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

% *Judgment reserved on :21.7.2015*
Judgment delivered on :28.7.2015

+ CRL A. 1331/2012

RAJU DAY Appellant.
Through Mr.S.S.Ahluwalia, Advocate.
versus
STATE Respondent
Through Mr.O.P.Saxena, APP.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order of sentence dated 04.8.2012 and 8.8.2012 wherein the appellant stood convicted under Section 376 of the IPC. He had been sentenced to undergo RI for 8 years and to pay a fine of Rs.2000/-, in default of payment of fine to undergo SI for 2 months.

2 This was an unfortunate case where the victim is the daughter of the appellant. The prosecutrix has been examined as PW-9. Her mother Smt.Ratna (PW-8) also supported her version. Version of the prosecution being that the victim was continuously raped for the last about six months by her father. She had disclosed the incident to her mother. Her mother accosted her father who had apologized stating that the incident would not be repeated in future. Her mother did not report the matter to the police. When her mother had gone to village the appellant again committed rape upon the victim. Police report was accordingly lodged. Apart from the statement of PW-8 and PW-9 the medical report which included the MLC of the victim (Ex.PW-6/A) proved through Dr.Ruchi Mishra (PW-6) recorded that her hymen was torn. The age of the prosecutrix was established through the record produced by the Principal of the MCD which included the admission Register; this was proved through Smt. Snehprabha Hastir (PW-4).

3 Challan was accordingly filed. In the statement of the accused recorded under Section 313 Cr.P.C. he stated that he had been falsely implicated. He further stated that his wife was in the business of

prostitution and she encouraged her daughters to join this business; this was the bone of contention between the parties hence for this reason he had been falsely implicated. No evidence was led in defence.

4 Arguments have been heard and record has been perused.

5 PW-9 is the star witness of the prosecution. She was the real daughter of the appellant. She had on oath deposed that sometime in January her mother had gone to her parents' house in West Bengal. She had gone alone. She spent 18-19 days there. On the day when her mother had left, her father had done 'galat kaam' with her. He slept with her against her wishes. Reply to a specific query which was put to the witness about the meaning of 'galat kaam' was noted. Her demeanour was also noted by the trial Judge. It was also noted that the victim was crying. PW-9 further deposed that this act was repeated by her father with her 2-3 times during the time when her mother was away. She told about this incident to her sister Rinki. Rinki told the incident to her mother. Her father was accosted by her mother to ensure that this act would not be repeated. Her father however again committed 'galat kaam' upon her on the same night. Her Bua Vandana was also aware of

this. But her father had threatened Vandana and her husband that nothing about this incident should be disclosed. Police had recorded her statement. In her cross-examination, she stated that her mother never stayed outside the house prior her going to West Bengal. Her mother had gone to West Bengal on 21.01.2011 but she did not remember the exact day of the week. She did not remember the date when she disclosed the things to her mother for the first time. She denied the suggestion that her mother used to stay outside for days together without the permission of her father so there was a usual marital discord between them. She denied the suggestion that she and her mother used to indulge in illicit activities of prostitution and her father used to stop them from doing all these things which was the bone of contention and the reason for the false implication of the appellant.

6 The mother of the victim Smt.Ratna was examined as PW-8. She was used to work as a maid servant in the house. She deposed that she had developed Jaundice that is why she had gone to West Bengal. Her husband used to ply rickshaw. "R" is her eldest daughter aged 11 years. Rinki is her second daughter. She has three daughters and one son.

Two of her daughters i.e. victim and Rinki stayed behind her with her husband. She further deposed that when she returned to Delhi after one and half month, the victim told her that her father raped her 5-6 times when she was not in Delhi. He used to say that he would give her Rs.20/- to Rs.30/- to spend. When PW-8 accosted her husband he pleaded sorry and stated that the things would not be repeated. Police complaint was lodged. Her daughter was medically examined. In her cross-examination PW-8 admitted that her statement was recorded by the police. She denied the suggestion that since she used to stay outside for days it was the bone of contention between the husband and wife.

Relevant would it be to note that the defence as emanated from the cross-examination of PW-8 and PW-9 is different. Whereas the suggestion given to PW-8 by the learned defence counsel was with regard to the bone of contention between PW-8 and the appellant for the reason that PW-8 used to stay out of house for several days; in the cross-examination of PW-9 the suggestion given to PW-9 was that the bone of contention between PW-8 and the appellant was that PW-8 was in the business of prostitution and she used to indulge her daughters in this business as well which was the fight between the husband and the wife.

This difference in the two defences has been noted. They are distinct and inconsistent. At this stage the most vehement argument pleaded by learned defence counsel is that right from inception his case has been that because of the activities of PW-8 (which was the fact that she was running a prostitution racket and also encouraging her daughters to indulge into it) annoyed PW-8 which was the reason for his false implication through his daughter (PW-9). This submission is incorrect.

7 This argument of the learned defence is thus without any merit.

8 The second argument raised by the learned defence counsel was based on the so-called inconsistency between the versions of PW-8 and PW-9. Submission being that PW-8 had categorically stated that she had gone to village with her two children whereas PW-9 had stated that her mother had gone to village alone. Moreover it would also be difficult to believe that the appellant had committed rape upon his daughter in the Jhuggi where his other children were also sleeping. This version set up by the prosecution is impossible to believe.

9 In this context the versions of PW-8 and PW-9 have been examined. This Court also notes the charge for which the appellant

had been charged is for the offence of rape. The testimony of the each witness has to be viewed as a whole and no minor discrepancy noted here and there which otherwise does not affect the merits of the controversy can be used as a defence tool to dislodge the otherwise well established version of the prosecution.

10 This Court notes that the version of PW-8 and PW-9 are consistent on all major aspects of the case. The Court also notes the demeanour noted by the trial Judge of PW-9 which was that at the time of examination of PW-9 on oath in court she became emotional and started weeping; it was a natural act. It would be extremely difficult for a minor daughter to depose against her father and that too of the nature of the offence which is sought to be established by the prosecution i.e. of an alleged sexual assault by the father upon his own daughter. Minor discrepancies noted here and there which do not detract from the gist of the case would not discredit the witness.

11 There was no reason for PW-9 to falsely implicate her father. The defence of the appellant that he had been falsely implicated because of his objection to the illicit activities of prostitution of PW-8 and

because PW-8 was encouraging her daughter in this business of prostitution is without merit as this line of defence has been adopted only in the cross-examination of Pw-9 but did not find mention in the cross-examination of PW-8. PW-8 had been cross-examined on 25.01.2012. PW-9 had been cross-examined on 21.02.2012 this was after a gap of more than one month. Counsel for the appellant had obviously become wiser.

12 PW-8 has been categorical in her version. She had deposed that her daughter told her about this incident rape committed upon her by her father. She accosted her husband. This was the most natural conduct of a mother in such situation. The husband had apologised and matter was not reported to the police. When the act of rape was again committed upon PW-9 she reported the matter to PW-8. PW-8 then reported the matter to the police. This was also a natural conduct. PW-8 had given benefit to her husband hoping that he would mend his ways but he did not. In these circumstances, she had no option but to get the FIR registered.

13 This Court also notes that PW-8 is a daily wager looking after the needs of herself and her family by working as a maid servant. The accused having been embroiled in this controversy and having been sent to Jail and being the main bread earner of the family, the family earner had been lost. It was obviously a huge cost for PW-8 that she resigned herself to the fact that her daughter had been subjected to such a humiliation by her own father and the matter required police intervention. The medical evidence which is the MLC of the prosecutrix (PW-3/A) also shows that her hymen was torn earlier. Human semen was also detected on the exhibits which were seized including the shirt, sameez and under wear of the prosecutrix. How and where did the semen come from? i.e. on the clothes of a minor girl. There also appears to be absolutely no reason for the false implication of the appellant but for the fact that the appellant was guilty of the crime for which he had been charged.

14 In AIR 2010 SC 3071 State of U.P. Vs. Krishna Master and Ors., while dealing with the testimony of child witness, the Hon'ble Apex Court held that child at a tender age is incapable of having any malice or

ill will against any person and there must be something on record to satisfy the court that something had gone wrong between the date of the incident and recording the evidence for the child witness due to which the witness wanted to implicate the accused falsely in a case of serious nature.

15 Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

JULY 28, 2015

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