

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

RESERVED ON : JULY 15, 2015

DECIDED ON : JULY 16, 2015

+ CRL.A. 777/2005 & CrI.M.A.9829/2005

MURTI DEVI

..... Appellant

Through : Mr.Arun Sharma, Advocate.

VERSUS

STATE

..... Respondent

Through : Mr.Amit Ahlawat, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

CrI.M.A.9829/2005

For the reasons mentioned in the application, the delay is condoned.

Application is allowed and disposed of.

CrI.A.777/2005

1. Aggrieved by a judgment dated 31.03.2005 of learned Additional Sessions Judge in Sessions Case No.246/96 emanating from FIR No.122/92 registered at Police Station Mukherjee Nagar by which she was convicted under Section 376 IPC read with Section 109 IPC, the

instant appeal has been preferred by the appellant-Murti Devi. By an order dated 02.04.2005, she was sentenced to undergo RI for 18 months with fine ₹200/-.

2. Briefly stated the prosecution case as set up in the charge-sheet was that on 8.7.1992 at around 2.00 p.m., the appellant abetted co-accused Rajinder @ Dhaduka to commit rape upon the prosecutrix 'X' (assumed name), aged 15 years, at house No.230 Village Dhir Pur, Delhi. The Investigating Officer lodged First Information Report after recording victim's statement (Ex.PW-3/A) on 16.07.1992. 'X' was medically examined and her statement under Section 164 Cr.P.C. was recorded. Both Rajinder and Murti Devi were apprehended. Statements of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against both of them. It is relevant to note that the appellant was declared Proclaimed Offender during trial. By a judgment dated 21.04.1994, Rajinder was held guilty under Section 376 IPC and was sentenced to undergo RI for four years with fine ₹1,000/-. It is informed that Rajinder has not challenged the judgment and has served out the sentence awarded to him.

3. I have heard the learned counsel for the parties and have examined the file. Allegations against the appellant are of assisting and

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aiding her brother-in-law Rajinder in committing rape upon the prosecutrix 'X'. It is not in dispute that 'X' and her mother PW-4 (Nafisa) lived as a tenant on the first floor of the house for the last one year whereas the accused persons lived on the ground floor. The parties had visiting terms.

4. Appellant's conviction is primarily based upon the sole testimony of the prosecutrix 'X'. However, a number of inherent infirmities are noticed in the prosecution case. The occurrence alleged took place on 08.07.1992 and 'X' apprised her mother about it on the same day when she returned to home at 10.00 p.m. However, no complaint whatsoever was lodged with the police till 16.07.1992. It is reasoned that after having consultations with the relatives decision was taken to lodge the FIR. This explanation does not inspire confidence. 'X' was aged around 15 years on the day of occurrence. It was not expected of PW-4 (Nafisa) to remain silent for about seven days and not to report the incident to the police. Even on that day, she did not go to the police station and purportedly the FIR was lodged at the spot when police officials met her on the way. Apparently, delay in lodging the FIR promptly has not been explained with plausible reasons.

The instant incident took place at around 02.00 p.m. At no stage, thereafter till PW-4 returned to home at 10.00 p.m. any hue and cry was raised by 'X' about the incident. She did not bother to inform her mother or neighbours. It is strange that after suffering rape, she continued to stay alone in home without any reaction. The conduct of the prosecutrix is unnatural/unreasonable.

5. Exact date of birth of prosecutrix has not come on record. No birth certificate or school record showing her date of birth was collected and produced though admitted position is that she had studied upto Vth class in various schools. As per ossification report (Ex.PW-8/A) given by PW-8 (Dr.C.P.Sharma), her age was ascertained between 14 and 16 years at the time of her examination on 23.07.1992. Prosecution witnesses have given different dates at different stages of the investigation/trial. In her statement given to the police (Ex.PW-3/A), 'X' disclosed her age 15 years. MLC (Ex.PW-5/A) records her age as 13 years. In her Court statement 'X' claimed herself to be of 15 years. On the date of her examination on 08.11.1993, her mother PW-4 (Nafisa) disclosed that 'X' was aged 14 years. She categorically admitted that she did not produce school certificate or birth certificate to the police. Adverse inference is to be drawn against the prosecution for not collecting

the cogent and reliable documentary proof about the exact date of birth of the prosecutrix. Possibility of 'X' to be above 16 years on the date of incident cannot be ruled out.

6. The alleged occurrence had taken place at the residence of the prosecutrix at around 2.00 p.m. when she was alone and her mother was away to a hospital. At the time of commission of the crime, she did not raise alarm. Even soon after the occurrence, after the departure of the perpetrator of crime, 'X' did not come out of the room to protest. Only when her mother returned at about 10.00 p.m. she narrated the incident to her. She also remained mum for about seven days. On 16.07.1992 when 'X' was medically examined at Hindu Rao hospital, no external injuries were found on her body. The alleged history did not record if the appellant had aided or assisted her brother-in-law to commit rape upon 'X'. There was no scratch mark or struggle mark over 'X's body to infer if at the time of incident she had put resistance.

7. 'X' has made vital improvements in her deposition before the court to implicate the appellant who herself was aged around 20 years. In her statement (Ex.PW-3/A), 'X' did not disclose if after the occurrence appellant visited or assisted her to change her clothes or made her to take bath. In her Court statement, she improved the version and for the first

time deposed that after Rajinder went away, the appellant made her to take bath, washed her clothes and changed it with new ones. 'X' did not explain as to why this vital aspect was omitted to be narrated in her initial version to the police. It is unbelievable that 'X' would allow the appellant any access to her room after the sexual assault or would seek her assistance. On the day of incident 'X' on her own had gone on the ground floor where she met the appellant. 'X' had not suspected any foul play. Nothing is on record to show that on that day, the appellant had anticipated the arrival of the prosecutrix to conspire with co-convict Rajinder to commit rape upon her. Visit to the appellant at that time was accidental and sudden. In such a short span of time, it is not believable that both the appellant and her brother-in-law would hatch a conspiracy to ravish 'X' inside her room. There was no hitch in that eventuality to commit the crime on the ground floor in the appellant's house. The prosecutrix did not explain in her statement (Ex.PW3/A) as to who opened the bolted room and at what time after the crime. At the time of physical relations, admittedly, the appellant was not physically present at the spot. She did not assist, aided or facilitated Rajinder in committing the crime upon 'X'. Allegedly, she had left the company of 'X' to bring her daughter upstairs. At that time, 'X' did not attempt to accompany her and

opted to remain present with Rajinder. Possibility of 'X' to be a willing or consenting party cannot be ruled out. 'X' had no complaint, whatsoever, against appellant's behaviour and conduct any time. She did not nurture any grievance against 'X' prompting her to aid and assist her brother-in-law in committing the crime when she herself was mother of a little child.

8. In the light of the above discussion, conviction of the appellant on the sole testimony of the prosecutrix in the presence of vital deficiencies in the prosecution case is unsustainable and is set aside.

9. The appeal is allowed. The conviction and sentence of the appellant are set aside. Bail bond and surety bond (if any) stand discharged. Trial Court record (if any) along with a copy of this order be send back forthwith. A copy of the order be sent to Jail Superintendent, Tihar Jail for intimation.

(S.P.GARG)
JUDGE

JULY 16, 2015

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