

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

**RESERVED ON : FEBRUARY 24, 2015
DECIDED ON : MARCH 19, 2015**

+ CRL.A. 494/2013

BIRJU @ MATHUR BUX

..... Appellant

**Through : Mr.Pramod Kumar Dubey with Mr.Shiv
Chopra and Ms.Megha, Advocates.**

versus

STATE NCT OF DELHI

..... Respondent

Through : Mr.Navin K.Jha, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 21.01.2013 in Sessions Case No.23/12 arising out of FIR No.145/11 registered at Police Station I.P.Estate by which the appellant Birju @ Mathur Bux was held guilty for committing offences under Sections 376/363/506 IPC, the instant appeal has been preferred by him. By an order dated 24.01.2013, the appellant was awarded RI for eight years with fine ₹ 10,000/- under Section 376 IPC and RI for one year with ₹ 2,000/- each under Sections 363/506 IPC. Both the substantive sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on the night intervening 27/28.11.2011 in the area of Jhuggi No.CN-225, Takiya Kalekhan, the appellant kidnapped the prosecutrix 'X' (assumed name), aged 14 years, out of the lawful guardianship of her parents and took her to his Jhuggi. She was sexually assaulted and criminally intimidated there. Police machinery swung into action when the incident was reported on 12.12.2011 and FIR was lodged on victim's statement (Ex.PW-5/A). She implicated the appellant by name and gave a vivid account as to how and under what circumstances, she was sexually assaulted by him. 'X' was medically examined and her 164 Cr.P.C. statement was recorded. The accused was arrested and medically examined. Statements of witnesses conversant with the facts were recorded. On completion of investigation, a charge-sheet was placed before the court. The prosecution examined ten witnesses to substantiate the appellant's guilt. In 313 statement, the appellant denied his complicity in the crime and pleaded false implication due to non-return of ₹13,000/- given by him to 'X's father as loan. He did not examine any witness in defence. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, he has filed the instant appeal.

3. I have heard the learned counsel for the parties and have examined the file. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective and erred on relying upon the testimonies of interested witnesses without independent corroboration. 12 days' delay in lodging the FIR remained unexplained. Absence of injuries on 'X's body at the time of her medical examination ruled out commission of rape. FSL report did not confirm her version. Reshma 'X's sister present in the jhuggi at the time of alleged kidnapping was not produced for examination. Learned Additional Public Prosecutor urged that the delay was satisfactorily explained and there are no sound reasons to disbelieve the prosecutrix.

4. Though the occurrence took place on the night intervening 27/28.11.2011, the incident was reported to the police on 12.12.2011. Apparently, there was inordinate delay in lodging the report with the police. However, in the instant case, the delay has been duly explained by the prosecution witnesses. The matter was reported to the police on the next day of the incident. However, the Investigating Officer instead of lodging FIR promptly attempted to get the matter settled between the parties. 'X' and her parents were threatened that in case they insisted to lodge FIR, 'X' would also be arrested. It caused reasonable fear in their

mind not to proceed further with the matter. Later on when 'X's maternal grand mother PW-4 (Shabra Begum) came to know about the accused to have gone scot free, she and 'X's parents approached higher police officers to register FIR. Copy of compromise deed (Ex.PW-2/D1) to settle the dispute between the parties has been produced. The learned Trial Court has discussed in detail the irresponsible behaviour of the investigating agency not to register the FIR disclosing commission of serious cognizable offence and to pressurize the victim and her family members to settle the matter. The Trial Court has rightly ordered ₹25,000/- to be paid to the victim and to take appropriate action against the erring police officials responsible for the lapse. Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and throwing the entire prosecution case overboard. If the delay is explained to the satisfaction of the Court, it cannot be counted against the prosecution. In the instant case 'X' had narrated the occurrence without any delay to her parents on the next morning who in turn had approached the police immediately. It appears that the police officials and community fellows prevented them not to pursue the case at first instance.

5. Appellant's conviction is primarily based upon the sole testimony of the prosecutrix 'X'. Her version is consistent throughout and

in her statement (Ex.PW-5/A) recorded at the first instance, she had named the appellant for committing rape upon her in his jhuggi. In her 164 Cr.P.C. statement (Ex.PW-5/B) also, she reiterated the version before the learned Magistrate and gave a detailed account of the circumstances/events leading to commission of rape by the appellant. In her Court statement as PW-5, she proved the said version without any variation. She deposed that she had gone to the jhuggi of her maternal grand mother along with her sister Reshma to sleep there as she (her maternal grand mother) was ill and had come to their jhuggi to sleep. In the night, she came out of the jhuggi to answer the call of nature. The accused who lived in a nearby jhuggi kidnapped her, took her to his jhuggi and committed rape upon her. She had given a kick blow to the accused but could not get rid of herself. After commission of rape, when the appellant slept, she ran out of the jhuggi and informed her mother at about 6:00 or 6:30 a.m. In the cross-examination, she denied herself to be a tutored witness or that the accused had given a loan of ₹13,000/- to his father and on its demand, he was falsely implicated. No material inconsistencies or infirmities could be elicited in her cross-examination to suspect her version. Her testimony on material facts remained unchallenged and uncontroverted. No ulterior motive was assigned to the

child witness to make serious allegations against him. A child witness would be extremely reluctant to make such allegations which are likely to reflect on her chastity unless such an incident has really been occurred. 'X's statement is in consonance with the medical evidence. PW-6 (Dr.Vandana Solanki) had examined her vide MLC (Ex.PW-6/A) on 12.12.2011, her hymen was found torn. There was old scratch mark of around 3-4 cm on left arm and 5 cm on left leg. PW-1 (Salim) and PW-2 (Sahida Begum), victim's parents, corroborated her version and had deposed on similar lines.

6. It is not the appellant's defence that 'X' was a consenting party. Even if this plea is taken into consideration, the consent of the child below 16 years to have physical relations was immaterial. The prosecution has collected and proved cogent evidence to show that 'X' was aged below 15 years on the day of occurrence and her date of birth was 19.01.1998 as per school record (Ex.PW-8/A). The appellant did not deny her date of birth. Minor contradictions, inconsistencies and omissions highlighted by the appellant's counsel are inconsequential as they do not affect the core of the prosecution case. The appellant did not offer any explanation as to how and under what circumstances compromise deed (Ex.PW2/D1) came into existence. 'X's statement

inspires confidence and can be relied upon without seeking corroboration. Statement of the prosecutrix cannot be discredited simply because Reshma, her sister, was not produced for examination. She was not a witness to the incident and her non-examination did not dent the prosecution case. Since the prosecutrix was medically examined after considerable delay, there was least possibility of traces of semen on her clothes seized in this case. The appellant did not produce any evidence to substantiate if any loan amount of ₹13,000/- was ever given by him to 'X's father. Rather in the cross-examination, 'X's father came up with the plea that he had given ₹6,600/- to the appellant. The defence put up by the appellant is inconsistent. It is unclear if ₹13,000/- were given as loan to 'X's father or were deposited as security with him. No detailed particulars have emerged as to when payment of ₹13,000/- was made to 'X's father. Moreover, for non-return of this paltry amount, 'X's father is not imagined to use his unmarried minor daughter to avoid its payment. The defence deserves outright rejection.

7. The impugned judgment based upon fair appraisal of the evidence warrants no interference. The appellant was sentenced to undergo RI for 8 years with fine ₹10,000/- under Section 376 IPC.

Nominal roll dated 09.01.2015 reveals that he has already undergone three

years, twenty six days incarceration besides remission for five months and twenty six days as on 09.01.2015. He is a first time offender and is not involved in any other criminal case. His overall conduct in jail is satisfactory. Till date he has not availed any parole/interim bail/furlough. Sentence order records that the appellant was a young boy of 22 years old and had no criminal antecedents. He is the sole bread earner of the family and has one young sister to take care of. Considering the mitigating circumstances, sentence order is modified to the extent that RI for eight years under Section 376 IPC shall be RI for seven years. Other terms and conditions of the sentence order are left undisturbed.

8. The appeal stands disposed of in the above terms. Trial Court record (if any) along with a copy of this order be sent back forthwith. A copy of the order be sent to Jail Superintendent, Tihar Jail for intimation.

(S.P.GARG)
JUDGE

MARCH 19, 2015
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