

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
RESERVED ON : FEBRUARY 04, 2015
DECIDED ON : FEBRUARY 06, 2015

+ CRL.A.979/2013

KRISHNA Appellant
Through : Mr.Krishan Kumar with Ms.Sunita
Arora, Advocates.

VERSUS

STATE (GOVT.OF NCT) OF DELHI Respondent
Through : Ms.Kusum Dhalla, APP.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is to a judgment dated 06.04.2013 in Sessions Case No.07/13 arising out of FIR No.33/10 registered at Police Station K.N.Katju Marg by which the appellant-Krishna was held guilty for committing offences under Sections 458/324/376/506/392 IPC. By an order dated 12.04.2013 he was awarded various prison terms with fine. All the sentences were to operate concurrently.

2. Allegations against the appellant, as projected in the charge-sheet were that on 20.02.10 at 11:30 p.m. after committing lurking house trespass in House No.635, Sector 26, Rohini, he sexually assaulted 'X' (assumed name), aged 13 years, putting her in fear and inflicted injuries on her person with a blade. He also committed robbery of cash ₹3,000/-

and jewellery articles. Police machinery swung into action on getting information on 21.02.2010 at about 11:25 a.m. about a quarrel at House No.635, Sector 26, Rohini. DD No.15/A (Ex.PW-14/A) and 16A (Ex.PW 14/B) came into existence. The investigation was assigned to SI Sandeep Yadav who went to the spot. After recording victim's statement (Ex.PW-2/A), he lodged First Information Report under Section 376 IPC. Statements of witnesses conversant with the facts were recorded. The prosecutrix was medically examined. She recorded statement under Section 164 Cr.P.C.. The accused was arrested and at his instance, pursuant to his disclosure statement, mobile phone was recovered. Exhibits were sent to Forensic Science Laboratory for examination. After completion of investigation, a charge-sheet was submitted against the appellant in the court. The prosecution examined 18 witnesses to substantiate its case. In 313 statement, the appellant denied his involvement in the crime and pleaded false implication without examining any witness in defence. After appreciating the evidence and considering the rival contentions of the parties, the Trial Court by the impugned judgment convicted the appellant for the offences mentioned previously. Being aggrieved and dissatisfied, the appellant has filed the instant appeal.

3. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell in grave error in relying upon the testimonies of interested witnesses who have given divergent statements. It is unclear as to at what time the parents of the victim had left for Railway Station to see off victim's grandmother for Allahabad. Identity of the appellant has not been established beyond reasonable doubt. It is highly improbable for the child witness to recognize the assailant in mobile light allegedly used by him at the time of occurrence. No visible injuries were found on the private parts of the prosecutrix and that of the appellant during their medical examination. The appellant was also not found to have consumed liquor. No robbed articles were recovered at his instance. FSL report does not confirm the version given by the prosecutrix. PW-4 (Javed) has given inconsistent version. Brothers and sisters of the prosecutrix present in the house were not examined. Delay in lodging of report has not been explained. No independent public witness was examined. Learned Additional Public Prosecutor urged that there are no valid reasons to disbelieve the prosecutrix who identified the appellant as the perpetrator of the crime. Minor contradictions or discrepancies in her statement are of no consequence.

4. The appellant's conviction is primarily based upon the testimony of the prosecutrix 'X'. The occurrence took place on the night intervening 20/21.2.2010 at around 11:30 p.m. when victim's parents had gone to see off Anara Devi-her grandmother, to Railway Station. They had locked the door of the house from outside. However, on return, they found it broken. The prosecutrix narrated the whole incident to them then and there. Efforts were made by her parents to ascertain the identity of the culprit. When the appellant was identified to be the author of the crime, he was beaten by the public and was handed over to the police. Daily Dairy (DD) No.15-A and 16-A were recorded at 11:25 a.m. and 11:26 a.m. respectively. Soon thereafter, the statement of the prosecutrix was recorded and rukka was sent for lodging First Information Record at around 02:30 p.m. The prosecutrix in her statement gave graphic details as to how and under what circumstances she was sexually assaulted by the appellant. Apparently, there was no slackness on the part of the family members to report the incident to the police.

5. The prosecutrix 'X' is consistent in her version throughout. In her 164 Cr.P.C. statement recorded on 22.02.2010, she reiterated the version narrated to the police at the first instance without variation and clearly implicated the appellant for the crime. She gave detailed account

of the occurrence before the learned Metropolitan Magistrate who recorded her statement after putting number of questions to ascertain if she was a competent witness and understood the questions put to her. The court was convinced that the prosecutrix was able to give rational answers to the questions and had sufficient maturity and intelligence. In her deposition before the court as PW-2, she identified and recognized the appellant as the perpetrator of the crime. She testified that after putting her in fear, the appellant inflicted injuries on her cheeks and other body parts with a blade and was sexually assaulted by him. The appellant did not stop there and forced her to disclose as to where the jewellery articles were lying. She further deposed that thereafter the appellant took out the jewellery items from a box. In the cross-examination, she revealed that she had seen the accused only in the room and was not aware as to how he had arrived there. The accused was not known to her but she had seen him prior to the occurrence plying autos in the areas. She also identified her clothes Ex.P-1 and Ex.P-2 seized by the police. Statement of the prosecutrix on material facts remained unchallenged and uncontroverted in the cross-examination. No suggestion was put to her if no such incident of sexual assault and robbery had taken place or that the appellant was not the author of the crime. Nothing was suggested to her if the appellant was

not present at the spot or was not identified and recognized by her the next morning. The court has no reasons to disbelieve the testimony of the prosecutrix, a child witness aged about 13 years. She had no ulterior or extraneous consideration to fake the incident of rape to bring herself in disrepute. Since she was not aware of the appellant's name and recognized him only by face, he was not named to be the culprit by her to her parents. Her testimony is in consonance with medical evidence and there is no conflict between the two. 'X' was medically examined by MLC (Ex.PW-3/A) on 21.02.2010 soon after lodging of the FIR at around 12:05 p.m. In the alleged history recorded therein, it is mentioned that she was sexually assaulted at home by a 'man' who was drunk that time at around 11:30 p.m. Number of injuries were noticed on her person. There were teeth bite marks on the left side of cheek and nail scratch marks over her right breast. Hymen was found ruptured and it admitted tip of a finger. However, no injuries were seen over vulva. In the cross-examination nothing was suggested to the prosecutrix if the appellant had not caused these injuries on her body. FSL report (Ex.PW-9/C) reveals that semen was detected on the frock of the prosecutrix. It corroborates the version given by the prosecutrix and nothing was explained by the accused as to

how semen appeared on the frock of the child. It is true that the prosecution could not establish that semen was of that of the appellant.

6. PW-4 (Javed), auto driver, disclosed that on 20.02.2010 he and his friends including appellant Krishna had consumed liquor at the house of their friend Anil near Community Centre at Sector-26. At about 11:30 p.m. they had left Krishna on the road and they all had gone to their respective houses for dinner. On the next morning from his friends Koki and Inderjeet, he came to know that the appellant had done something wrong in the house of victim's father. He took Krishna to Section 26, Rohini, where he was beaten and handed over to the police. He further testified that Krishna was identified by the 'prosecutrix' when she put her hand on him in the presence of public stating that he was the 'person' who had done wrong act with her. Again, his statement on material facts remained unchallenged. Similar is the testimony of PW-5 (Anil Kumar) and that of PW-8 (Anita Verma), victim's parents. Minor inconsistencies pointed out by the learned counsel for the appellant regarding as to when the victim's parents left for Railway Station or when they returned to the house are immaterial and do not affect the core of the prosecution case. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring

of the truth. The fact remains that the occurrence took place in their absence when they had gone to see off the victim's grandmother. Absence of injuries on the private parts of the prosecutrix and that of the appellant are also inconsequential. Since prosecutrix aged about 13 years had submitted under fear without offering much resistance, there was least possibility of her to sustain external injuries. In *Aman Kumar and Anr. Vs. State of Haryana* 2002 Cri. LJ 1399 the Supreme Court observed:-

“In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity..... Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC”

7. In *Radhkirshna Nagesh vs. State of Andhra Pradesh* 2012 (2)

Scale 506, the observation of Hon'ble Supreme Court are relevant:

“The mere fact that the hymen was intact and there was no actual wound on her private parts is not conclusive of the fact that she was not subjected to rape. According to PW9, there was a definite indication of attempt to rape the girl. Also, later semen of human origin was traceable in the private parts off the girl, as indicated by the FSL Report. This would sufficiently indicate that she had been subjected to rape.

Penetration itself proves the offence of rape, but the contrary is not true i.e. even if there is no penetration, it does not necessarily mean that there is no rape. The explanation to Section 375 IPC has been worded by the legislature so as to presume that if there was penetration, it would be sufficient to constitute sexual intercourse necessary for the offence of rape. Penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case.”

8. The prosecutrix had clear and reasonable opportunity to note down the broad features of the appellant as he had stayed in the house for sufficient duration. The prosecutrix had direct confrontation with him and had even revealed the place where her mother used to keep cash and jewellery. She also recognized the appellant to be the perpetrator of the crime when the mobile was switched ‘on’ by him to see her body parts. In her deposition, she elaborated that on seeing the ear-rings, she had identified the appellant. In her statement (Ex.PW-2/A) she had given broad features/description of the assailant. Moreover, in the cross-examination, the appellant did not deny his presence at the spot at the time of occurrence. He did not explain as to where he remained present after he left the company of his friends including PW-4 (Javed) after consuming liquor on the previous night. He did not examine any of his family members to show his presence in the house at the time of

occurrence. Identification of the appellant in the court as assailant by the prosecutrix is sufficient to prove his involvement in the crime.

9. The prosecutrix was aged about 13 years as per certificate (Ex.P-1) proved on record by PW-1 (Bharti Laroia) Principal, Primary School, Sector 17, Rohini, Delhi. Her date of birth was described as 27.05.1997. The child witness had no animus or ill-motive to falsely identify the appellant and to spare the real offender. No ill-will or prior animosity was imputed to her in the cross-examination. Her testimony inspires implicit confidence. She categorically deposed that cash of ₹3,000/- and jewellery articles were taken away by the appellant. Again, her testimony remained unchallenged on this aspect. Non-recovery of robbed articles is not fatal.

10. In 313 Cr.P.C. statement only a bald statement has been made by the accused that he was innocent. No explanation has been furnished by him as to why 'X' had deposed against him and involved him in such a heinous crime.

11. The Trial Court has appreciated all the relevant contentions of the appellant to reject them with valid reasons. The impugned judgment is based upon fair appraisal of the evidence and the findings require no interference. The child aged 13 years was ravished by the

appellant after committing lurking house trespass in the absence of her parents and she was criminally intimidated. Injuries were inflicted on her body. Not only that, the appellant also robbed ₹3,000/- and jewellery articles. The punishment/sentence awarded to the appellant cannot be considered unreasonable. The court can well understand the trauma of the child who suffered physically and mentally at the hands of the appellant for no fault of hers. The appellant needs to be dealt with sternly. The substantive sentence awarded to the appellant needs no modification.

12. The appellant has been directed to pay total fine of ₹16,000/- in all under various offences. Sentence order needs modification to the extent that default sentence for the non-payment of ₹16,000/- shall be one month. Other terms and conditions of the sentence order are left undisturbed.

13. The appeal stands disposed of in the above terms. Copy of this order be sent to the concerned Jail Superintendent for information and necessary action. Trial court record be sent back along with a copy of this order.

(S.P.GARG)
JUDGE

FEBRUARY 06, 2015/sa