

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

RESERVED ON : 4th MARCH, 2015

DECIDED ON : 6th MAY, 2015

+ CRL.A. 1448/2012

MD.PANAULLAH Appellant

Through : Mr.Sachin Dev Sharma, Advocate.

VERSUS

STATE OF DELHI Respondent

Through : Mr.Navin K.Jha, APP.

AND

+ CRL.A. 514/2013

MOHD.MUMTAZ Appellant

Through : Mr.Chetan Lokur, Advocate.

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. Aggrieved by a judgment dated 04.09.2012 in Sessions Case No. 05/11 arising out of FIR No.415/10 PS Narela by which Md.Panaullah (A-1) and Mohd.Mumtaz (A-2) were convicted for committing offences under Sections 328/376(2)(f) IPC, they have preferred the appeals. By an order dated 06.09.2012, A-1 was awarded RI for ten years with fine ₹ 10,000/- under Section 376 (2)(f) IPC and RI for five years with fine ₹ 5,000/- under Section 328 IPC. A-2 was sentenced to undergo RI for ten years with fine ₹ 10,000/- under Section 376 (2)(f) IPC. The sentences were to operate concurrently.

2. Briefly stated the prosecution case as reflected in the charge-sheet was that in between eight or nine months, before 09.10.2010 the appellants sexually assaulted 'X' (assumed name) aged around 13 years after administering poisonous substance to her on various dates and criminally intimidated her. It is relevant to note that A-1 is X's father and A-2 was acquainted with her before the occurrence being A-1's friend. On 08.10.2010, at A-1's residence, marriage of his elder daughter Majida Khatun was to take place. Many relatives including PW-2 (Afsana), PW-6 (Akhtari) and PW-8 (Mohd.Bilali) had participated in the said marriage.

PW-2 (Afsana) suspected that A-1 was concealing real facts about ill health of her daughter 'X'. She became suspicious and forcibly touched X's abdomen and felt that she was pregnant. She immediately called PW-1 (Nageena) working as counsellor for NGO known as "STOP". One mid-wife was called at the spot who confirmed that 'X' was pregnant. People from the locality gathered and A-1 was beaten. Intimation was given to the police. 'X' disclosed that she was sexually assaulted by the appellants. Daily Diary (DD) No.14A (Ex.PW-4/A) was recorded at PS Narela. The investigation was assigned to SI Mohd. Yaqub Khan, who went to the spot. After recording victim's statement (Ex.PW-5/A), he lodged First Information Report. 'X' was medically examined and her statement under Section 164 Cr.P.C. was recorded. During investigation, Investigating Officer recorded statements of the witnesses conversant with the facts. The accused persons were arrested and medically examined. After completion of investigation, a charge-sheet was filed against both of them in the Court. The prosecution examined sixteen witnesses to prove their complicity in the crime. In 313 Cr.P.C., they denied their involvement in the crime and pleaded false implication at PW-2 Afsana's behest. The trial resulted in their conviction as aforesaid. Being aggrieved and dissatisfied, they have filed the instant appeals.

3. I have heard the learned counsel for the parties and have examined the file. Initially, in her statement under Section 161 Cr.P.C. (Ex.PW-5/A) and under Section 164 Cr.P.C. (Ex.PW-5/B), 'X' had implicated A-1 for committing rape upon her for the past one year. PW-1 (Nageena), PW-2 (Afsana), PW-6 (Akhtari) and PW-8 (Mohd.Bilali) also deposed that on 08.10.2010, during their presence at A-1's house, 'X' had informed A-1 also to be the perpetrator of the crime. It enraged the public and A-1 was beaten at the spot. However, when 'X' was examined as PW-5, in her Court statement, she completely exonerated A-1 and specifically deposed that he did not commit any wrong act with her. She alleged that her statement given to the police was incorrect and was under pressure. The Trial Court, however, based A-1's conviction on the basis of circumstantial evidence noting unnatural and unreasonable conduct of A-1; that of the prosecutrix 'X'; her sisters; behaviour of the crowd coupled with the deposition of public witnesses including PW-1 (Nageena) and PW-2 (Afsana). The Trial Court was of the view that due to her sister (Majida)'s intervention who used to visit her in Nirmal Chaya, 'X' opted not to support the prosecution case.

4. Apparently, A-1's conviction is based upon mere conjectures, surmises and possibilities. None of these witnesses was witness to the

incident of sexual assault upon 'X' at any stage. No medical or scientific evidence emerged on record to infer if at any time, A-1 administered poisonous substance to her daughter 'X' and sexually assaulted her. In her Court statement, 'X' was very categorical and certain that A-1 was not the author of the crime. It is significant to note that DNA test conducted during investigation did not connect A-1 with the birth of female child born to 'X' subsequently. There is no other medical / FSL findings against A-1 to connect him with the crime. Under these circumstances, A-1's conviction merely on the basis of alleged circumstantial evidence and suspicion is unsustainable and is set aside.

5. Regarding A-2, 'X' had implicated him in her statement (Ex.PW-5/A) given to the police at first instance on 09.10.2010. She gave detailed account as to how and under what circumstances A-2, who lived in D-Block and worked with her father, committed rape upon her in a factory against her wishes on various dates. In her statement under Section 164 Cr.P.C. also she reiterated her version and named A-2 to be the rapist. In her Court statement she exonerated her father but was certain about A-2's involvement in committing rape upon her. She deposed that A-2 had committed sexual intercourse with her twice or thrice in the afternoon in her house. She further revealed that A-2 had called her in his factory

(Karkhana) in JJ Colony, Bawana in the evening and had sexually assaulted her there. Elaborating further, she deposed that A-2 was alone there at that time; he closed the door from inside and forcibly raped her. He had told her not to disclose the incident to anyone as it was a routine and general thing. In response to Court question, 'X' disclosed that an aged man also used to ravish her repeatedly in the park. The police, however, did not conduct any investigation on this aspect to find out the said rapist. 'X's statement inspires confidence in this regard as DNA report No. 2011/DNA-0740/420 dated 07.04.2011 did not connect A-1 and A-2 with the pregnancy of the child and they were not responsible for the birth of the female child. Apparently, someone else had also sexually assaulted 'X' and had made her pregnant. Investigation on its face is defective and no sincere efforts were made to find out as to who was the father of the child born to 'X'. It, however, does not dilute the nefarious act committed by A-2 with 'X'. She was aged about 13 years on the day of occurrence and had no ulterior motive to falsely implicate him for the heinous offence. There was no previous enmity or ill-will forcing 'X' to level serious allegations against him. A-2 did not give plausible explanation to the incriminating circumstances proved against him and did not offer believable reason for his false implication. His name emerged

even in the statements of PW-1 (Nageena) and PW-2 (Afsana) on the very day when the matter came to the knowledge of A-1's relatives. Despite searching cross-examination, nothing material could be extracted to disbelieve the prosecutrix. Her version is consistent throughout about A-2's involvement. It is true that in DNA report, A-2 was found not to have any connection with the child born but that is not enough to discredit X's statement. Simply because she has opted not to implicate her father for reasons known to her, it does not efface the crime committed by A-2 with an innocent child. In fact, as per school certificates (Ex.PW-7/A to Ex.PW-7/D), her date of birth is 04.10.1999. So innocent she was that she was unaware of her pregnancy for about seven months. She had to remain in Nirmal Chhaya as per CWC's order where she delivered a female child. A-2 taking advantage of X's innocence ravished her repeatedly. Her innocence is apparent as despite being sexually assaulted repeatedly by an unknown aged person, she did not report the incident to her father or anyone else. Since she was below 16 years on the day of incident, even her consent for physical relations was insignificant.

6. Minor contradictions, discrepancies and omissions highlighted by the appellants' counsel are not sufficient to throw away the prosecution case overboard and to disbelieve the prosecutrix. Nothing

more can be expected from a child aged about 10 / 12 years who did not know the consequences of physical relations established by A-2 and others with her making her pregnant and forcing her to deliver a child.

7. In the light of above discussion, appeal preferred by A-1 is allowed and conviction / sentence recorded by the Trial Court qua him is set aside. A-1 is on bail. His bail bond and surety bond stand discharged.

8. Appeal preferred by A-2 lacks merit and is dismissed. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

MAY 06, 2015 / *tr*