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

% *Judgment reserved on : 29.9.2015*
Judgment delivered on : 09.10.2015

+ CRL.A. 36/2013

HARI SHANKAR KUMAR Appellant

Through Mr. K. Singhal, Advocate.

versus

STATE GOVT. OF NCT OF DELHI Respondent

Through Ms. Neelam Sharma, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order on sentence dated 15.10.2012 and 26.10.2012 respectively wherein the appellant had been convicted under Section 376 of the IPC. He had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.20.000/- for the offence; this amount of Rs.20,000/- was directed to be paid to the prosecutrix as compensation, in default of payment of fine the convict was to undergo SI for 6 months. Benefit of Section 428

of the Cr.P.C. had also been granted to the appellant.

2 Nominal roll of the appellant reflects that as on date he has undergone incarceration of almost about 5 years including remissions.

3 Version of the prosecution was unfolded after recording of DD No.24A (dated 28.7.2011) wherein it was disclosed that one person had been apprehended from House No.31A, Jamini Park, Nangli Sakrawati, Najafgarh, New Delhi. SI Ram Dhan (PW-8) along with Constable Surender (PW-11) reached the spot. The appellant Hari Shanker had been apprehended. He was being beaten by the public. He was handed over to PW-8 by Vijay Kumar (PW-3). A complaint was registered against the appellant. The version of the prosecution was that the prosecutrix "S" (examined as PW-2) who was studying in the 6th class was being given tuitions by the appellant. On 23.7.2011 while the appellant was giving tuition, he bolted the door from inside and committed rape upon PW-2. Statement of PW-2 was recorded to the said effect. Her version being that on that date i.e. on 23.7.2011 at about 5.30 p.m. the appellant had come to her house to give tuition to her. On the asking of the appellant her brothers went out of the room. The appellant bolted the room from inside and committed rape upon her.

Her parents were not at home. She was threatened not to disclose the incident to anyone or else she would be killed. She did not disclose the incident to her parents on that date. The incident was finally disclosed on 28.7.2011 pursuant to which the present FIR has been registered. The mother of the victim Anju Devi was examined as PW-4 and her brother Master Digvijay was examined as PW-10. The victim was medically examined on 28.7.2011 by Dr.Shruti Joshi Dabral (PW-13). Her MLC (Ex.PW-13/A) had noted her hymen to be not intact. The appellant was arrested. He was also subjected to a medical examination and as per the report of the Dr.A.S.Yadav (PW-15) there was nothing to suggest that he could not perform the sexual act.

4 In the statement of the appellant recorded under Section 313 Cr.P.C. he pleaded innocence. His submission being that he had been falsely implicated as there was a money dispute as he had received an overtime of Rs.5000/-, the father of the victim who was also working with him in the same department wanted a share in this amount pursuant to which a quarrel had taken place with PW-3 and this had led to his false implication.

5 In defence the appellant had produced one witness. DW-1 was Avdesh. He was working as a security guard in the Ircon International. He had produced the attendance register to substantiate the stand of the appellant that on the fateful day his attendance was marked in the department between 8.00 a.m. to 6.00 p.m. and thus the version of the prosecution that the incident had taken place at 5.00 p.m. on 23.7.2011 was negatived.

6 On behalf of the appellant arguments have been addressed in detail.

7 The foremost argument of the appellant is that a benefit of doubt must be given to the appellant for the dents which he had created on the versions of the prosecution through DW-1 and there was sufficient evidence to establish that on the fateful day i.e. on 23.7.2011 the appellant was working in his office from 8.00 a.m. to 6.00 p.m. and as such the version of the prosecution is dented. There is also no explanation for the inordinate delay in lodging the FIR which was after a period of 5 days; the MLC also does not support the version of the prosecution as no injury was noted upon the person of the victim. Had it

been a case of forceful rape some kind of injuries would have been noted upon her person. It is also difficult to believe as to how semen was detected on the vaginal and anal swabs of the victim when even as per the prosecution the incident had occurred five days earlier i.e. on 23.7.2011. The version of the prosecution was concocted.

8 Needless to state that learned APP for the State has refuted these submissions.

9 Arguments have been heard. Record has been perused.

10 The victim has been examined as PW-2. She was a 12 year old girl. After putting a preliminary round of questions to her, she was examined. She deposed that on 23.7.2011 Ram Shankar Yadav who used to give tuitions to her had come to her house at about 5.00 p.m. On some pretext he sent her two brothers outside the room and thereafter he committed rape upon her. He threatened her not to disclose this incident to any person. Her statement was recorded under Section 164 Cr.P.C. This witness was permitted to be cross-examined by the learned APP as she had wrongly given the name of the appellant as Ram Shankar Yadav; his name was Hari Shankar. In her cross-examination, she

admitted that the name of her tutor was Hari Shankar and the accused standing in the Court was the person who had committed rape upon her. She correctly identified him. She clarified that because of fear she had wrongly given the name as Ram Shankar Yadav whereas the name of her tutor was Hari Shankar.

11 She was subjected to cross-examination. There was nothing to dent her version. She had in her cross-examination stated that at the time when the act of rape was being committed Kavita had knocked at the door and after putting on his own clothes and her clothes the appellant opened the door. On this count learned counsel for the appellant submits that Kavita has not been examined; she was a relevant witness.

12 This Court notes this submission but is of the view that Kavita can in no manner be said to be a relevant witness. It is not the version of PW-2 that Kavita had the seen any incident or that PW-2 had disclosed anything to Kavita. In this background non-citing of Kavita as a witness is an argument wholly without merit.

13 The version of PW-2 was corroborated by her medical evidence i.e. her MLC (Ex.PW-13/A). Hymen was not found intact. There is no

doubt that no injury had been noted upon her person in spite of the fact that an act of rape had been committed upon her but in all cases evidence of injuries may or may not be a relevant circumstance to prove the allegation of rape.

14 In this context, the observations of the Supreme Court in the case of **Ranjit Hazarika v. State of Assam**, (1998) 8 SCC 635 are relevant.

They read as under:

“.....non-rupture of hymen or absence of injury on victim's private parts does not belie her testimony. This Court further held that the opinion of doctor that no rape was committed cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. This Court held that the evidence of the prosecutrix was amply corroborated by her mother and father whom she immediately informed about the occurrence.”

15 Version of PW-2 is clear, coherent and cogent. There was no reason for a 12 year old child to implicate the appellant. The fact that he used to give her tuition is supported not only from her own version but also by the version of her brother (PW-10) her father (PW-3) and her mother (PW-4). Admittedly, the appellant was working in Ircon International , the same company where PW-3 was also working. PW-3

was a security guard and the appellant was working in the capacity of a supervisor. These facts are admitted.

16 The defense of the appellant and the plea of alibi which has been set up by him only found mention at the time when he was asked to lead his evidence in defense. This defense was never disclosed earlier. It did not find mention in the cross-examination of the witnesses of the prosecution; it is also in conflict with the defense raised by the appellant in his statement recorded under Section 313 Cr.P.C.. In his statement under Section 313 Cr.P.C. the appellant had stated that because he had taken an overtime amount of Rs.5000/- in which PW-3 wanted a share this had led to a quarrel and false implication of the appellant. The defense of the appellant through DW-1 was wholly different. Plea of alibi set up and the version of the appellant being that the appellant was not present at the spot at the time of incident. The attendance register which DW-1 had brought (Ex.DW-1/A) was a document rightly rejected by the Trial Judge as this document even did not contain a stamp of the company i.e. Ircon International. Even otherwise the defense vacillating and the appellant not being sure of his stand; it was obviously for the reason that the defense was not an honest defense.

17 Ingredients of Section 376 of the IPC stood established. A 12 year old girl has been ravished by her tutor. The trust and faith which had been reposed by this minor girl in her so-called 'guru' was destroyed by the act of the appellant. She could not report the matter earlier than 28.7.2011 as she was under threat from the appellant. After the fateful day of 23.7.2011, (the evidence on record shows), the appellant had gone to his native village and had come back again only on 28.7.2011 to give her tuition. She refused to take tuitions from him at that point of time and revealed the incident to her mother. The mental and psychological trauma which the minor victim must have suffered in this intervening period is understandable. Her apprehension and fear of not disclosing the incident earlier to 28.7.2011 is explained.

18 The conviction calls for no interference. However, noting the submission of the learned counsel for the appellant that the appellant is young in years and he has a wife and a family to support leniency in sentence is considered. Accordingly, the sentence of RI for a period of 10 years is reduced to RI for a period of 8 years. Sentence of fine which is by way of a compensation to be paid to the victim calls for no interference.

19 Appeal disposed of in the above terms.

INDERMEET KAUR, J

OCTOBER 9, 2015
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