was alone and despite her resistance, he committed rape upon her. On various other occasions, Sajid committed rape upon her in the absence of her mother and intimidated her that she and her father would be killed if she revealed this to anyone. The prosecutrix got frightened and did not tell anyone about it. When her health deteriorated, she was taken to a Doctor where it transpired that she was three months' pregnant. She told about the incident to her parents and her father took her to the police station. Her statement was recorded in the police station and FIR was registered.

2. Next day, the prosecutrix was got medically examined in AIIMS where she was found to be 19-20 weeks pregnant. The accused was arrested on 3.6.2008. He was also medically examined in AIIMS where the attending doctor did not find anything suggestive of any incapacity of the accused to perform sexual intercourse in ordinary circumstances. Statement of the prosecutrix was also recorded u/s. 164 Cr.PC and after completion of investigation, charge sheet was filed against the accused and since the offence of 'rape' was exclusively triable by the Court of Session, the matter was committed to the Sessions Court for trial. The accused was charged u/s. 376 IPC, to which he pleaded not guilty and claimed trial.

3. The only contention raised by the learned counsel for the Appellant is that the sexual intercourse with the prosecutrix was with her consent. When the factum of the prosecutrix becoming pregnant was discovered by the prosecutrix's mother she (the prosecutrix) in collusion with her parents leveled false allegations of rape against the Appellant.
4. The learned counsel for the Appellant argues that the consensual sexual intercourse was converted into rape by the prosecutrix which is proved

from the circumstances under which the act of rape was disclosed for the first time by the prosecutrix.

5. On the other hand, learned APP for the State argues that it is not believable that false allegations of rape would be leveled by a young unmarried girl. The fact that the prosecutrix got pregnant speaks volume about the sexual intercourse performed on the prosecutrix against her consent.
6. To appreciate the contention raised by the respective parties, it would be appropriate to extract the prosecutrix's statement recorded by the learned Additional Sessions Judge ('ASJ' as under:-

"I know accused Sajid present in the court today as he used to reside in front of my house. About an year ago my mother was away to Bareilly those days and I was alone at my home. My father also used to leave in morning for his work. One day accused Sajid came to my house when I was alone and committed rape upon me. Thereafter, on several occasions he committed rape upon me. Whenever he got an opportunity he used to commit rape upon me. He also threatened me if I disclose about this to anybody he will kill my father. Out of this fear, I did not tell anything to anybody. As I started remaining sick, my mother took me to a Doctor, who told us that I was three months pregnant. Upon this, I disclosed everything to my mother and father. I was taken to the police station and my statement was recorded which is upon Ex.PW2/A bearing my R.T.I. at point A. I was also medically examined.

My statement was also recorded in the court. At this stage, a sealed brown envelope sealed with the seal of SK containing statement of prosecutrix is opened and shown to the witness. Ex.PW2/B is the same statement bearing my R.T.I. at point A.

Accused Sajid who committed rape upon me is present in the court today. (Witness correctly identifies the accused).

XXXXXXXXXX by Sh. Rajid Jain, Adv. for the accused.

I do not remember my residential address at the time, when the complaint about this incident was lodged. I can tell my address prior to that address, which is H.No.730/22. We had shifted in the

present address, two years back. The rape was committed upon me in H.No.730/22. The said house had four storeys. We were residing at second floor of the said house. On the said floor, besides us, one another family and few boys were also residing. The said family was comprising of husband, wife and two children. Husband used to leave for work and the wife used to remain in the house. Other boys who were residing in the said floor used to leave for work. Our rooms were situated at some distance of about 1-2 ft. On the ground floor and first floor the work of 'zari' was carried out by few workers but I cannot say the exact number of workers. It might be around 10/20 workers and they used to come to their duty at about 9 am and leave around 6 pm.

I did not raise alarm when accused had started committing rape as he had threatened me. I did not raise alarm even after the commission of the rape because of the said reason. I had not narrated the incident to my father when he returned back from his house in the evening because of being threatened. I had not raised alarm on any occasion whenever accused used to commit rape me because of his threats. My mother had returned back from village after one month of the incident. I had not told to my mother about the incidents. It is wrong to suggest that I was not afraid because of the threats of the accused after commission of rape till the filing of complaint.

I do not know any boy namely Dilshan. It is wrong to suggest that I was having an affair with one Dilshan and having sexual relation with him. It is wrong to suggest that accused was causing hindrance in my meeting with Dilshan by telling that he will tell about the relation to my parents and when I became pregnant, I had falsely implicated the accused in order to save Dilshan being my close friend. It is wrong to suggest that I have deposed falsely. It is wrong to suggest that I was not threatened by the accused or that accused never committed rape upon me."

7. In the statement under Section 164 Cr.P.C. recorded during investigation of the case on 22.08.2008, the prosecutrix gave her age as 16 years and 8 months. The alleged offence of rape was committed sometime in January, 2008. Thus, according to the prosecutrix herself she was above 16 years on the date of the alleged offence. Similarly, PW-3 Mohd. Munne, the prosecutrix's father gave the age of the prosecutrix to be 18 years on

13.01.2010. Thus, as per the prosecutrix's father also she was aged above 16 years on the date of the alleged offence. Thus, if it is proved that the sexual intercourse with the prosecutrix was with her consent, the Appeal would succeed.

8. There is a delay of about four months in lodging the report with the police. The Court has to discount some delay in lodging the report in rape cases on account of various reasons including initial hesitation on the part of the prosecutrix and her family members to lodge the report lest it may bring shame to the family and adversely affect the prosecutrix's marriage prospects.
9. In *State of Rajasthan v. N.K.*, 2000 (5) SCC 30 the Supreme Court held that *"mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case overboard. The court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the court it cannot be counted against the prosecution."*
10. It is well settled that the testimony of a prosecutrix who is victim of sexual assault cannot be compared with that of an accomplice in a crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. The Courts sometimes look for an assurance when it is not convinced or there are doubts in the case of the prosecution.
11. I have already extracted above the prosecutrix's testimony. According to her rape was committed on her for the first time by the Appellant when she was alone in the house and her mother was away to the village. She says that thereafter the Appellant committed rape on her on several occasions as per his convenience. She went on to add that he threatened

her that he would kill her and her father if the act was disclosed. She deposed that out of fear she did not disclose this fact to anybody till she had to go to the doctor for her general check up because of her ill health where it was discovered that she was three months pregnant.

12. It has to be borne in mind that the Appellant was the prosecutrix's neighbour. It is true that a young girl of 16-17 years can be overpowered by a young boy of 22 years. He may also keep the young girl under fear and forcibly commit rape on her. The prosecutrix has not come up with any reason as to why she continued to be under fear for a period of almost four months.
13. Thus, although the Courts do not insist on corroboration of the testimony of the victim of a sexual assault, however, in the instant case, it would be difficult to rely on her testimony without corroboration particularly when the explanation for the delay of four months in lodging the FIR is not very convincing.
14. The rule relating to corroboration of the version of the prosecutrix in a case of rape was based on the ground that it was easy to make allegations of rape and difficult to repel them. Even when the alleged victim is a consenting party, she may, when an act of sexual intercourse has been discovered, alleged rape only to protect her honour and reputation.
15. It is important to note that the act of rape is alleged to have been committed on the second floor of a four storey house. PW-2 (the prosecutrix) admitted in her cross-examination that on the same floor another family and some boys used to reside at the time of the incident. The prosecutrix has not given any explanation as to how the Appellant would find her all alone to commit rape on her. PW-2 admitted that there were 10-20 workers carrying out work of 'zari' on the ground floor of the

premises. It is not believable that the Appellant would have sexual intercourse with the prosecutrix against her will without anybody knowing the same. The prosecutrix says that her mother returned from the village after one month. If the sexual intercourse was committed upon the prosecutrix against her consent by extending any threat, she would have confided with her mother and disclosed the same

16. Thus, it is evident that the prosecutrix disclosed the alleged sexual intercourse by the accused with her when it was discovered that she was three months' pregnant. All the circumstances, narrated above would indicate that the sexual intercourse was with her consent and she (the prosecutrix) alleged rape only when she had to prove her to be innocent before her parents.
17. In view of the above discussion, the prosecution has failed to establish that the sexual intercourse with the prosecutrix was against her will or without her consent. On the other hand, the circumstances indicate that the prosecutrix was a consenting party. Since the prosecutrix was more than 16 years, the learned ASJ erred in holding the Appellant guilty of the offence punishable under Section 376 IPC.
18. The Appeal succeeds. Consequently, the impugned order is set aside and the Appellant is acquitted of the charges; he is ordered to be released forthwith, if not wanted in any other case.
19. Pending application also stands disposed of.
20. Copy of the order be sent to the Superintendent Jail for information and compliance.

(G.P. MITTAL)
JUDGE

MARCH 05, 2013/vk