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IN THE HIGH COURT OF DELHI AT NEW DELHI

**RESERVED ON : November 18, 2015
DECIDED ON : January 11, 2016**

+ **CRL.A. 97/2012 & CRL.M.B.11265/14**

SARITA Appellant
Through : Mr.Chetan Lokur, Advocate with
Mr.Nitish Chaudhary, Advocate.

versus

STATE (NCT) OF DELHI Respondent
Through : Mr.Amit Ahlawat, APP.

+ **CRL.A. 40/2012 & CRL.M.B.11298/14**

RAHUL Appellant
Through : Mr.M.L.Yadav, Advocate.

versus

STATE Respondent
Through : Mr.Amit Ahlawat, APP.

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

S.P.GARG, J.

1. Aggrieved by a judgment dated 04.04.2011 of learned Additional Sessions Judge in Sessions Case No.1152/2009 arising out of FIR No.311/2009 registered at Police Station Jahangir Puri by which the appellants were convicted, the instant appeals have been filed them. Sarita (A-1) was held guilty for committing offences punishable under Sections 366A/368/201/506(II) and also of Section 109 read with Section 376 IPC. Rahul (A-2) was convicted under Section 376 IPC. By an order dated 27.04.2011, they were sentenced to undergo various prison terms.

2. Briefly stated the prosecution case, as reflected in the charge-sheet was that A-1 during the period from 22.5.09 to 5.6.09 at ground floor, H.No.J-389, Jahangir Puri, Delhi, abetted commission of rape upon the prosecutrix 'X' (assumed name), aged about 12 years after wrongfully confining and criminally intimidating her. She was also charged for causing disappearance of evidence of commission of rape. It was alleged that A-2, Dev Raj (since expired) and one Vakil (since absconding) had established physical relations with 'X' during this period in the said house in A-1's occupation at her behest.

3. On 05.06.2009, the prosecutrix and her mausi reported the incident to the police. The Investigating Officer after recording victim's statement (Ex.PW-19/B) lodged First Information Report. In her complaint 'X' gave detailed account as to how and under what circumstances, she was raped by Dev Raj, Rahul (A-2) and Vakil on various days after she was called by A-1 to her residence on one pretext or the other. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. Exhibits collected during investigation were sent for examination to Forensic Science Laboratory. A-1, A-2 and Dev Raj were arrested. The Investigating Officer moved an application for conducting Test Identification Proceedings qua Dev Raj. Upon completion of investigation, a charge-sheet was filed against the accused persons in the court. To establish its case, the prosecution examined twenty witnesses. In 313 statement, the accused persons denied their involvement in the crime and pleaded false implication. The trial resulted in their conviction as mentioned previously. Being aggrieved and dissatisfied, the convicts have preferred separate appeals. It is relevant to note that Dev Raj had filed Crl.A.No.822/2011 which stood 'abated' on 1.5.2014 on his death.

4. I have heard the learned counsel for the parties and have examined the file. Appellant's counsel urged that the Trial Court did not

appreciate the evidence in its true and proper perspective. The appellants have been falsely implicated at the instance of the victim's mausi -Kusum to avoid payment of ₹45,000/- taken by her as loan from Dev Raj. The victim's statement is at the behest of her mausi. Delay in lodging the FIR has remained unexplained. No external injuries were found on the 'X's body including private parts at the time of her medical examination. Counsel pointed out various discrepancies and inconsistencies in her statements to urge that she is not a reliable witness. Learned Additional Public Prosecutor would submit that no sound reasons prevail to disbelieve the prosecutrix aged 12 years who has no extraneous consideration to falsely implicate the accused persons.

5. Admitted position is that A-1 used to live on the ground floor of H.No.J-389, Jahangir Puri, Delhi. 'X' lived along with her mausi and maternal grand mother on the first floor of the said premises. 'X's mother has expired soon after her birth and her father had abandoned her after remarriage and his whereabouts were not known. She was brought up by her mausi and nani. PW-1 (Kusum) 'X's mausi used to go to an STD booth at Sanjay Gandhi Transport Nagar on her duty during day time and her mother worked as maid in different houses. Kusum's husband was not

living with them. She had two children who used to go to school. 'X' used to be alone in the house during their absence.

6. From the very inception, it was the case of the prosecution that 'X' was aged around 12 years on the day of incident. No cogent documents, however, were collected during investigation to find out her exact date of birth. She did not go to any school and is completely illiterate. Ossification test was conducted to ascertain her approximate age. As per ossification report (Ex.PW-2/D), her estimated age was between 12 years to 14 years. The accused persons did not challenge the ossification report. No other specific date of birth of the prosecutrix was suggested or proved. Apparently, the prosecutrix was below 16 years of age on the date of occurrence and her consent for physical relation (if any) was of no relevance.

7. 'X' was sexually abused by various individuals during the period from 22.5.09 to 5.6.09. The incident was reported to the police on 05.06.2009. In her statement (Ex.PW19/B), the victim gave graphic details as to how and in what manner, she used to be called by A-1 to her residence during noon-time where she was forced to have physical relations with various different individuals on every day. She assigned specific role to each of the perpetrators of the crime and named them. In

her 164 Cr.P.C. statement (Ex.PW-10/F), she reiterated her version and implicated all the accused persons by name. The learned Presiding Officer before recording her statement had put number of preliminary questions to ascertain her state of mind and to see if she was making statement voluntarily without any fear, coercion or undue influence. After recording satisfaction, the learned Presiding Officer recorded 'X's statement on 26.06.2009. In the said statement again 'X' named the authors of the crime on different dates and described the role played by them in the commission of crime.

8. In her Court statement as PW-2, she fully supported the prosecution and proved the versions given before the police/learned Metropolitan Magistrate without any major variations. She testified that on a day, the exact date she did not remember, when she was alone at her house in the afternoon, A-1 called her to her residence on the pretext that it was her daughter's birthday. When she went to her house on the ground floor, A-1 shut the door. Dev Raj uncle was already sitting in the house that time. A-1 asked her to open her 'pant' to which she declined. Thereafter, she forcibly removed her pant and Dev Raj committed rape after taking off his clothes. Dev Raj left the spot extending threats to her. A-1, thereafter, cleaned her private parts and warned her not to tell the

incident to anyone or else she would be killed. On the second day, she was again called by A-1 on the pretext that she was feeling scared being alone. Again, she was raped by Dev Raj uncle in similar circumstances. On the third and fourth day, she was called by A-1 to her house where A-2 established physical relations with her against her wishes. On the fifth day, she went to A-1's house as usual, where one Vakil committed rape upon her. She further deposed that after three or four days, she told the incident to her mausi Kusum. She took her to the police station and her statement was recorded by the police and FIR (Ex.PW-2/A) was lodged. 'X' identified the rapists in the court during her deposition. She added that accused Dev Raj was also identified by her in jail. In the cross-examination, she elaborated and explained that A-1 used to call her by standing on the gate of the staircase. She admitted that she had visited A-1 earlier also at her house but volunteered to add that she used to go to play with her small daughter. She claimed that none of the rapists was known to her before the incident. She denied if her mausi- Kusum had taken a loan of ₹45,000/- from Dev Raj. She denied that A-1 was implicated due to her acquaintance with Dev Raj who had visiting terms in her house. She further denied herself to be involved in any criminal case.

9. On scanning the various statements given by the minor witness at various stages, it reveals that she is consistent throughout. Despite lengthy cross-examination by the accused persons, no material infirmities could be elicited to suspect her version. No ulterior motive was assigned to the child witness for levelling serious allegations of rape against the rapists with whom she had no prior acquaintance. Her statement on material facts has remained unchallenged and uncontroverted in the cross-examination. It is unthinkable that in the absence of prior animosity or ill-will, 'X' would falsely rope in her neighbour A-1 living on the ground floor since long. No sound reasons exist to disbelieve the prosecutrix.

10. PW-1 (Kusum) has corroborated 'X's version in its entirety. She deposed that on 04.06.2009 at around 8.00 p.m. 'X' apprised her about the incident. On 05.06.2009 she took 'X' to the Police Station and lodged the report. In the cross-examination, she denied to have any familiarity with Dev Raj before the incident or to have taken ₹45,000/- from him as loan. She admitted to be working at an STD booth at Sanjay Gandhi Transport Nagar for the last about two years. The STD booth was not in her name. She denied that 'X' was going the wrong way. She

denied that to avoid payment of ₹45,000/- taken as loan from Dev Raj, 'X' was used to implicate the accused persons.

11. The prosecutrix had specifically named the rapists in her statements during investigation and had identified them in the court without hesitation. She was not acquainted with them before the incident. Dev Raj could not be arrested initially. After he surrendered in the court, he opted to participate in Test Identification Proceedings which were duly conducted. It is pertinent to note that 'X' identified him in Test Identification Proceedings as well. In 313 statement, Dev Raj attempted to wriggle out of it alleging that 'X' knew him before. He, however, did not elaborate as to how and in what circumstances, he had come into contact with 'X'. In 313 statement, it was claimed by him that 'X's' mausi Kusum had taken a loan of ₹45,000/- from him which was to be returned within six months. When he pressed for its return, he was falsely implicated in the case. On 22.5.2009 and 23.5.2009, he was not present in Delhi and had gone to Punjab to his in-laws house along with his wife and daughter. His plea of 'alibi' was not accepted by the Trial Court. Dev Raj did not produce on record any document to show if any loan amount was advanced by him to Kusum. It was also not clarified as to how A-1 or Kusum were known to him. A-1 in her 313 statement declined any

familiarity with Dev Raj. She did not state if any loan of ₹45,000/- was advanced by Dev Raj through her. Besides it, just for a trivial dispute of non-payment of ₹45,000/-, PW-1 Kusum who treated 'X' like her daughter is not believed to invent a false story to implicate not only Dev Raj but also Rahul and Vakil for commission of rape upon 'X'. The defence deserves outright rejection.

12. 'X' aged around 12 years was an immature and innocent girl. She was unaware of the consequences of the act being done by her on A-1's behest. She did not raise any alarm at the time of commission of rape on different days and did not report the incident to her mausi/nani promptly. Rather she continued to visit A-1's house repeatedly on number of days without any demur. During her medical examination on 5.6.2009 by Dr.Pooja vide MLC Ex.PW-2/C, no external fresh injuries were found on her body including thigh and perineum; hymen was found ruptured (old); introits admitted one finger easily. It ruled out that 'X' was forcibly raped by the individuals against her wishes. It appears that she was a consenting party but was allured or abetted to do so by A-1. Since she was below the statutory age of 16 years, her consent to have physical relations with the rapists is inconsequential. Submission of body under the influence of fear is no consent.

13. Minor discrepancies, inconsistencies and contradictions pointed out by the appellant's counsel are insignificant and do not affect the core of the prosecution case materially to throw it over-board. Minor variations in the ocular accounts of the witnesses are often the hallmark of the truth of their testimony. The child was sexually abused for about five days taking advantage of her loneliness in the house and also of her immature age. There was no inordinate delay in lodging the report. PW-1 (Kusum) was informed of the occurrence on 04.06.2009 and soon thereafter, she put the police machinery into motion. Delay in rape cases is not fatal. Moreover, 'X' has explained that due to fear, she was unable to report the incident to her relatives. In 313 statement, the accused persons did not submit plausible explanation to the incriminating circumstances proved against them. A-1 did not impute any motive to 'X' or her mausi for levelling false allegations against her. It was merely claimed that there used to be 'quarrels' and for that reason, she was involved in this case. She did not elaborate if any serious quarrel had taken place on any particular day or that the said incident was reported to the police. For petty quarrels (if any) among the neighbours, such allegations are not expected to be levelled.

14. The impugned judgment based upon fair appraisal of evidence requires no intervention. The conviction is upheld. Considering the gravity of the offence whereby a child of tender age was sexually exploited for money consideration, no leniency is called for.

15. In the light of the above reasoning, the appeals being devoid of merit are dismissed. All pending application(s) also stand disposed of. Trial Court record be sent back forthwith along with the copy of the order. Intimation be also sent to Superintendent Jail.

(S.P.GARG)
JUDGE

January 11, 2016

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