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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : JULY 20, 2015

DECIDED ON : JULY 29, 2015

+ CRL.A.864 /2011 & Crl.M.B.937/2014

SHER ALAM

..... Appellant

Through : Mr.Ashotosh Kaushik, Advocate.

versus

STATE

..... Respondent

Through : Ms.Kusum Dhalla, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The present appeal is directed against the judgment dated 28.02.2011 of learned Additional Sessions Judge in Sessions Case No.89/09 emanating from FIR 235/08 registered at Police Station Khajuri Khas by which the appellant Sher Alam was held guilty for committing offence under Section 452/376 IPC. By an order dated 04.03.2011, he was sentenced to undergo RI for seven years with fine ₹5,000/- under Section 376 IPC and RI for three years with fine ₹1,000/- under Section 452 IPC. Both the sentences were to run concurrently.

2. Prosecution case as projected in the charge-sheet was that on 19.08.2008 at about 9.30 a.m., the appellant committed rape upon 'X' (assumed name) after committing house trespass at I-C2/141, Street No.3, 3rd Pushta, Sonia Vihar, Delhi. Soon after the incident, 'X' went to her mother's place of work and apprised her about the occurrence. The police was informed; 'X' was medically examined. The accused was apprehended and medically examined. After recording victim's statement (Ex.PW-4/A), the FIR was lodged. Statements of the witnesses conversant with the facts were recorded. During investigation various exhibits were collected and sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. The prosecution examined twelve witnesses to substantiate its case. In 313 statement, the accused denied his involvement in the crime and pleaded false implication. Ajay Saklani (DW-1) and Neeru Mourya (DW-2) appeared in defence. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

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. Vital

discrepancies and contradictions emerging in the statements of witnesses were ignored without cogent reasons. 'X' in her cross-examination clearly admitted that she did not allow the appellant to commit rape on her though he had attempted to do so. Apparently, at the most it could be 'an attempt to rape'. Learned counsel urged that no visible injuries were found on 'X' body at the time of her medical examination; her hymen was intact. 'X's statement has remained uncorroborated. She had lodged similar complaint earlier also against one Mahender Bhati at the behest of Pushpa Chameli, a social worker. Non-examination of the lady to whom the prosecutrix had informed about the occurrence is fatal. No complaint was ever lodged by 'X' or her mother any time against the appellant's conduct and behaviour. The prosecutrix was unable to reveal and prove her exact date of birth. Learned Additional Public Prosecutor urged that 'X', aged around 16 years, has fully supported the prosecution and her testimony is in consonance with medical evidence.

4. 'X' aged around 16 years had lost her father before her birth and she used to stay along with her mother who used to earn her livelihood by working as a maid and lived in a rented accommodation. She used to go for her work at about 8.00 a.m. and return at 11.30 a.m. The helpless child aged about 11 years was sexually assaulted by one

Mahender Bhati on 20.01.2007 and FIR No.37/07 was registered under Sections 376 IPC at Police Station Khajuri Khas. The Trial Court believed 'X's version and convicted Mahender Bhati by a judgment dated 17.01.2009. Mahinder Bhati challenged his conviction in appeal which was dismissed by this Court. Apparently, the appellant cannot claim that 'X' is in the habit of lodging false complaints. She did not exonerate the perpetrator of crime that time too. She is rather a victim and the appellant who lived in her neighbourhood taking advantage of her loneliness in the jhugi sexually assaulted her. 'X' has suffered sexual assault twice during her childhood.

5. The occurrence took place at 9.30 a.m. on 19.08.2008. Soon thereafter, 'X' apprised a lady present in the street but she preferred to remain mum after accepting ₹500/- from the appellant. 'X' went to her mother's place of work and informed her about the ghastly crime committed upon her. Without any delay, she recorded statement (Ex.PW-4/A) and the Investigating Officer lodged First Information report by making endorsement (Ex.PW-4/C) at 5.30 p.m. over it. Prior to that, she was available at Guru Teg Bahadur hospital for medical examination at 3.15 p.m. In her Statement (Ex.PW-4/A), 'X' described her age 15 years and implicated the appellant by name for committing rape upon her.

She gave detailed account as to how and under what circumstances, the appellant arrived at the jhugi in the absence of her mother and sexually assaulted her. Since the FIR was lodged promptly and appellant was named to be the author of the crime, there was least possibility of the prosecutrix and her mother to fabricate a false story in such a short period. MLC (Ex.PW-5/A) records alleged history of sexual assault by a neighbour at 9.30 a.m. 'X' further revealed that earlier about two years back she was sexually assaulted by some other individual. In her Court statement 'X' proved the version given to the police without any variation. While appearing as PW-7, she deposed that her mother had left the home at 8.00 a.m. and she was alone in the room. After half an hour, the appellant, her neighbour, came inside through the roof by jumping and committed rape upon her. She narrated the occurrence to one of the ladies who resided adjacent to her house. The accused gave ₹500/- to her and despite narrating the facts to her, she kept mum and did not say anything. She went to her mother and narrated all the facts to her. She identified salwar (Ex.P-2) which she was wearing at the time of rape. In the searching lengthy cross-examination, all sorts of questions relevant or irrelevant were put to her. However, she was able to answer all the queries intelligently. The appellant was unable to extract any material

infirmity to suspect her version and she stood the test of cross-examination on all relevant and material facts. She admitted to have lodged earlier FIR against Mahender Bhati at Police Station Khajuri Khas. She also admitted her acquaintance with Pushpa Chameli. About the appellant, she informed that he used to tease her since her childhood; he even used to offer small gifts which she because of her immature age used to accept. She elaborated that after her mother scolded her, she returned the articles to him. She further informed that after attaining the age of understanding, she declined to accept any article offered by the appellant. She further deposed that the appellant was in the habit of peeping at the time of her taking bath. Her mother was helpless to check the appellant despite being informed. She denied that her motive was to extort money from the appellant.

6. On scrutinizing the testimony of the prosecutrix, it stands established that the appellant established physical relations with her against her wishes. It is not appellant's case that 'X' was a willing and consenting party to the physical relations. Had it been so, there was no occasion for her to rush to her mother's place of work. No ulterior motive was assigned to 'X', aged 16 years, to falsely implicate the appellant who lived in her neighbourhood. No valid reasons exist to disbelieve the

prosecutrix. Why an unmarried girl of tender age would tarnish her reputation by falsifying her claim. Her mother would obviously be chary to such an incident gaining publicity to impact marriage prospects of her unmarried daughter.

7. PW-9 (Sudha), 'X's mother has corroborated her version in its entirety. She deposed that at around 9.00-9.30 a.m. when she was present at her place of work, 'X' came and told that the appellant who lived in the nearby vicinity had committed rape upon her after committing house trespass through the roof. She along with her daughter 'X' went to the Police Station and informed the police. In the cross-examination, she declined if any money was demanded from the appellant to settle the dispute. Nothing has surfaced to show if any demand of money was ever made by 'X' or her mother to settle the dispute. 'X' in her cross-examination was fair enough to admit that ₹1.5 lacs offered by Mahender Bhati to settle his case was declined to be accepted by her. She denied that her mother had demanded four lacs from Mahender Bhati. She further denied that the appellant had offered some money to them at the Police Station. Nothing was, however, explained as to why the appellant would offer any amount to 'X' or her mother in the Police Station in case he was innocent and was not the perpetrator of the crime. PW-9 (Sudha) used to

earn her livelihood by working as maid at various houses and it is unbelievable that she would 'use' her minor daughter to extract any money from the appellant. Unless such an incident has really been happened, no mother would like to level such serious allegations of rape against an innocent to have reflection on the chastity of her own unmarried daughter. She does not have a strong motive to falsely involve the appellant.

8. 'X' was medically examined promptly at GTB hospital vide MLC Ex.PW-5/A where she informed the examining doctor about sexual assault committed by her neighbour. It is true that as per MLC (Ex.PW5/A), hymen was found 'intact' and there was no tear and abrasion. Merely because the hymen of the prosecutrix was found 'intact' and there was no actual wound on her private parts, is not conclusive of the fact that she was not subjected to rape. The Trial Court has dealt with this aspect elaborately citing judgments to conclude that the absence of injuries or mark of violence on the person of the prosecutrix does not lead to any inference that she consented for sexual intercourse with the accused. In *Madan Gopal Kakkad vs. Naval Dubey and Another* (1192) 3 SCC 204, a minor girl aged about eight years was raped. It was held that even slight penetration of the penis into the vagina without

rupture would constitute rape. In *Radha Krishna Nagesh vs.State of Andhra Pradesh* 2012 (12) SCALE 506, the Supreme Court held that being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. MLC (Ex.PW-5/A) does not state in so many words that it was not a case of sexual assault. PW-5 (Dr.Kanika Agarwal) was not cross-examined on this aspect and nothing was suggested to her if it was a case of ‘attempt to rape’. The prosecutrix in her examination-in-chief categorically claimed that she was sexually assaulted. In the cross-examination, she informed that the accused could not succeed to commit rape as she was able to prevent him from doing so. The statement of the prosecutrix is to be read in its entirety and not in isolation. Penetration, however, small is enough to constitute an offence of rape. By saying that she was able to prevent rape, she meant that she did not allow the appellant to have complete penetration. A girl aged 16 years and that too from a rustic background could hardly be aware of such technicalities of law in relation to an offence of sexual assault. She was categorical and certain to state that the appellant, after the rape had wiped out semen with a piece of cloth and had thrown it. FSL report (Ex.PW-10/A) demonstrates that ‘human

semen' was detected on exhibits 1 (Frock) and 3a (microslides having faint smear). This lends credence to 'X' version about sexual assault.

In 313 statement, the appellant did not offer plausible explanation to the incriminating circumstances proved against him. He did not lay any foundation for false implication. It is not explained as to why 'X', the victim of sexual assault would blame him sparing the real culprit. While appreciating the evidence of the prosecutrix, the Courts always keep in mind that no self-respecting woman would put her honour at stake by falsely pressing commission of rape upon her. Statement of the prosecutrix if found to be worthy of credence and reliable requires no corroboration. The court may convict the accused on her sole testimony. Minor discrepancies and contradictions highlighted by the appellant's counsel are irrelevant and inconsequential as they do not go to the root of the case. Mere fact that the prosecutrix was unable to prove her exact date of birth makes no difference as it was not a case of sexual assault with consent.

9. The impugned judgment is based upon fair appreciation of evidence and all the relevant contentions raised by the appellant's counsel have been dealt with minutely. Order on conviction with reasons does not warrant intervention.

10. The victim a child aged around 16 years was sexually assaulted against her wishes. Minimum sentence of seven years prescribed under Section 376 IPC cannot be modified or reduced. Sentence order is modified to the extent that default sentence for non-payment of fine under both the heads would be two months in total. Other terms and conditions of the sentence order are left undisturbed.

11. 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

JULY 29, 2015

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