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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 30th April, 2015

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CRL.A. 1319/2013

REETA

..... Appellant

Through: Mr. Jivesh Tiwari, Advocate

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Ms. Fizani Hussain, Additional Public
Prosecutor along with SI Lovkesh
Kumar, PS Mandawali, Delhi

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 6th March, 2013 and order on sentence dated 19th March, 2013 in Sessions Case No. 155/2011 arising out of FIR No.31/2011, PS Mandawali u/s 363/366A/376/34 IPC whereby the appellant was convicted u/s 366A IPC and Section 109 IPC r/w Section 376 IPC and was sentenced to undergo rigorous imprisonment for a period of four years and fine of Rs. 1000/- in default to undergo SI for one month on each count. The substantive sentences were to run concurrently.

2. Gravamen of the prosecution case is that PW1-Jagdish made a complaint regarding missing of his daughter 'P' aged about 12 years on 29th January, 2011 when she had gone to school. On the basis of

this complaint, FIR u/s 363 IPC was registered. On 5th September, 2011, prosecutrix returned to her house. She was taken to police station by her father. SI Vijay Kumar-PW8 recorded statement of the prosecutrix and got her medical examination done. She was produced in the Court where her statement u/s 164 Cr.P.C. was recorded by the Metropolitan Magistrate. On 4th September, 2011, on the basis of secret information, accused was arrested from main Road Mandawali near primary school. During interrogation, she made disclosure statement regarding her involvement in the commission of offence. Test Identification Parade of the accused was fixed on 22nd September, 2011. However, she refused to participate in the same. Efforts were made to arrest other accused but they could not be arrested. After completing investigation, charge sheet was submitted u/s 363/366A/376/34 IPC. Charge for offence u/s 366A IPC and Section 109 IPC r/w Section 376 IPC was framed to which accused pleaded not guilty and claimed trial.

3. Eight witnesses were examined by the prosecution to substantiate its case. In her statement recorded u/s 313 Cr.P.C., the accused denied the allegations and took the defence of false implication in the case. She, however, did not prefer to lead any defence evidence.

4. After considering the evidence adduced by the prosecution and the defence of accused, learned Trial Court found the appellant guilty of the aforesaid offences and sentenced her as mentioned hereinbefore.

5. Feeling aggrieved and dissatisfied, the present appeal has been preferred.

6. Assailing the findings of the learned Trial Court, learned counsel for the petitioner submitted that the testimony of the prosecutrix is not reliable as the same is full of inconsistencies. The appellant refused to join Test Identification proceedings as she was shown to the prosecutrix. The medical evidence does not support the case of the prosecution as there was no mark of fresh external injury on her body. No public witness was joined in the investigation. Sanjay Sharma, in whose house the prosecutrix was alleged to be confined, was not examined. As such, prosecution has failed to bring home the guilt of the accused beyond reasonable doubt. As such, the impugned judgment be set aside. Reliance was placed on *Ashok Nivruti Desai and Ors. vs. State of Maharashtra*, 1995 Cri. LJ 826.

7. While supporting the findings of the learned Trial Court, learned Additional Public Prosecutor for the State submitted that the prosecutrix was just 12 years of age at the relevant time, as such, if some discrepancies have appeared on trivial issues, that itself is not sufficient to discard her testimony. She returned home after a lapse of about seven months and during this period, she was sexually exploited by the appellant and her husband. That being so, the fact that there was no mark of external injury on her body does not cast any dent on the prosecution version. As such, it was submitted that the appeal being bereft of merits is liable to be dismissed.

8. Star witness of prosecution is the prosecutrix PW4-‘P’ who has unfolded that accused is the mother of her friend Pooja. She and Pooja were studying in the same class and in the same school. In the month of January, 2011, she developed friendship with Pooja and one day Pooja took her to her house for the purpose of playing. She was made to sit in a room by accused and her husband, namely, Subhash. She was given new clothes to wear and thereafter she was taken to their village at Calcutta. From Calcutta, she was taken to some other place. Husband of the accused and her daughter accompanied her. When she started crying and asked Subhash that she wanted to go home then she was brought back to Delhi. However, she was kept locked in their house and was not allowed to go to her house. Subhash used to give her short clothes to wear and she used to feel shy after wearing those clothes. Subhash used to call ladies and gents in his house and they used to indulge in sexual intercourse in their house. Subhash also did sexual intercourse with her against her wish number of times. Subhash also made her to do sexual intercourse with other persons in their house. For more than 20 days, she was made to do sex with three persons during day time and one during night time. She used to cry a lot but all in vain. She even asked Pooja that she is just like her sister and why she did all these things with her. On this, accused reprimanded her. She further deposed that one day at about 7:30 AM, accused was sleeping, Subhash went to drop Pooja to her school and she was taking bath. The door was bolted by Subhash from outside but he forgot to lock it. She asked a boy who was playing in front of the house to open the door. That boy opened

the door and she ran away from there and returned to her house. She told everything to her father who took her to school and everything was told to the Principal of the School. Thereafter she along with her father went to the police station where her statement was recorded. She was taken to hospital where she was medically examined. Her clothes which she was wearing were seized by the doctor. She was kept in Nirmal Chhaya. Thereafter she was produced in the Court and her statement Ex.PW4/A was recorded by the Magistrate. After two months of recovery, she went along with a lady police official and other staff to Tihar Jail but accused refused to join Test Identification proceedings. She was cross-examined by learned Additional Public Prosecutor for the State wherein in her cross-examination, she stated that the accused and her husband changed their house and there they used to call the customers and used to force her to do prostitution with them. She admitted that accused and her sister used to get her ready and used to keep her confined in a room. She admitted that one day police was taking accused towards Mandawali Railway Colony, she along with her father was at Kalyan Marg and, on seeing her, she identified her as Reeta who used to force her to do prostitution. She admitted that she had pointed out the place where she was forced to do prostitution. In cross-examination by the counsel for the accused, she denied that she had gone to Calcutta of her own will. At one stage, she deposed in her cross-examination that when Pooja took her to her house, at that time, only the father Subhash was present and the accused was not present in the house and even thereafter she did not meet her at any place. However, in re-examination by learned Public

Prosecutor for the State, she stated that accused was present in the house and that out of confusion during her cross-examination she deposed that when Pooja took her to her house at that time only the father Subhash was present in her house and accused was not present in the house at that time.

9. It is to be kept in mind that as per complainant-PW1, prosecutrix was 12 years of age at the time of incident. PW2-Sarla Jain, Principal, Municipal Corporation Primary School, Mandawali produced the record regarding admission of Pooja in school as Ex.PW 2/A to C. As per record, her date of birth is 10th February, 2001. This record establishes that the prosecutrix was admitted in Municipal Corporation Primary School on 29th July, 2009, i.e., much prior to the incident. As such, there was no reason to disbelieve the school record. That being so, the age of the prosecutrix at the time of incident was between 10 to 12 years. Keeping in view such tender age of the prosecutrix coupled with the fact that she was subjected to lengthy cross-examination and had suffered a traumatic experience, which was still haunting her mind which is reflected from the record that while recording her statement, the Court also noted that the witness was weeping during her deposition in the Court. That being so, if the witness forgot some of the facts which could be elicited by the Public Prosecutor for the State in cross-examination or some discrepancy on minor points appeared which required clarification that does not mean that the testimony of the prosecutrix under those circumstances becomes unreliable.

10. The fact that there was no fresh external injury as per the MLC, also is of no consequence because as per her deposition, for number of days she was subjected to forcible sexual exploitation by the appellant and her husband whereby she was made to indulge in sexual intercourse with four persons every day. Further, as per her version, the husband of the appellant also exploited her sexually although he himself was having a daughter of her own age.

11. After the arrest of accused, her test identification parade was arranged by the Investigating Officer of the case. As per TIP proceedings Ex.PW6/A conducted by PW6-Sh. S.K. Arora, Metropolitan Magistrate, the accused refused to participate in TIP on the ground that witness was previously known to her and used to call her Mummy. Refusal on the part of accused to join TIP proceedings leads to an adverse inference against her that had she joined the proceedings, she would have been identified by the witness.

12. During the course of argument, it was submitted by the learned counsel for the accused that the appellant was not living with her husband and, therefore, was not involved in any criminal activity, the same is not fortified by the record, inasmuch as, no such suggestion was given to any of the prosecution witnesses. Even the accused in her statement recorded under Section 313 Cr.P.C. has nowhere taken the plea that she was living separately from her husband. A suggestion was given to the prosecutrix that her father had taken loan from the father of her friend Pooja on returnable basis; when father of Pooja demanded back his money from her father, her father showed

his inability to return the same; on that issue, hot talks took place between her father and father of Pooja and thereafter this false complaint was made. This suggestion has been denied by the witness. Rather to the father of the prosecutrix Jagdish-PW1, it was suggested that accused and her family members were not known to her prior to the incident and the witness admitted the suggestion to be correct and further stated that he had never visited their house. Under the circumstances, the suggestion given to the prosecutrix and the stand taken by the accused in her statement is completely contradictory to the suggestion given by the accused to PW1-Jagdish.

13. *Ashok Niruti Desai*(supra), relied upon by the learned counsel for the appellant instead of supporting him rather helps the prosecution, inasmuch as, in that case, the prosecutrix was taken by A1 to a hut where A2 and A3 were residing. A1 committed sexual intercourse with the prosecutrix number of times. A2 also wanted to have sexual intercourse with her, however, she raised alarm which was heard by someone and then she was saved. On the facts of the case while A1 was convicted, A2 was acquitted. So far as A3 is concerned, she was also convicted and her appeal did not find any favour with the High Court by observing that she abetted the acts of A1 in commission of rape and, as such, not entitled to any leniency even in the matter of sentence.

14. In the instant case, the evidence on record clearly reveals that there was no motive with the accused to keep the prosecutrix in her house except subjecting her to sexual exploitation by customers being

called by her and her husband. Statement of the prosecutrix clearly established that after she was brought to Delhi for more than 20 days she was made to do sex with number of persons during day time and night as well. Under the circumstance, the appellant was rightly convicted of offence u/s 366A IPC and Section 109 IPC r/w Section 376 IPC and no interference is called for in the same.

15. Coming to the quantum of sentence, as per the nominal roll dated 29th April, 2015, the appellant has already undergone the sentence of 3 years 4 months and 29 days besides earning remission of 6 months and the unexpired portion of sentence is only 1 month and 1 day. Under the circumstances, the sentence is modified to the period already undergone. The fine is reported to have been paid in jail. That being so, the appellant be released forthwith if not wanted in any other case.

Trial Court record be sent back forthwith through Special Messenger as trial of the co-accused is still going on.

Information be sent to the Superintendent Jail for necessary action.

(SUNITA GUPTA)
JUDGE

APRIL 30, 2015

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