

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

**RESERVED ON : 16th SEPTEMBER, 2015
DECIDED ON : 5th OCTOBER, 2015**

+ CRL.A. 233/2013

RAJESH Appellant

Through : Mr.Jivesh Tiwari, Advocate.

VERSUS

STATE Respondent

Through : Mr.Sanjeev Sabharwal, APP.

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

S.P.GARG, J.

1. Aggrieved by a judgment dated 04.08.2011 of learned Addl. Sessions Judge in Sessions Case No.44/10 arising out of FIR No.87/10 PS Dabri by which the appellant – Rajesh was convicted for committing offences under Sections 376/506 IPC, he has preferred the instant appeal to challenge its legality and propriety. By an order dated 18.08.2011, the appellant was awarded RI for ten years with fine ₹10,000/- under Section 376 IPC and RI for two years with fine ₹5,000/- under Section 506 IPC. The substantive sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that before registration of the FIR, the appellant sexually assaulted and abused the prosecutrix 'X' (assumed name) at House No.RZ-372, Gali No.14A, Durga Park, Sagar Pur, New Delhi, for about six months and criminally intimidated her. The police machinery came into motion when information was conveyed by Duty Constable Manjeet Singh at DDU Hospital about admission of a girl 'X' aged around seventeen years in an injured condition by her mother. Daily Diary (DD) No.33A (Ex.PW-13/A) came into existence at 02.30 p.m. The investigation was assigned to SI Anil Kumar who with Constable Rakesh went to DDU Hospital and found 'X' admitted there. He moved an application (Ex.PW-7/A) to seek permission from the doctor to interrogate 'X'. 'X' revealed that she was being continuously raped by her step-father for the last five or six months. SI Anil Kumar apprised the SHO concerned on telephone and the investigation was taken over by W/SI Asha (PW-14). After recording X's statement (Ex.PW-9/A), she lodged First Information Report. During investigation, 'X' recorded her statement under Section 164 Cr.P.C. The accused was arrested and taken for medical examination. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed in

the Court against the appellant. The prosecution examined sixteen witnesses to substantiate its case. In 313 Cr.P.C. statement the appellant pleaded false implication without producing any witness in defence. The trial resulted in conviction for the offences as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been filed by him.

3. I have heard the learned counsel for the parties and have examined the file. Undisputably, PW-10 (Santosh), victim's mother, was earlier married to one Babu Lal and six children were born to her out of the said wedlock. When Babu Lal deserted her around five or six years before, she married the appellant and started living along with her children with him in the premises in question. In 313 Cr.P.C. statement, the appellant admitted that Santosh (X's mother) used to live with him as his wife without marriage along with her children, husband and mother.

4. Exact age of the prosecutrix 'X' has not surfaced on record. PW-1 (Phool Wati), Principal, Nagar Nigam Prathamik Balika Vidhyalya, Mahavir Enclave, disclosed that X's date of birth recorded in the school register (Ex.PW-1/A) was 15.10.1991. 'X' had taken admission in the school on 09.07.1997 and had left it on 31.03.2004. School Leaving Certificate mark - 'A' was issued to her. It is unclear on the basis of what documents date of birth 15.10.1991 came to be recorded in the school

record. Apparently, no birth certificate of the prosecutrix was submitted to infer her exact date of birth. In her Court statement recorded on 23.11.2010 'X' claimed herself to be about seventeen and a half years. Her mother PW-10 (Santosh) did not reveal her exact age. Obviously, 'X' was above sixteen years of age on the day of occurrence.

5. It is not in dispute that physical relations between the appellant and the prosecutrix took place during her stay in the premises in question. Appellant's stand on this aspect is conflicting and contrary. Suggestions were put in the cross-examination to material prosecution witnesses that the physical relations with the prosecutrix were with her consent. However, in 313 Cr.P.C. statement, the appellant denied to have any physical relations with the prosecutrix. Admitted position is that the prosecutrix became pregnant. She and her mother had no inkling about it. When 'X' was taken for medical examination because of pain in her stomach by her mother PW-10 (Santosh) on 13.04.2010, the truth came out. PW-5 (Dr.Sarabjeet Singh) medically examined 'X' vide MLC (Ex.PW-5/A) and found that she had four months pregnancy that time. Necessary information was conveyed to the police. Subsequent to that, the pregnancy was terminated on 15.04.2010 after preserving foetus. As per DNA profiling (STR analysis) performed on the exhibits sent to DNA

Unit FSL Rohini vide report Ex.PW-14/C proved by PW-15 (Dr.A.K.Shrivastava), it was concluded that source of Ex.2 [blood sample of Rajesh (the appellant)] was biological father of Ex.1 (foetus of the prosecutrix). Needless to say that the appellant and the prosecutrix were involved in physical relations as a result of which she became pregnant.

6. In her statement (Ex.PW-9/A) to the police 'X' gave detailed sequence of events as to how and under what circumstances after criminal intimidation, she was sexually abused and assaulted by the appellant, her step-father. She further informed that after coming to know about pregnancy, she consumed pills to avoid its detection as a result of which her condition deteriorated and her mother brought her to DDU Hospital. She specifically named the appellant to be the perpetrator of the crime. While appearing as PW-9 in the Court, 'X' proved the version given to the police at first instance without major variations. She implicated the accused to have sexually assaulted her for about six months. She was specific to state that in November, 2009 when she was alone in her house, the accused caught hold of her. When she tried to shout, he clamped her mouth. After extending threats to kill her and pressing her neck, he committed rape upon her. It continued for about six months. In the cross-examination, she elaborated that the accused used to rape her during day

time. She did not divulge the occurrence to her friends or siblings due to fear. She denied that the appellant was falsely implicated to put pressure to transfer the ground floor of the premises in question in her mother's name.

7. PW-10 (Santosh) has corroborated X's version in its entirety. She deposed that from 'X', she came to know that the appellant was author of the crime. She came to know about her pregnancy when she was taken to DDU Hospital after she complained to have pain in her stomach. When she enquired from 'X', how she became pregnant, she named the appellant.

8. There are no valid or tangible reasons to disbelieve the testimonies of PW-9 and PW-10 in this regard. Despite searching cross-examination, no material infirmities could be extracted to cause dent in their versions. Both the witnesses were closely related to the appellant and were in his company for the last five or six years. They had no ulterior motive to falsely name the appellant for the dreaded crime. Their statements whereby the appellant established physical relations with 'X' have been confirmed by DNA report. Feeble attempt was made by the appellant to allege that false implication was to put pressure upon him to transfer the ground floor of the premises in question in favour of PW-10

(Santosh). During investigation or trial, nothing surfaced as to when the premises in question were purchased by the appellant. Admittedly, first floor of the premises in question was transferred in the name of X's mother. However, it is unclear as to on what date and for what purpose the said transfer took place. It is unclear whether it was before the incident of commission of rape or after the registration of the FIR. PW-10 (Santosh) admitted that the first floor was transferred in her name. She, however, volunteered to add that the appellant had taken advance money from some property dealer for the sale of said floor and subsequently she had returned double the amount of advance money to the said property-dealer and as she did not have faith in him (the appellant), she asked him to first execute the transfer paper of the first floor in her name. She further elaborated that the said amount to the property dealer was given in cash after withdrawing it from her account and the account of the prosecutrix. She categorically stated that she did not want the documents of the ground floor executed in her name. No comprehensive investigation has been carried out on this aspect. It is not clear as to who is in possession of the ground floor of the premises in question. The documents of execution of first floor in favour of Santosh are not on record. It is unbelievable that to get the documents of the ground floor executed in her name, Santosh, X's

natural mother would use her to falsely implicate the accused. It stands established that physical relations were established by the appellant with the prosecutrix. So there was no question of his false implication.

9. Under Section 114 of the Evidence Act, it was heavily upon the appellant to prove that sexual intercourse with the prosecutrix was with her consent. The appellant did not explain how and in what manner he got X's consent for physical relations. Relationship between the parties was that of father and daughter. Under normal circumstances, it was unthinkable that a father or step-father would demand or ask sexual favour from his own daughter under his protection and care since the age of 12 or 13 years. The appellant was to establish beyond doubt that 'consent' (if any) given by the prosecutrix for physical relations was voluntary and free. The appellant wielded an imposing authority over the child. Their relationship was of utmost faith and trust. It was for the appellant to prove that the prosecutrix was not under fear or undue influence to submit herself. Consent under Section 376 IPC requires exercise of intelligence based on the knowledge of the significance and moral quality of the act and there must be a choice between the resistance and assent. Submission of the body under the influence of fear or terror is no consent.

10. In the instant case, a girl aged around eighteen years was not imagined to submit her body to the barbaric lust of her step-father with her free consent. Had it been so, there was no occasion for her to implicate the appellant in the crime. Neither the appellant nor PW-10 (Santosh) were aware of her pregnancy. Had the pregnancy been result of consensual sex, the prosecutrix must have revealed it to the appellant to assist her in its termination. Instead 'X' on her own consumed pills to abort it to avoid its detection due to fear. When her condition deteriorated, it was her mother who took her to DDU Hospital for medical examination.

11. No sound reasons exist to disbelieve 'X' merely because she did not inform her mother and other siblings or friends of sexual abuse. It is to be noted that the perpetrator of the crime was none else but her step-father under whose protection she along with her other family members was living. It required a lot of strength and courage to report against her father. 'X' suffered in silence and even became pregnant which she would never had desired.

12. It is true that in her 164 Cr.P.C. statement (Ex.PW-3/B), 'X' exonerated the appellant and informed the learned Presiding Officer that physical relations with the appellant were with her free consent. The said statement was recorded on 17.04.2010 and by that time, the appellant had

already been taken into custody. Appellant's anxiety was to get her father released from custody. It appears that she opted to take entire blame upon herself. She was bold enough to claim that physical relations with the appellant were with her free consent. If tenor of the statement is analysed minutely, it reveals that despite the appellant to have sexually abused her, she did not want him to be 'punished'. She eagerly desired that her father should be released; she did not want any punishment for him. She further informed the Presiding Officer that her father was caught hold by the police on the complaint lodged by the examining doctor. She and her mother had not lodged any complaint and both wanted the police to release him. It shows X's love and affection towards her father and despite being ravished, she opted to exonerate him. In Court statement, she was categorical to implicate the appellant. So merely because at one stage in 164 Cr.P.C. statement the prosecutrix opted to exonerate the appellant, his otherwise cogent testimony in Court cannot be suspected or doubted. The Trial Court has dealt with all the aspects minutely. Conviction is based upon fair appraisal of the evidence and warrants no intervention.

13. Considering the gravity of offence and the relationship of the appellant with the prosecutrix, Sentence Order requires no modification

except that default sentence for non-payment of fine shall be one month in all.

14. The appeal stands disposed of in the above terms. 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

OCTOBER 05, 2015 / *tr*