

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

RESERVED ON : 17th NOVEMBER, 2015

DECIDED ON : 5th JANUARY, 2016

+ CRL.A. 557/2013
RAJ KISHORE @ RAJ KUMAR Appellant

Through : Mr.S.B.Dandapani, Advocate.
versus

THE STATE (GNCT OF DELHI) Respondent

Through : Mr.Amit Ahlawat, APP.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is to a judgment dated 07.11.2012 of learned Addl. Sessions Judge in Sessions Case No.18/2012 arising out of FIR No.53/2012 PS Shalimar Bagh by which the appellant – Raj Kishore @ Raj Kumar was held guilty for committing offences punishable under Sections 342/354 and 376 IPC read with Section 511 IPC. By an order dated 17.11.2012, he was awarded RI for one year under Section 342 IPC; RI for two years under Section 354 IPC and RI for five years with fine ₹10,000/- under Section 376 read with Section 511 IPC. All the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 29.02.2012 at around 01.30 p.m. at Jhuggi No.150, Dharna Camp, Haiderpur, Delhi, the appellant committed rape upon the prosecutrix 'X' (assumed name) aged around 14 years after wrongfully confining her there. 'X' made statement (Ex.PW-11/A) and the Investigating Officer lodged First Information Report on 01.03.2012 at around 01.00 a.m. 'X' was medically examined. Exhibits collected during investigation were sent for examination to Forensic Science Laboratory. The accused was arrested. Upon completion of investigation, a charge-sheet was filed against the appellant for committing offences under Sections 342/376 IPC. The appellant was charged for commission of the said offences by an order dated 24.07.2012 to which he pleaded not guilty and claimed trial. In order to establish its case, the prosecution examined 24 witnesses in all. It is relevant to note that when the statement of the prosecutrix was underway, additional charge under Section 354 IPC read with Section 325 IPC were framed by an order dated 12.09.2012 to which the accused pleaded not guilty. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. After considering the rival contentions of the parties and on appreciation of the evidence, the Trial Court, by the impugned judgment, held the appellant

guilty for commission of the offences mentioned previously. State did not challenge appellant's acquittal under Section 376 IPC. Aggrieved by the said orders, the appellant has filed the instant appeal.

3. I have heard the learned counsel for the parties and have examined the file. Appellant's conviction is primarily based upon the solitary statement of the prosecutrix 'X' which has not been corroborated by any other independent source. Needless to say, conviction can be based on the sole testimony of the prosecutrix provided it lends assurance of her testimony. In case, the Court has reasons not to accept the version of the prosecutrix on its face value, it may look for corroboration.

4. In the instant case, the occurrence took place at around 01.30 p.m. on 29.02.2012. The FIR was not lodged promptly. Only during the night intervening 29.02.2012 and 01.03.2012 at about 01.00 a.m. after recording victim's statement (Ex.PW-11/A) the Investigating Officer registered the case under Sections 342/376 IPC. It is pertinent to mention that at not stage prior to that, the prosecutrix or her family members had reported the incident to the police. No DD entry to that effect came into existence. In the complaint (Ex.PW-11/A), 'X' gave detailed account of the incident and informed the Investigating Officer that when her mother had gone outside to work as 'maid' and her siblings were playing in the

park, her neighbour – Raj Kishore called her inside his jhuggi to clean it. When she went inside the jhuggi, the accused closed its gate and switched off the light. She was made to lie on the bedding on the floor and after putting off her salwar, he committed rape upon her. Apparently, ‘X’ was very categorical that the accused had established physical relations with her forcibly against her wishes. ‘X’ was taken for medical examination on 29.02.2012 at 10.40 p.m. No external injuries were seen on her body including private parts at the time of her examination; her hymen was found torn. MLC (Ex.PW-7/A) is, however, silent if there was any fresh bleeding. In her Court statement as PW-11, ‘X’ introduced a new version. She deposed that on 29.02.2012, when she went to Raj Kumar’s room on his call to clean it, he put the kundi of the door and made her to lie down on the floor (kundi lagane ke baad zamin pe lita diya). He, thereafter, removed her salwar and started playing with her (zabardasti khel raha tha). At this juncture, a Court question was put as to what she meant by “Zabardasti khel raha tha?” She responded “Deh par chadh gaya”. Thereafter, he put his hand (ungli) into her vagina (hath ander dal diya tha). She started screaming and on hearing her cries, her brother Rajesh came there. She immediately got up, wore her salwar, opened the ‘kundi’

and ran out. Her brother Rajesh saved her. When her mother returned to the house in the afternoon, she informed her about the occurrence.

5. 'X' did not state if physical relations were established by the accused with her forcibly against her wishes that time. She elaborated that thereafter her statement (Ex.PW-11/A) recorded; she was medically examined. In the evening, the accused was arrested from his room vide arrest memo (Ex.PW-11/B). At this stage, the learned Presiding Officer observed that the prosecutrix had made allegations of digital rape by the accused. Hence additional charges under Section 354 read with Section 325 IPC were required to be framed against him. Accordingly, the accused was charged for commission of the said offences. It was further observed by the Court that the child was not mentally developed and was getting thoroughly confused. The Presiding Officer again put up her a specific question "Beta kya aap hame sari baat batayenge ki Raj Kishore ne kya kiya tha?" To this, she answered "Raj Kishore uncle ne mere ander susu dala tha aur uske baad mujhe uper leta kar mere ander ungli bhi dali thi." In the cross-examination, 'X' admitted that there were large numbers of children playing outside in the gali. She did not raise any alarm when the accused had removed her salwar. She volunteered to add that only when the accused forcibly started playing with her, she shouted and

screamed. A Court question was put to ascertain for how much time she remained present at the house of the accused after she was called there. To which, the prosecutrix informed that it was for 'one' minute. Again, Court observations were made that 'X' was having no sense of time. In further cross-examination, she disclosed that when her brother saved her, she apprised a lady passing through the gali as to what the accused had done. She was unable to tell the name of the said lady / aunt despite Court asking the question.

6. On scanning the testimony of the prosecutrix as a whole, it reveals that she has made vital improvements in her deposition before the Court. In her initial version (Ex.PW-1/A), there was no mention if the accused had fondled with her private part or had inserted finger / hand. Specific case of the prosecutrix that time was that she was raped by the accused forcibly against her wishes. In her Court statement, she was not certain and specific, if the accused has established physical relation with her. Initially, she disclosed that the accused had only fondled with her inside the house. When she was asked Court questions by the learned Presiding Officer, she came up with the plea that the accused had inserted his male organ in her female organ. The Trial Court did not believe the said version of the prosecutrix. The Trial Court was of the view that the

prosecution was able to establish that an 'attempt' was made by the accused to commit rape upon the prosecutrix. This was neither the case of the prosecution nor of the prosecutrix. A new case was introduced by the prosecutrix in her statement before the Court and it led the Trial Court to frame additional charges under Section 342 read with Section 325 IPC. It is relevant to note that the learned Addl. Public Prosecutor did not move any application for amendment / alteration of the charge.

7. PW-17 (Rajesh), X's brother who had allegedly saved her at the spot did not corroborate X's version in its entirety. He merely deposed that when he was going to his house after playing, he saw 'X' coming out of the house of the accused and she was perplexed. When he enquired as to what had happened, 'X' started 'running'. He chased her and caught hold of her near the house of his 'bua'. When he enquired from her as to what had happened, she told that 'nothing' had happened. He caught hold of her and confined her inside the room. Thereafter, he made telephone call to her mother who had gone to work as maid and asked her to come immediately to the house as Rakesh, his younger brother had fallen. The witness is conspicuously silent if he had saved her sister from the spot as claimed by the prosecutrix. He did not depose if he had reached the spot on hearing X's cries or that he had found her without salwar. In the

complaint (Ex.PW-1/A) also there is no mention of arrival of her brother Rajesh at the spot. This witness did not state if the prosecutrix had informed him about the commission of rape by the accused.

8. FSL reports (Ex.PW-8/A and Ex.PW-8/B) do not connect the appellant with the crime. Semen could not be detected on exhibits – Ex.‘Q-1a1’ (One lady’s shirt), Ex.‘Q-1a2’ (One salwar), Ex.‘Q-1b1’ (One brassier), Ex.‘Q-1b2’ (One underwear), Ex.‘Q-1b3’ (One cloth piece), Ex.‘Q-1c’ (One plain paper along with a nail cutter described as nail scrappings), Ex.‘Q-1d’ (Cotton wool swab on a stick described as in between fingers), Ex.‘Q-1e (Cotton wool swab on a stick described as breast swab), Ex.‘Q-1f1’ & ‘Q-1f2’ (Two microslides described as ‘Oral swab’), Ex.‘Q-1g’ (Plain paper along with a comb described as ‘Combing of public hair’), Ex.‘Q-1h’ (Small hair clippings along with a scissors described as ‘Clipping of pubic hair’), Ex.‘Q-1i’ (Cotton wool swab on a stick kept in a test tube described as ‘Cervical mucus collection’) and Ex.‘Q-1j1’ & ‘Q-1j2’ (Two microslides having faint smear described as ‘Vaginal secretion’ kept in a plastic case).

9. The prosecutrix is stated to be aged around 14 years. However, the Investigating Officer did not collect any cogent document to ascertain her exact date of birth. She was taken for ossification test on

15.03.2012 and as per ossification report (Ex.PW-9/A) her estimated age was between 14 – 16 years. PW-18 (Santosh Devi), X's mother informed the Court that on enquiry from the prosecutrix as to what had happened, she had told her that the accused had put his 'hand' on her private parts after removing her salwar (Salwar kholne ke baad haath lagaya). She did not state if the prosecutrix had disclosed that she was sexually abused by the accused against her wishes or an attempt was made by him to commit rape upon her. She further disclosed that the 'X' was suffering from physical deformity by birth. The impugned judgment records that at the time of her examination on 12.09.2012, she was produced from Nirmal Chhaya. It records that the prosecutrix had been sent to Nirmal Chhaya because her mother had pointed out to the Court that due to her mental retardation, she often used to run from the house and even a kidnapping case had been registered and she could not be found on one occasion. The medical documents on record do not reflect if 'X' is mentally retarded.

10. The accused is also physically disabled. Order-sheet dated 06.07.2012 records that he was produced from judicial custody on a wheel chair. He explained to the Court that he was paralytic by one leg for the last ten years and had also sustained injuries on the other leg too. Sentence order also records that the accused was suffering from paralysis having no

family member to look after him. Possibility of the accused to have physical relations with the prosecutrix against her wishes forcibly seems doubtful.

11. The prosecutrix has given divergent statements and has introduced a new case which did not find mention in her initial complaint (Ex.PW-1/A) to the police. The Trial Court also did not believe the prosecutrix in its entirety about commission of rape by the accused. 'X' omitted to disclose in her complaint (Ex.PW-1/A) if the accused had fondled with her private parts. A new case was introduced during her statement recorded before the Court for the first time. Statement of the prosecutrix was not recorded under Section 164 Cr.P.C. Medical evidence is not supportive to the prosecution case. No external injuries were found on the body of the prosecutrix ruling out 'force' used by the accused to ravish her. FSL reports absolve the accused of commission of rape. There are major inconsistencies in the statement of the prosecutrix and her brother – PW-17 (Master Rajesh) which make their statements unworthy of credit. Case of the prosecution suffers from inherent inconsistencies and flaws and the statement of the prosecutrix cannot be taken on its face value to base conviction.

12. In view of the above reasoning, the appeal filed by the appellant is allowed giving benefit of doubt. Conviction and sentence recorded by the Trial Court are set aside. The appellant shall be released forthwith if not required to be detained in any other criminal case.

13. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

JANUARY 05, 2016 / *tr*