

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

RESERVED ON : 5th OCTOBER, 2015

DECIDED ON : 15th OCTOBER, 2015

+ CRL.A.1731/2014

SATISH Appellant

Through : Mr.Biswajit K.Patra, Advocate.

versus

THE STATE (GOVT OF NCT), DELHI Respondent

Through : Mr.Amit Ahlawat, APP.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Aggrieved by a judgment dated 20.05.2013 of learned Addl. Sessions Judge in Sessions Case No.103/13 arising out of FIR No.296/11 PS Sagarpur whereby the appellant – Satish was held guilty for committing offences under Sections 376/506 IPC, the instant appeal has been preferred by him. By an order dated 20.05.2013, the appellant was sentenced to undergo RI for seven years with fine ₹ 5,000/- under Section 376 IPC and RI for one year under Section 506 IPC. Both the substantive sentences were to operate concurrently.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that on 25.11.2011 at about 05.00 p.m. at House No.RZ-652, Gali No.3, Main Sagarpur, Delhi, the appellant committed rape upon the prosecutrix 'X' (assumed name) aged around fifteen years and criminally intimidated her. The incident was reported to the police on 27.11.2011. Investigating Officer after recording victim's statement (Ex.PW-2/A) lodged First Information Report. In her complaint, 'X' implicated the appellant for committing rape upon her. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. The accused was arrested and taken for medical examination. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent for examination to Forensic Science Laboratory. Upon completion of investigation a charge-sheet was filed against the appellant in the Court. The prosecution examined sixteen witnesses to establish appellant's guilt. In 313 Cr.P.C. statement, the appellant denied his complicity in the crime and pleaded false implication without examining any witness in defence. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and correct perspective and fell in grave error to rely upon the testimonies of interested witnesses. There was inordinate delay of two days in lodging First Information Report which creates doubt about the trustworthiness of the prosecution case. The prosecutrix and her mother have made vital improvements in their deposition in the Court. The prosecution was unable to establish the true and correct age of the prosecutrix. Crime weapon i.e. knife was not recovered during investigation. There was unexplained delay in sending samples to FSL. Non-examination of X's friends – Poonam and Anita are fatal to the prosecution case. Reliance has been placed on '*Thulika Kali vs. State of Tamil Nadu*', 1972 (3) SCC 393; '*Maharaj Singh vs. State of UP*', 1994 (5) SCC 188; '*Thanedar Singh vs. State of MP*', 2002 (1) SCC 487; '*Rajeevan vs. State of Kerala*', 2003 Cri.LJ 1572; '*State of Rajasthan vs. Gurmail Singh*', 2005 (3) SCC 59 & '*Sujoy Sen vs. State of West Bengal*', 2007 (6) SCC 32.

4. Learned Addl. Public Prosecutor controverting the appellant's contention urged that there are no sound reasons to disbelieve the prosecutrix aged around fifteen years.

5. On scanning the testimonies of the prosecution witnesses, it stands established that the prosecutrix and the appellant established physical relation on 25.11.2011 at appellant's house. In her statement (Ex.PW-2/A), 'X' gave detailed account as to how and under what circumstances, after she was taken to his house by the appellant, he sexually assaulted her. The appellant was implicated by name in the FIR. In her 164 Cr.P.C. statement (Ex.PW-2/B) again reiterating her version, the prosecutrix assigned specific role to the appellant whereby physical relation was established at his house by him. Similar is the statement of the prosecutrix before the Court. No sound reason exists to disbelieve her on this aspect. She was medically examined vide MLC (Ex.PW-5/A) on 27.11.2011. PW-16 (Dr.Parul Mehra) proved observations recorded at Ex.PW-16/A from point 'X' to 'X' and deposed that the girl had abrasions and nail marks over second and third fingers of right hand; she had laceration on outer aspect of labia minora (left) and her hymen was torn; the vagina admitted two fingers with ease. Crucial document to corroborate X's version in this regard is DNA report (Ex.PX) as per which the DNA isolated from the underwear of the prosecutrix matched with the DNA of the accused isolated from his blood sample. The Trial Court has dealt with the appellant's challenge to the authenticity of DNA report

minutely and there are no valid reasons to have different view. The appellant did not summon the concerned expert to cross-examine him to challenge his findings. Since the appellant has accepted the report without any demur, finding fault on alleged delay in sending the samples is without substance. It is relevant to note that the prosecutrix was aged around fifteen years and was a student of 10th standard. She was not expected to fake the incident of physical relationship to have reflection upon her chastity.

6. On scrutinising the entire prosecution case set up by the prosecution, it stands established that 'X' was a consenting party to the coitus. No reliance can be placed on the wavering testimony of the prosecutrix and her mother to infer that physical relation was made by the appellant forcibly without X's consent. Admitted position is that the prosecutrix and the appellant were well acquainted with each other before the incident. They were known to each other for the last three or four months. The prosecutrix had visited the appellant's house on several occasions. She had even met appellant's other family members. On the day of occurrence allegedly the prosecutrix had gone to take tuitions. The story presented by the prosecutrix and her mother in this regard is contradictory and inconsistent. In the complaint (Ex.PW-2/A) 'X'

disclosed that when she was returning to her house at 04.30 pm after taking tuitions, the accused met her on the way and took her to his house on the pretext to meet his mother. In the cross-examination, 'X' disclosed that her tuition timings were from 03.00 pm to 06.00 pm. She did not reveal that on that day, the tuition teacher was not available and she had not taken her tuition class. PW-3 (Somwati), X's mother, deposed that 'X' used to return from her tuition by 05.30 pm. In her 164 Cr.P.C. statement (Ex.PW-2/B), 'X' disclosed that she had gone along with her friends to take tuition at 04.00 pm. Since the tuition teacher was not available, she along with her friends came back at 04.30 pm. The prosecution did not examine the concerned teacher who used to impart tuition to verify as to what were the exact timings for tuition classes or whether on that day she had not imparted tuition to 'X' and her friends. The prosecution also did not examine X's friends who used to attend the tuition classes along with her. The exact timings of tuition classes have not come on record.

7. The prosecutrix had accompanied the appellant to his house voluntarily with her free consent. Physical relation was made in the house when none else were present there. At no stage, the prosecutrix raised alarm or hue and cry. Even after the alleged rape incident, 'X' did not protest in any manner. Though her mother had met her in the appellant's

house after the incident, she avoided to accuse the appellant for crime as she wanted to save him. She did not try to run away from the spot though she had the opportunity as the appellant had gone to arrange money. She remained mum for considerable time without any cogent reasons. After an unexplained delay of two days, the FIR was lodged. The truth came out in the statement (Ex.PW-2/B) under Section 164 Cr.P.C. recorded on 28.11.2011. She disclosed that the accused had filled her 'Maang' with blood and had promised to marry her. She further revealed that both of them liked each other. She was apprehensive that her parents would marry her somewhere else. She further disclosed that the accused had gone to his work-place to bring money and had assured to come within ten minutes. However, in the meantime, her mother arrived at the spot. The accused had made a telephone call to her father expressing his intention to marry her. From this revelation, it can safely be inferred that the prosecutrix and the appellant were in love and wanted to marry. X's parents were not in favour of their marriage. It appears that X's statement in Court to implicate the appellant for rape was at the behest of her parents. In the MLC (Ex.PW-5/A), no injuries on the private parts of the prosecutrix were found; the vagina admitted two fingers easily.

8. Prosecutrix's age is crucial to infer the appellant's guilt as she was a consenting party. PW-6 (Jai Singh), Lab Assistant, Sarvodya Kanya Vidyalya No.2, Sagarpur, New Delhi, proved the School record in which date of birth of the prosecutrix was recorded as 26.09.1996. He deposed that as per admission register of academic year 2006 – 2007, 'X' took admission in class 6th on 01.04.2006 vide application form (Ex.PW-6/A). He further deposed that before taking admission in class 6th for the academic year 2006 – 2007, 'X' had studied in the same school from class 1st to class 5th. As per school record, she had taken admission in class 1st on 19.04.2001 and her date of birth recorded therein was 26.09.1996. X's father had submitted birth certificate (Ex.PW-6/C) that time. She also proved the certificate (Ex.PW-6/D) and admission form (Ex.PW-6/B). These documents were issued by the government officials in the discharge of their official duties when X's parents had not predicted any such unfortunate incident to take place in future to manipulate her age. In the absence of any other proof, the age recorded in the school record cannot be doubted or suspected. 'X' and her mother have specifically claimed that 'X' was below sixteen years of age on the day of incident.

9. Since the prosecutrix was below sixteen years of age on the day of occurrence, her consent for physical relation with the appellant was

inconsequential. The appellant is liable to suffer conviction under Section 376 IPC.

10. Regarding Section 506 IPC, since the prosecutrix was a consenting party, apparently there was no criminal intimidation to have physical relation with her. Conviction under Section 506 IPC thus cannot be sustained and is set aside.

11. Regarding sentence, it is to be noted that the appellant was aged around nineteen years on the day of incident. He is not involved in any other criminal case and is not a previous convict; he has clean antecedents. The prosecutrix and the appellant were in love. 'X' was a consenting party throughout. In her 164 Cr.P.C. statement, she expressed desire to see the appellant once. Both of them wanted to marry but due to opposition by X's parents, they could not do so. The convict who was aged about nineteen years at the time of commission of offence himself was not fully mature to understand the nature and implications of his act. Considering these circumstances, I am of the view that there exist special and adequate reasons to award sentence less than seven years as mandated under Section 376 IPC. In *Sanjay vs. State* 2014 (1) C.C.Cases (HC) 326, this Court held:

“The legislature in its wisdom made a provision for awarding a sentence of less than seven years when there are special and adequate reasons for the same. I have before me the prosecutrix’s testimony. It goes without saying that the prosecutrix merrily proceeded with the Appellant most willingly. She travelled with him in a bus and then in a train to Lucknow. The prosecutrix was brought back to Delhi by the Appellant himself where the Appellant and the prosecutrix were apprehended at New Delhi Railway Station by the police. Thus, although the Appellant does not want to contest the appeal on merits, it is borne out from the record that it was a case of consensual intercourse with the prosecutrix. While awarding punishment, the Court has to take into consideration the mitigating and aggravating circumstances. The prosecutrix was aged 15 years and eight months and she was incapable of giving the consent for sexual intercourse. I have seen numerous cases where the girls sometimes less than 16 years of age take a lead in eloping with a boy, enters into a marriage with the boy and have sexual intercourse with him. Such a predicament was noticed by this Court in several cases including in two judgments passed by the Division Benches of this Court, namely, Manish Singh v.State Govt. of NCT & Ors, AIR 2006 Delhi 37 and Bholu Khan v.State of NCT of Delhi & Ors. (W.P.(Crl.)1442/2012 dt.01.02.2013.”

Considering the age of the prosecutrix and the facts narrated above, in my view, it is a fit case where sentence less than the minimum should be awarded. Similar view was taken and sentence less than minimum was awarded by a learned Single Judge of this Court in Brij Pal v.State (Crl.Appeal No.278 of 2000) decided on May 31, 2011. I accordingly, sentence the Appellant to undergo RI for four years and to pay a fine of Rs.2,500/- for each of the offences under Sections 366 and 376 IPC, and in default of payment of fine, the Appellant shall undergo SI for one

month each. Both the substantive sentences shall run concurrently.”

12. In the light of the above discussion, while maintaining conviction under Section 376 IPC only, the sentence order is modified and the substantive sentence of the appellant under Section 376 IPC shall be RI for five years instead of seven years. Conviction and sentence under Section 506 IPC is set aside. Other terms and conditions of the sentence order are left undisturbed.

13. The appeal stands disposed of in the above terms. Copy of this order be sent to the concerned Jail Superintendent for information. Trial court record be sent back along with a copy of this order.

(S.P.GARG)
JUDGE

OCTOBER 15, 2015 / *tr*