

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

RESERVED ON : 26th APRIL, 2016

DECIDED ON : 29th APRIL, 2016

+ **CRL.A.147/2003**

SAYEED NABEES

..... Appellant

Through : Mr.Mohit Mathur, Sr.Advocate with
Mr.Shishir Mathur &
Mr.Mohd.S.Hussain, Advocates.

VERSUS

STATE OF DELHI

..... Respondent

Through : None.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 05.03.2003 of learned Addl. Sessions Judge in Sessions Case No.100/02 arising out of FIR No.486/99 PS Defence Colony by which the appellant – Sayeed Nabees was convicted for committing offence punishable under Section 376 IPC. By an order dated 06.03.2003, he was sentenced to undergo RI for seven years with fine ₹1,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 28.05.1999 at around 12.00 noon at house No.343, Masjid Moth, the appellant committed rape upon the prosecutrix 'X' (changed name) aged around 14 years without her consent. The incident was reported

to the police on 30.05.1999. The Investigating Officer after receiving complaint from victim's mother lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Statements of the witnesses conversant with the facts were recorded. The appellant was arrested and medically examined. Upon completion of the investigation, a charge-sheet was filed against him in the Court. In order to establish its case, the prosecution examined fifteen witnesses. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. He examined himself as DW-1 in defence. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file. At the outset, it may be mentioned that the complete original record was not traceable / available before the Court. Pursuant to the letter No.15197-04 dated 24.04.2010 of this Court and letter No.36215/F.44/Compt/Vig./10 dated 20.05.2010 of the office of District Judge-1 & Sessions Judge on the subject "Reconstruction of Lower Courts Records", the record was reconstructed to some extent. However, the Court below was unable to reconstruct the entire original record. Apparently, in the absence of complete Trial Court record, this court is handicapped to appreciate the statements of the witnesses and the documents on record. Since the occurrence had taken place in 1999, no useful purpose will be served to seek de-novo trial.

4. The FIR was lodged on the written complaint (Ex.PW-2/1) lodged by victim's mother PW-2 (Rita Katazu) on 30.05.1999. The complainant informed the police that she was mother of the victim aged around 14 years who was raped by an individual known by the name of Amzad Khan at around 12.00 – 01.00 p.m. in the afternoon on 28.05.1999. She further informed that her daughter was criminally intimidated and threatened by the assailant. She was afraid to disclose the incident. Apparently, there was delay of two days in lodging the FIR.

5. Victim's statement was recorded under Section 164 Cr.P.C. on 26.07.1999. She informed the Presiding Officer that on 28.05.1999 when she was present at her house, Sayeed Nabees, known to her mother before, came at around 10.00 a.m. and enquired about her mother on the pretext that he had some work with her. She asked him to wait. He was carrying beer bottles in a packet. The appellant forced her to have beer. Despite her resistance, she was forced to have one glass of beer, as a result of which, she started feeling dizzy. She asked the appellant to go. However, he started taking off her clothes, his clothes and also forcibly committed intercourse with her. He warned her that if she disclosed the incident to anyone he would ruin her family. He was carrying a knife with him. She did not inform her mother about the occurrence on 28.05.1999. On her mother's enquiry on 29.05.1999, she told her everything.

6. While appearing as PW-1, in her Court statement, the victim disclosed that on the day of occurrence i.e. 28.05.1999 she was studying in 7th standard in St. Marry School. During those days she used to attend summer camp. The accused met her on that day at the bus stand from where she used to take bus to go to summer camp at Lajpat Nagar. The accused

wanted to meet her mother. She told the accused that he could meet her mother in case she was at home. Thereafter, she took him to her house but her mother was not there. Asking the accused to come later on, she went to attend summer camp. When she returned at around 12.00 noon, she found the accused standing outside her house; her mother had not come back. She went inside her house. On the appellant's request, she permitted him to come inside. On his asking to have some drinks, she permitted him to do so. The accused was carrying drinks with him, he consumed beer. He committed rape upon her. He asked her not to disclose about the incident to anyone. She further deposed that the accused had also asked her to take drink and she had taken some drink. She felt dizzy after taking the drinks.

7. Cross-examination of the witness is not on record. This portion of the statement could not be reconstructed.

8. PW-2 (Rita Katazu) – victim's mother disclosed that on 28.05.1999 when she came to home in the afternoon, she found a small teddybear and a ballpoint pen on the bed. She also found sandwiches and soft cold drinks in the fridge. On enquiry about these articles from 'X', she did not tell anything. Next day, she took her to a doctor as 'X' was too scare to tell anything. She took her to a gynaecologist Dr.Raj in Moolchand Hospital on 29.05.1999. After examining the victim, the doctor informed that she had been sexually assaulted. After consultation with her mother and sister, she lodged complaint (Ex.PW-2/1). She further deposed that after the victim was taken to the doctor, she informed that the said perpetrator of the crime used to ring her up in her absence. She further informed her that she was criminally intimidated and was forced to consume something in the drinks. In response to Court questions, she disclosed that the clothes which

‘X’ was wearing on 28.05.1999 were washed. She further informed that the accused had come to her residence once along with receptionist of the organization First Option where he used to work; she had met him only once. In the cross-examination, she was unable to name the receptionist with whom the accused had visited her house. She disclosed that one Chattarjee, her previous husband, was father of her elder daughter. She denied that the prosecutrix was aged more than 16 years on the day of incident.

9. On scanning the evidence whatever is on record, it transpires that divergent and inconsistent versions have emerged at different stages of the investigation in the testimonies of PW-1 (X) and PW-2 (Rita Katazu). Apparently, both the prosecutrix and the appellant were acquainted with each other prior to the incident and even used to have telephonic conversation. The prosecutrix had accused’s pager number with her. She has given contradictory version as to how and in what manner the appellant gained entry inside the house on the relevant date. In her 164 Cr.P.C. statement, she did not claim that the accused had met her at the bus stop from where she used to go to attend summer camp at Lajpat Nagar or that on return from the summer camp at about 12.00 noon, she had found him standing outside the house. PW-2 (Rita Katazu) did not disclose as to where she had gone, and if so, at what time she had left the house; whether it was locked or not. It is unclear as to when she returned to the house that day.

There was no occasion for the prosecutrix to allow a stranger inside the house in the absence of her mother or other family members. She had no reasons to consume beer. In the Court statement, there is no specific plea that the sexual assault was committed upon her forcibly against her

wishes. At the time of her medical examination, no external injuries whatsoever were found on her body including private parts. Nothing has come on record to show if at the time of incident or soon thereafter, the prosecutrix raised hue and cry. Nothing is on record to infer if any resistance was offered by the victim at the time of alleged forcible rape. Even when her mother returned to the house, she did not inform her about the occurrence and kept mum. Only when she was taken for medical examination, may be due to certain medical complications, on 29.05.1999, it was found that she was sexually assaulted. Only then the prosecutrix revealed about the episode. The FIR was lodged on 30.05.1999 after consultation with complainant's mother and sister. They have not been examined. Delay in lodging the FIR has remained unexplained. The prosecutrix has made vital improvements at various stages. She did not explain as to how the teddy-bear and the ball point pen happened to be there on the bed. Presence of sandwiches and soft cold drinks in the fridge was not explained by the prosecutrix despite being enquired by her mother. No beer bottle was found in the house that time by PW-2 (Rita Katazu) – victim's mother. Possibility of the prosecutrix to be a consenting party cannot be ruled out.

10. To infer the appellant's guilt, age of the victim is crucial. No birth certificate was produced during investigation by the victim or her mother to ascertain her exact date of birth. In school record, her date of birth was recorded as 26.10.1984. However, it was not based upon any birth certificate. It is relevant to note that this certificate pertained to the date of birth recorded in Colonal Satwari School where the prosecutrix had taken admission in class 9th in the academic year 1999-2000. In the cross-

examination, PW-10 (Dr.Shakuntala), Principal of the School, admitted that child's date of birth was recorded on the basis of the application form filled by child's mother at the time of admission on 13.07.2009 (Ex.PW-10/D1). She further disclosed that child's parents were expected to deposit transfer certificate issued by the school in which the child was previously studying, however, it was not so deposited. She further informed that 'X' had left the school on 07.11.2000 without taking any Transfer Certificate from her. Needless to say, no reliance can be placed on certificate (Ex.PW-2/2) showing her date of birth 26.10.1984 as it came into existence on 13.07.2009 after the incident. The prosecutrix left that school on 07.11.2000 without taking any transfer certificate. It has not been explained as to why the school record where the victim had studied earlier was not collected to find out her date of birth. Ossification test was conducted to ascertain her approximate age. PW-9 (Dr.Arun Batra) conducted ossification test on 30.05.1999. On the basis of the X-Ray plates examined by him, he was of the view that the prosecutrix was more than 15.8 years and less than 16.4 years of age vide report (Ex.PW-9/A). If error of margin is given, the prosecutrix was obviously above 16 years of age on the day of incident.

11. The medical evidence did not corroborate the victim's version. No external injuries were found on her body including private parts; hymen was found ruptured. PW-15 (Dr.Sujata) proved MLC (Ex.PW-15/A) prepared by Dr.Manchanda. As per this MLC, there was no sign of any external injuries / scratch marks, bruises anywhere on the body. The hymen torn was 'old'. The Investigating Officer did not seek clarification in this regard.

12. As per FSL report, human semen could not be detected on Ex. '1a' and '1b' (two microslides having whitish smear described as vaginal swab). Apparently, it did not connect the appellant with the crime.

13. Considering the inherent defects in the prosecution case even from the available record, in my view, prosecution was unable to establish its case beyond reasonable doubt. The appellant deserves benefit of doubt. Consequently, appeal is allowed. Conviction and sentence recorded by the Trial Court are set aside.

14. Bail bond(s) and surety bond(s) of the appellant stand discharged. 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

APRIL 29, 2016 / tr