

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

% *Judgment reserved on :31.07.2015*  
*Judgment delivered on : 07.08.2015.*

+ CRL.A. 430/2013  
MAHESH

..... Appellant

Through Mr. K. Singhal, Adv.  
versus

STATE

..... Respondent

Through Ms. Kusum Dhalla, APP for the  
State

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

**INDERMEET KAUR, J.**

1 This appeal impugns the judgment and order on sentence dated 28.09.2012 and 10.12.2012 respectively wherein the appellant Mahesh stands convicted under Sections 366/376/506 of the IPC. For his conviction under Section 376 of the IPC, he has been awarded RI for a period of 8 years and to pay a fine of Rs.3,000/- and in default of payment of fine to undergo SI for a period of 4 months. For his conviction under Section 366 of the IPC, he has been awarded a sentence of RI 7 years along with fine of Rs.2,000/- and in default of payment of fine to undergo SI for 3 months. For his conviction under

Section 506 of the IPC, he has been sentenced to undergo RI for a

period of 2 years and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo SI for 1 month. The sentences were to run concurrently.

2 This Court notes that two criminal appeals have been filed by the same appellant which will be disposed of by this common order; this was due to inadvertence and both the appellants were accordingly directed to be listed together.

3 The version of the prosecution was unfolded in the testimony of 'S' examined as PW-2. She was living with her sister and brother-in-law. The appellant was known to her. On the fateful day i.e. on 19.01.2011, he had committed forceful act of rape upon her. Her complaint was lodged on the following day on 20.01.2011.

4 Prior to her complaint on 19.01.2011, her brother-in-law had lodged a missing report which was recorded vide DD dated 19.01.2011; this was at 10:12 pm. In this DD, it had been stated that the victim had gone with a person by the name of 'Tikka'. Apart from the statement of PW-2, the statements of her sister Jamila (PW-3) and her brother-in-law Sher Mohammad (PW-4) were recorded. The victim was medically examined on 04.02.2011 vide MLC Ex.PW-9/A. The victim could not

CrI. Appeal No.430/2013 Page 2 of 14

be examined earlier. The bony age of the victim had been conducted by Dr.Shipra Rampal, Radiologist (PW-8) who had opined vide report Ex.PW-8/A that the bony age of the victim to be between 16 to 17 years.

5 In the statement of the accused recorded under Section 313 of the Cr.PC, he had pleaded innocence. Submission being that he has been falsely implicated in the present case.

6 On the basis of the aforementioned evidence collected by the prosecution, the accused was convicted.

7 On behalf of the appellant, arguments have been addressed in detail. Attention has been drawn to the version of PW-2 in various parts of her cross-examination. Submission being that PW-2 was a consenting party and by no stretch of imagination, can it be said that there was any forceful act committed upon her which was against her wishes. There have been vital improvements in her version. She had refused to get her statement recorded under Section 164 of the Cr.PC; she had also refused her medical examination and this is evident from the version of the Investigating Officer SI Sushil Rana (PW-16). The trial Judge has wrongly concluded that the victim was a minor when the finding suggests otherwise; she was major on the date of the offence. The

CrI. Appeal No.430/2013

appellant is entitled to a benefit of doubt and a consequential acquittal.

8      Needless to state that the State has refuted these allegations. Submission being that the impugned judgment calls for no interference.

9      Arguments have been heard. Record has been perused.

10     The star witness of the prosecution is the victim herself. She was examined as PW-2. Her statement under Section 164 of the Cr.PC has not been recorded. Her statement under Section 161 of the Cr.PC had been recorded which had formed the basis of the FIR. In this statement, she had given her age as 14 years. In her version on oath, she had deposed that she was residing with her sister and brother-in-law and was working in a pickle factory where the accused Mahesh also worked. He was known to her. He had made a proposal of marriage to her. On 19.01.2011, the accused had called her to his house. At 07:00 pm, she went to his house without telling anyone at her house. The accused forcibly committed sexual intercourse upon her. He pressed her mouth. He kept her in his house at night. When she went home, she narrated the entire incident to her sister and brother-in-law pursuant to which the present FIR was lodged. She was permitted to be cross-examined by the learned public prosecutor. In her cross-examination by the learned

defence counsel, she admitted that she had left the house on the pretext of attending to a call of nature; she reiterated that her younger sister was at home when she left her house. The accused had met her at the toilet from where she accompanied him to his house. She knew the accused since the last 10-15 days as they were both working in the same pickle factory. She did not raise any alarm while she was going to the house of the accused. This was at about 7- 8 pm. She sat in the house of the accused for about five minutes. The accused had committed rape upon her three times during the night. He had disrobed her and thereafter he put her clothes upon her. The accused had also been making a proposal of marriage to her since the last 5-6 days. In another part of her cross-examination, she had stated that in the morning of the fateful day, a friend of the accused took her to his house at Jahangirpuri and from there she went to the bus stop and then returned home where she narrated the incident to her sister and brother-in-law. She did not visit the hospital on 20.01.2011 but had gone on 21.01.2011. She denied the suggestion that the accused has been falsely implicated.

This version of PW-2 on oath reflects that the appellant was known to the victim since the last 10-15 days as they were both working

Crl. Appeal No.430/2013 Page 5 of 14

in the same factory. Parties had a friendly relationship and that was probably the reason that the proposal for marriage had been made to her. Further version of PW-2 being that she had left her house at 7:00-8:00 pm on the fateful evening of 19.01.2011 pretending to attend a call of nature and the accused met her at the toilet from where she had accompanied him to his house which was at a distance of 10-15 minutes away. She did not raise any alarm on the way. She sat in the house of the accused for about 5 minutes.

11 All these facts do show that there was a consent and voluntariness on the part of the victim to have accompanied the accused.

12 However, the next question which arises is that whether this act of accompanying the accused to his house on the fateful evening; presuming it was consent to go to his house but did it mean that it was also a consent to allow the accused to commit the forceful act of rape upon the victim or not has to be answered?

13 To answer, this query, inconsistencies relied upon by the learned counsel for the appellant have been highlighted. The submission of the learned counsel for the appellant being that this witness is not worthy of any credence as there have been vital improvements in her version.

14 This submission of the learned counsel for the appellant has to be tested on the anvil of the testimony of the victim recorded both under Section 161 of the Cr.PC as also her version on oath in Court. At the cost of repetition, it was noted that there was no statement of the victim recorded under Section 164 of the Cr.PC. In this context, the cross-examination of the Investigating Officer (PW-16) is also relevant. PW-16 has admitted that PW-2 was not cooperating inspite of every effort to get her statement recorded under Section 164 of the Cr.PC; she did not appear before the Court of learned MM to get her statement recorded.

15 In the statement of the victim recorded under Section 161 of the Cr.PC, she had stated that she knew the appellant since the last one month and since 15 days he was pressurizing her to marry him. In the evening of 19.01.2011, when she had gone to attend a call of nature, the accused enticed her and took her to his jhuggi where he committed the forceful act of rape upon her. She was threatened not to disclose this incident to anyone. She managed to escape and disclosed the incident to her sister and brother-in-law pursuant to which the report in the police station was lodged.

16 On oath in Court, the victim has admitted that she had

accompanied the accused voluntarily which was at a distance of 10-15 minutes away and she had not raised any alarm while accompanying him there and where she sat for about 5 minutes. On oath, she had stated that on the following day, the friend of the accused took her to his house at Jahangirpuri from where she came to the bus stop and then managed to return to her house. This version on oath, that the friend of the accused had taken her to his house at Jahangirpuri does not find mention in her statement under Section 161 of the Cr.PC. Who was this friend was not detailed? Even presuming that this is not a material contradiction/omission on the part of the victim, her version on oath was that at the time of committing rape upon her when she had resisted, two friends of the accused who were also present in the house caught hold of her hands. This version on oath in Court that there were two other friends in the house of the accused at the time when the accused was committing rape upon her had not found mention in her statement recorded under Section 161 of the Cr.PC and which had formed the basis of the FIR. This to the mind of the Court is a vital improvement which has been made by the prosecutrix. This throws doubt on the credibility of the witness as up to the date of registration of the FIR, the

version of the prosecution was that the accused had forcibly committed the act of rape upon her in his jhuggi after having enticed her. On oath, the victim has admitted that she had gone voluntarily on her own with the accused; at the time when rape was committed upon her, there were two other friends of the accused who were also present in the house and when she resisted, they caught hold of her hands. Credibility of PW-2 does become questionable?

17 Testimonies of PW-3 and PW-4, the sister and brother-in-law are also relevant. PW-3 was the sister with whom PW-2 was residing at the time when the offence had taken place. Her deposition was to the effect that while searching for her, they saw their sister on the staircase outside the house of the accused and she was weeping. She was taken for medical examination but she could not be medically examined as she was having her menstruation. In her cross-examination, she has made an evasive statement about the love affair between her sister and the accused. She however admitted that the accused was known to her sister. She admitted that her sister had gone to the hospital on 20.01.2011 as well.

18 This version of PW-3 is in contrast with the version of PW-2. As

per the version of PW-2, she managed to escape from the house of the accused; she had gone to the house in Jahangirpuri and then she managed to return home and narrate the incident to PW-3 and PW-4. PW-3 in her cross-examination had stated that they found the victim sitting outside the house of the accused Mahesh.

19 The medical record of the victim shows that she had been taken to the hospital on 20.01.2011 but she had refused medical examination. This has been admitted by PW-16 (Investigating Officer) who in her cross-examination had admitted that initially the prosecutrix had refused to undergo internal medical examination. The victim was finally examined on 05.02.2011.

20 Testimony of PW-4, the brother-in-law of the victim is also relevant. His testimony is to the same effect as that of PW-3; both of them have stated that they found the victim sitting outside the house of the accused. In his cross-examination, he also admitted that PW-2 had initially refused her medical examination. He had also made an evasive statement on a specific query as to whether his sister-in-law used to have secret talks and conversations with the appellant.

21 The learned trial Court had returned a finding that the victim was

a minor on the date of the offence i.e. aged about 14 years. This finding is wholly against the record of the case. Admittedly in terms of Rule 2 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 in the absence of the three categories of documents mentioned in the first part of Rule 12 (which is applicable for purposes of determination of age of a rape victim in view of the judgment of the Apex Court in 2013 (14) SCC 637 Mahadeo Vs. State of Maharashtra and Another) a Medical Board has to be constituted and the age of the victim has to be determined from the radiological examination. Dr. Shipra Rampal (PW-8), Radiologist had conducted the radiological examination of PW-2 on 19.02.2011. She had submitted her detailed report after examination of the X-ray plates of the victim. Her report is Ex.PW-8/A which had opined the age of the victim between 16-17 years. However, how the trial Court had returned a finding that the victim was 14 years of age in spite of documentary evidence adduced before him is not answered. This is wholly unjustified. A margin of two years has in fact to be given after estimation of bony age and this margin has to work in favour of the accused.

dealing with the age of the prosecutrix, in this context as held as under:-

*“On consideration of the entire evidence on record and the judgment cited at the bar, if there can be difference of two years, even in the ossification tests, in that event, the benefit of doubt has to go to the accused.”*

23 By no stretch of imagination, can it be said that the victim was a minor. For the offence under Section 376 of the IPC (under the amended law i.e. prior to Amendment Act of 2013), a victim of rape is to be treated as a minor only if she is below 16 years. In the instant case, the victim was above 16 years.

24 This finding becomes necessary to correlate it to answer the question whether the victim was a consenting party or not as consent of a minor would have no relevance in the eye of law. However, if the victim was an adult as is so inferred from the evidence noted and discussed supra it becomes material.

25 This Court is of the considered view that the victim had consented to her relationship with the accused and had voluntarily accompanied him to his jhuggi. Qua the act of rape which has been alleged against the accused, this Court notes that the testimony of PW-2 is shaky and suffering from vital improvements which throws a grave shadow of

doubt on her credibility. Her version on oath in Court that there were two other boys who were in the room at the time when the accused had committed rape upon her, who had caught hold of her hands at the time when she had resisted did not find any mention in the FIR. Her resistance to get her statement recorded under Section 164 of the Cr.PC and to get herself medically examined again throws doubt on her credibility. From where the victim was recovered i.e. in front of the house of the accused (as is the version of PW-3 & PW-4) or whether she had gone to the house of the friend of the accused at Jahangipuri from where she had gone back to her own house is also in conflict.

26 There are too many contradictions in the version of the prosecution.

27 The Apex Court in this context in (2013) 11 SCC 688, Umesh Singh v. State of Bihar has held as under:-

*“there is possibility of some variations in the exhibits, medical and ocular evidence and it cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour of the accused. Where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused.”*

28 The appellant is entitled to a benefit of doubt. Giving him benefit

of doubt, he is acquitted. He be released forthwith, if not required in any other case.

29 Appeal is allowed.

**Crl. M (B) No.964/2014**

30 This application has become infructuous.

31 It is accordingly disposed of.

32 Date of 20.08.2015 stands cancelled.

**INDERMEET KAUR, J**

**AUGUST 07, 2015**

**A**