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

Date of Decision: 12th March, 2015

+ **Crl.A. 563/2011**

AZAD SINGH

..... Appellant

Through: Mr.Avninder Singh with Mr.Siddhant
Srivastava, Advocates

versus

STATE

..... Respondent

Through: Ms.Fizani Hussain, Additional Public
Prosecutor for the State.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgment dated 19.11.2010 and order on sentence dated 25.11.2010 passed by learned Additional Sessions Judge (West), Delhi in Sessions Case No.251/1/10 arising out of FIR No. 314/09 under Section 376/506 IPC, Police Station Nangloi whereby the appellant was convicted under Section 376 IPC and was sentenced to undergo rigorous imprisonment for a period of seven years and fine of Rs.5000/- in default to undergo simple imprisonment for a period of one month.w

2. Prosecution case emanates from the fact that on 13.08.2009 prosecutrix "A" was sleeping in her room at ground floor while her parents alongwith her other brothers and sisters were sleeping at the roof. Appellant was residing in the adjoining room. Door of prosecutrix was opened due to summer season. The appellant entered her house and committed rape on her. Prosecutrix informed her parents about the misdeed of the appellant. The appellant was beaten by her parents and neighbours. Police was informed on which DD No.13A was recorded and assigned to ASI Rampal who reached the spot. On coming to know that it was a case of rape, PW-8 ASI Mala was informed who alongwith lady constable Sunita reached the spot. Prosecutrix as well as accused were taken to hospital for their medical examination. Statement of prosecutrix Ex.PW5/A was recorded on which FIR Ex.PW-1/A was registered. The blood stained bedsheet and mattress were seized. During the course of investigation, the seized articles and the articles handed over by the doctor during the medical examination of the prosecutrix and accused were sent to FSL. After completing investigation, chargesheet was submitted against the accused.

3. Charge under Section 376/506 IPC was framed against the accused to which he pleaded not guilty and claimed trial. In order to substantiate its case, prosecution in all examined 17 witnesses. All the incriminating

evidence was put to the accused by recording his statement under Section 313 Cr.P.C wherein he denied the case of the prosecution. According to him, his brother Balbir had expired. He alongwith his entire family had gone to Rohtak and returned alone on 13.08.2009 while his family remained at Rohtak. He alleged his false implication in this case and claimed innocence. In order to substantiate his case, he examined four defence witnesses.

4. After examining the prosecution evidence as well as the defence witnesses, vide impugned judgment, the appellant was convicted and sentenced as mentioned above.

5. Feeling dissatisfied, present appeal has been preferred.

6. It was submitted by learned counsel for the appellant that so far as the factum of commission of rape upon the prosecutrix is concerned, same is not disputed. However, it was a case of mistaken identity. It was submitted that although the appellant was not a stranger to the prosecutrix as he was living in the adjoining room of the prosecutrix yet at the first instance the prosecutrix did not disclose the name of the appellant but only gave the description that rape was committed by a person who was bald and having moustache. On the basis of suspicion, the accused was apprehended and thereafter falsely implicated in this case. There is no medical or scientific

evidence to connect the accused with the crime. Moreover, the incident is alleged to have taken place at about 3.00 a.m however the rukka was sent only at 2.00 p.m. The accused was not even present at his house at the alleged time of incident as due to death of his brother he had gone to Rohtak and returned back only in the morning of 13.08.2009. Four witnesses have been examined by the accused all of whom have deposed that the accused was in Rohtak at the relevant time. The defence witnesses are entitled to the same weight as that of the prosecution and for raising this submission reliance was placed on *State of Haryana vs. Ram Singh (2002) 2 SCC 426*. As such, it was submitted that the appellant is entitled to be acquitted.

7. Per contra, it was submitted by learned Additional Public Prosecutor for the State that the prosecutrix has been consistent in her statement regarding the complicity of the accused in the crime in as much as rukka was sent on her statement wherein she mentioned the name of the accused as the perpetrator of crime. Not only that, when her statement under Section 164 Cr.P.C was recorded, there also similar version was given by her and the affirmation made earlier was substantiated by her in her deposition before the Court. Moreover, the medical evidence also connect the accused with the crime in as much as underwear of the accused was seized which was sent to FSL and as per the report, human blood was detected on the

same. No explanation has been furnished by the accused as to how blood was detected on the same. The appellant does not get any benefit from the defence witnesses examined by him in as much as such plea is an afterthought. No such suggestion was given to any of the prosecution witnesses as such, it was submitted that the impugned order does not suffer from any infirmity which calls for interference. That being so, appeal is liable to be dismissed.

8. I have given my considerable thoughts to the respective submissions of learned counsels for the parties and have perused the record including trial court record.

9. So far as the gruesome act of commission of rape upon the prosecutrix who was only 12 years of age at the time of incident, same is rightly not challenged by learned counsel for the appellant in as much as there is voluminous evidence in this regard. The most material witness is the prosecutrix herself who has stated that on 13.08.2009 she was sleeping in her room situated at ground floor. Her parents alongwith her brothers and sisters were sleeping at roof. It was summer season. Due to hot, door of room was opened. Azad Singh who was living in the same house in the adjoining room entered her room, put his hand on her mouth to stop her

from shouting for help and threatened to kill her if she raised alarm. Thereafter, accused removed her clothes and also removed his nicker and committed rape on her. He threatened to kill her and her parents in case she disclosed the incident to anyone. Thereafter, he ran away. She wore her clothes and went to her mother and informed about the indecent act committed by the accused. Her parents came downstairs and saw her bed. Her father went to her Mausi room which was near her room. Accused was called by her father on the pretext that there was a theft in the house. Then her father called her and enquired whether the accused was the same person who had done “ganda kaam” with her and she answered in affirmative. Accused was beaten by her parents and neighbours. Police was called. She was taken to the hospital where she was medically examined. Her statement Ex.PW5/A was recorded by the police and her statement under Section 164 Cr.P.C Ex.PW5/B was recorded by the Magistrate. In cross-examination, she admitted that the man who had come in the night was bald and he was having heavy voice. Initially she had not seen the face of the accused however when she woke up at that time the accused was running his hand on her body. Light was coming from the house of her Mausi and then she had seen the face of the accused and identified that he was Azad. She admitted that she had not told the name of culprit as Azad to her parents and had only

told them that the culprit was bald and had a moustache. Her father had gone to the room of Azad at 9.00 am. Although she admitted that accused used to treat her like a little child prior to the incident but denied the suggestion that she was told the name of accused as culprit by his father or she was naming him at the instance of her parents.

10. It has come in the statement of PW-3 Ms.Noorana, mother of the prosecutrix and PW-4 Mohd.Sarhan Khan, father of the prosecutrix that they were sleeping at roof alongwith other children while the prosecutrix was sleeping at ground floor and at about 3/3.30 a.m prosecutrix came at roof weeping and informed that Azad committed rape on her. Thereafter, they came downstairs and saw that the bedsheet and the mattress were drenched in blood.

11. The factum of making the complaint and the terms thereof become relevant as subsequent conduct. Such a conduct is relevant under Section 157 read with Section 8 of the Evidence Act as held in *Emperor vs. Phagunia Bhuran AIR 1926 Pat.58*, *Rameshwer Kalyan Singh vs. State of Rajasthan (1952) 3 SCR 377*; *Nagam Ganga Dhar vs. State 1998 Crl.L.J 2220*, *Syed Pasha vs State of Karnataka 2004 Crl.L.J 4123*, *Nannu Gupta @*

Babu vs. State (2010) 11 AD (Delhi) 117, Hariom vs. State 2010 Crl.L.J 1281.

12. Moreover, ocular testimony of prosecutrix find corroboration from medical evidence.

13. Prosecutrix was taken to Sanjay Gandhi Memorial Hospital where she examined by Dr.Kirti and her MLC, Ex.PW17/A was prepared. As per the MLC, the prosecutrix was brought to the hospital with alleged history of “sexual assault by Azad” as told by patient herself. As per the MLC, the hymen of the prosecutrix was found to be torn. There was tear para urethral and second degree perineal tear. Fresh clotted blood was present on vulva. There was injury on the private parts of the prosecutrix. This medical examination of the prosecutrix substantially corroborates her version regarding commission of rape.

14. During the course of interrogation blood stained bedsheet, mattress, shirt, salwar of prosecutrix, underwear, jeans of accused and blood sample were sent to FSL. As per FSL report Ex.PW8/K human blood was detected on the mattress however no blood could be detected on the bedsheet. Human blood was also detected on one damp salwar however the blood group could not be opined. Human blood was detected on the underwear of accused.

However, no blood could be detected on Jeans and semen could not be detected on any of the articles.

15. The prosecutrix was produced before the Metropolitan Magistrate for recording her statement under Section 164 Cr.P.C and her statement Ex.PW5/B recorded by Sh.Ashu Garg, Metropolitan Magistrate goes to show that she has corroborated her version as given in the initial statement made by her to the police.

16. The law is well settled that testimony of prosecutrix herself is sufficient provided it inspires confidence and no corroboration to the same is required. However keeping in view the fact that prosecutrix in the instant case was aged about 12 years as such, being minor, her testimony required to be scrutinised carefully. A perusal of the same goes to show that she has been consistent throughout in narration of the incident initially to the police, then to the Metropolitan Magistrate and in the Court. Except for certain minor variations, no material contradiction could be pointed out. Moreover, her testimony finds substantial corroboration from the information given by her to her parents immediately after the incident coupled with medical and scientific evidence. In that scenario, learned counsel for the appellant rightly did not challenge the factum of commission of rape upon the prosecutrix.

17. However, his main emphasis is on the fact that it was a case of mistaken identity and much emphasis was laid on the fact that initially when the prosecutrix informed about the incident to her parents, at that time she did not disclose the name of the accused despite the fact that he was her neighbour. Only description was given. It was subsequently that on the basis of the description the appellant was roped in this case although he was not even present in Delhi at the time of incident as testified by the defence witnesses.

18. Although, it is true that, as per the prosecutrix initially when she narrated the incident to her parents she gave the description of the accused to her parents by stating that the person who committed rape on her is bald and having moustache but the description tallied with the accused and when the father of the prosecutrix confronted her with the accused she identified him. She further deposed that she had seen the face of the accused from the light coming from the room of Mausi. Thereafter, she has been consistent in naming the accused before the police, doctor, Metropolitan Magistrate and in Court. Her testimony is cogent, credible on which implicit reliance can be placed. Moreover the prosecutrix and her family members were residing in the neighbourhood of the accused and absolutely no animosity has been alleged against the accused for which reason they will implicate him falsely

in this case. In fact the testimony of father of the prosecutrix reflects that after the description of the accused was given by the prosecutrix to him, in order to verify the fact the accused was called by him to his room on the pretext that a theft has taken place in his house and then the father of the prosecutrix confronted him with the prosecutrix and after she confirmed that it was only he who had committed rape on her then the whole police machinery was set in motion.

19. The accused has tried to take a plea of alibi by stating that his brother Balbir had expired on 10.08.2009 and his taiya (third day after death) was held at Rohtak at about 5.00 am on 13.08.2009 and the appellant had attended that ceremony. Therefore, he could not be present at about 3.00 am on the intervening night of 12/13.08.2009 when the incident is alleged to have taken place. In order to substantiate this plea he has examined four witnesses.

20. As regards the legal preposition, as enunciated by Hon'ble Supreme Court in *Ram Singh (supra)* there is no dispute that the defence witnesses are entitled to equal treatment and equal respect as that of prosecution. The crucial question for consideration, however, is whether the defence witnesses in the instant case substantiates the case of accused or not.

Appellant examined DW-1 Mahavir-brother of his maternal uncle, DW-2 Dayanand-neighbour of Balbir, DW-3 Pravesh-earlier neighbour of Balbir, DW-4 Abdus Salam-Imam in Noorani Masjid, Rohtak. All these witnesses have deposed that Balbir, cousin brother of accused died on 10.08.2009 and his taiya took place on 13.08.2009 at 5.00 am. According to DW-1, DW-2 and DW-3 the accused was in Rohtak during the period 10.08.2009 to 13.08.2009. According to DW-4, after three days of the burial, there is a ceremony of Teeja which is also known as taiya and this ceremony is performed around 5.30 am after the namaj. Azad was present in that ceremony. It is pertinent to note that this plea of alibi has seen the light of the day for the first time when statement of accused under Section 313 Cr.P.C was recorded on 07.05.2010. No such plea was taken at any earlier stage of the proceedings nor any suggestion to this effect was given to any of the prosecution witnesses. Under the circumstances, there was no occasion for any of the prosecution witnesses to admit or deny this plea of alibi taken by the accused. Record reveals that father of the prosecutrix PW-4 Sarhan Khan was examined and cross examined on 27.01.2009. Thereafter pursuant to an application under Section 311 Cr.P.C moved by the accused, this witness was recalled for further cross-examination on 29.03.2010 and even at that time the only suggestion given to him was that brother of Azad

had died on 10.08.2009. While pleading ignorance about this fact, the witness went on stating that the accused was present in his room prior to 2-3 days of the incident. Moreover, there is variance in the testimony of defence witnesses. DW-1 has deposed that he left the accused at bus stop of Rohtak on 13.08.2009 at about 6.00 am for going to Delhi. However, DW-4 has deposed that accused was in Rohtak on 13.08.2009 till evening which is not even the case of accused. Moreover, assuming the testimony of the defence witnesses to be correct, the incident took place on the intervening night of 12/13.08.2009 at about 3.00 am. Teeja ceremony took place on 13.08.2009 at about 5/5.30 am at Rohtak. The distance between Delhi to Rohtak can be covered within two hours. Therefore, even if it is taken that the appellant attended the Teeja ceremony, the possibility of his going to Rohtak after committing the act cannot be ruled out. Father of the prosecutrix also noticed him at his room around 9.00 am and thereafter there is ample evidence on record that he was beaten by the public and then after the arrival of police he was taken to hospital and his medical examination was conducted. Therefore, defence witnesses do not enhance the case of accused. Moreover, as stated above, the undergarment of the accused was taken into possession after his medical examination was conducted and as per the report of FSL, blood was detected on the same. No explanation has been

given by the accused as to how blood was detected on his undergarment. Under the circumstances, the prosecution had succeeded in establishing that it was only the accused who had committed the gruesome act with a minor child. Under the circumstances, the impugned judgment of conviction and the order of sentence does not suffer from any infirmity which calls for interference. That being so, the appeal is bereft of any merit and is accordingly dismissed.

21. Copy of the judgment alongwith trial court record be sent back.
22. Appellant be also informed through Superintendent Jail.

(SUNITA GUPTA)
JUDGE

MARCH 12, 2015

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