

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

% *Judgment Reserved on : 03.8.2015*
Judgment delivered on: 10.8.2015.

+ CRL.A.1414/2012

AJAY KUMAR MANDAL Appellant

Through Ms. Aishwarya Rao, Adv.

versus

STATE Respondent

Through Ms. Kusum Dhalla, APP for the
State along with SI Kishore
Kumar.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order of sentence dated 03.3.2012 wherein the appellant stood convicted under Sections 376 and 506 of the IPC. He had been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.5000/-, in default of payment of fine to undergo SI for a period of 2 months under Section 376 of the IPC. For his second conviction he had been sentenced to undergo RI for a period of 3 years. Sentences were to run concurrently.

Benefit of Section 428 of the Cr.P.C. had been granted to the appellant.

2 The version of the prosecution was unfolded in the complaint made by the complainant "RJ" (PW-1). She had disclosed that she was staying with her sister in her jhuggi at Ambedkar Bhawan, Pahar Ganj since the last two years. She was looking after the children of her elder sister. On 16.9.2009 in the afternoon at about 2.00 p.m. when she was sitting with the children of her sister aged 1½ years and 4 years the accused (who was their neighbor) came to the jhuggi. She knew him from before. He pressed her mouth and committed rape upon her. He threatened her not to disclose the incident to anyone or else he would kill her sister's children. In the evening when her sister Kanchan (PW-3) returned home, she narrated the incident to her. FIR was registered on the complaint. The prosecution in support of its case had examined nine witnesses of whom prosecutrix was examined as PW-1. Her elder sister Kanchan was examined as PW-3. Dr.Shilpa Dhingra (PW-2) had medically examined the victim; her hymen was not intact. No external injuries were noted. Her blood samples and vaginal swab and smear were taken besides her salwar which was sent for a scientific examination. The Investigation Officer W/ASI Vedawati was

examined as PW-9. She had proved the FSL report as Ex.PW-9/D; the report of the biological division was proved as Ex.PW-9/E.

3 In the statement of the accused recorded under Section 313 Cr.P.C. he had taken up the defence of alibi. Submission being that he was not present at the place of incident on the day of the incident as he had gone to meet his brother at Laxmi Nagar at a Juice shop where his brother was employed. No evidence was led in defence.

4 On the basis of the aforementioned evidence collected by the prosecution, oral and documentary the appellant was convicted and sentenced as aforementioned.

5 On behalf of the appellant, arguments have been addressed by the learned Amicus Curiae. In the first instance, it is submitted that the appellant was a juvenile and the plea of juvenility was taken even before the Trial Judge but it did not find favour with the Judge. Submission being that this plea can be taken at any stage i.e. even at the appellate stage.

6 This submission of the learned counsel for the appellant is correct.

7 Record shows that the plea taken by the accused that he was a juvenile, since there was no documentary proof about the age of the

accused except for his school leaving certificate which was not his school leaving certificate from the first attended school (in terms of Rule 12 of the Juvenile Justice Rules 2007), he was rightly referred to Medical Board which had been duly constituted. The report of the Medical Superintendent, LNJP Hospital dated 31.10.2009 on the basis of the X-ray findings (which included X-ray of the shoulder, elbow, wrist joints and knee joints) had opined the age of the appellant to be 20-22 years. The appellant was held to be a major.

8 Even, at the time of recording of sentence i.e. on 03.3.2012, learned counsel for the accused had argued that the accused is aged 22-23 years meaning that on the date of offence i.e. 16.9.2009 even as per the accused he was more than 19 years.

9 Thus the submission of the learned counsel for the appellant that the question of determination of the age of the appellant is permitted to be raised even at the appellate stage in view of the judgment of the Apex Court AIR 2015 SC 1770 Abdul Razzaq Vs. State of U.P. although is a correct proposition but it has already been answered. Under Rule 12 of the Juvenile Justice Rules, 2007, in the absence of the documents mentioned in the first category, it is incumbent upon the Juvenile Justice

Board to get a Medical Board constituted (as in the present case) and the opinion given by the Medical Board will be a relevant fact in concluding about the age of the appellant. The Medical Board vide its report dated 31.10.2009 had held the appellant to be a major. Thus the submission of the learned counsel for the appellant that the appellant was a juvenile on the date of the offence is unfounded.

10 The prosecutrix was a minor on the date of the offence. In the FIR she had given her age to be 12 years; so also in her statement recorded under Section 164 of the Cr.P.C. before the learned M.M. Shri Deepak Dabas (PW-5). The witness even in Ex.PW-5/A had stated that her age to be 12 years. On oath when the witness had come (into the box which was on 03.8.2011) she had given her age as 14 years. She had stated that at the time of her deposition her age was 16 years. At the time of offence her age was 14 years. It is this discrepancy which has been highlighted by the learned counsel for the appellant that the victim was not clear as to whether she was 12 years of age or 14 years of age on the date of the offence. These contradictions have to work in favour of the appellant.

11 Before answering this submission, the testimony of PW-3 sister of

the victim is relevant. She had described the age of victim to be 12 years on the date of the incident. The victim had stated her age to be 14 years. Whether her sister was aged 12 years or 14 years would not really be relevant. The victim would be a minor for the purposes of the offence for which the appellant has been charged. Moreover, the Court must remember that the victim comes from an illiterate and rustic background. She has studied only up to 4th class and after that she has left the school. She was taking care of her sister's children. She did not know her exact date of birth. One or two years difference in her age in her version would not really detract from her testimony; de hors this fact her version has to be tested.

12 PW-1 has reiterated that she knew the accused from before. He used to reside in the neighbourhood. She had been living in the jhuggi of her sister for about last two years and she was looking after the children of her sister aged 1½ years and 4 years. On the fateful day i.e. 16.9.2007 at about 2.00 p.m. accused came to her sister's jhuggi and committed "galat kaam" upon her. She clarified what was "galat kaam". She was threatened not to disclose the incident to anyone else her niece and nephew would be killed. In the evening when her sister (PW-3)

returned from her work PW-1 was sitting in the room and she was looking sad. On questioning, the incident was disclosed by PW-1 to PW-3. In the cross-examination of PW-1 she did not detract from her version. She had specifically stated that the accused had committed the act of rape upon her at 2.00 p.m. Version of PW-1 has been fully corroborated by the testimony of PW-3. PW-3 had stated that when she returned home she found her sister in a silent mood. She stated that the appellant had committed rape upon her and he threatened her not to disclose about the incident to any person.

13 FIR was registered at 8.15 p.m. on 16.9.2009 i.e. within less than 2 hours from the time when PW-3 had returned home and PW-1 had narrated the incident to her.

14 Although suggestions have been given to both PW-1 and PW-3 that the accused has been falsely implicated as the accused knew about the illicit relations of PW-1 with her brother-in-law (husband of PW-3) and this was the reason for the false implication of the accused yet this Court notes that besides the fact that this defence taken in the cross-examination of PW-1 and PW-3 is totally contrary and in conflict with the defence set up by the accused in his statement recorded under CrI. Appeal No. 1414/2012

Section 313 Cr.P.C. yet even otherwise it is wholly impossible to understand that PW-3 would have consented to this illicit relationship between her 14 year old minor sister and her own husband. This is wholly unfathomable. The version of the defence that this knowledge the accused had of the illicit relationship of PW-1 with her brother-in-law had led to this false implication has no basis as PW-3 would not have been a consenting party to such a relationship. Such a conduct would be wholly unnatural and abnormal. That apart this Court notes that in the defense of the accused taken in his statement under Section 313 Cr.P.C. he had set up a plea of alibi. His submission was that on the fateful day i.e. 16.9.2009 he was not present at the place of incident as on that day he had gone to meet his brother at a Juice Shop in Laxmi Nagar. These conflicting and contrary versions taken up by the accused clearly show that the accused has no defence to find support from. He was vacillating. It was obviously for the reason that he has no defence.

15 There in fact appears to be absolutely no reason for the false implication of the accused but the fact is that the accused had committed the offence for which he had been charged. The medical evidence

Ex.PW-5/A shows that the hymen of the victim was torn. Merely
Crl. Appeal No. 1414/2012

because there was no external injuries would again not detract from otherwise cogent version of the prosecutrix. The MLC shows that the victim had been examined as early as 9.55 p.m. on 16.9.2009 and the brief history as narrated by the victim was that sexual assault was committed by the neighbor on 16.9.2009 while she was alone at home. Her hymen was also torn. This Court also notes that the accused had just attained adulthood. It is also not as if he was a well built man. In this background, the absence of injuries on the victim and especially when her version does not show that she had resisted the accused would not really cast doubt on her otherwise cogent version. Absence of injury on her person would not really detract from her credibility.

16 The vehement submission of the learned counsel for the appellant that the FSL report also does not support the version of the prosecution is also an argument which is noted to be rejected as the record shows that the blood samples, could not give any result because the same were putrified.

17 Appellant has already been given a minimum sentence of RI for a period of 7 years. The Statute does not permit the sentence below the minimum unless a special circumstance is carved out, which is not so in

Crl. Appeal No. 1414/2012 Page 9 of 10

the presence case.

18 There appears to be no merit in the appeal. Dismissed.

INDERMEET KAUR, J

AUGUST 10, 2015

ndn