

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

RESERVED ON : 17th MARCH, 2016

DECIDED ON : 22nd APRIL, 2016

+ CRL.A.1023/2013

SURYA BHAN @ UDAY

..... Appellant

Through : Mr.Habibur Rahman, Advocate.

VERSUS

STATE NCT OF DELHI

..... Respondent

Through : Ms.Meenakshi Dahiya, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant – Surya Bhan @ Uday impugns a judgment dated 11.01.2013 of learned Addl. Sessions Judge in Sessions Case No.65/12 arising out of FIR No.85/12 PS Keshav Puram by which he was convicted under Sections 376/341 IPC. By an order dated 22.01.2013, he was ordered to undergo RI for ten years with fine ₹10,000/- under Section 376 IPC and RI for one month under Section 341 IPC. The sentences were to operate concurrently.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that on 04.04.2012 at around 02.00 - 02.30 p.m. the appellant committed rape upon the prosecutrix 'X' (changed name) aged around 12

years at House No.851/54, 3rd floor, Lekhoo Nagar, Tri Nagar, Delhi, after criminally intimidating and wrongfully confining her. The incident was reported to the police and DD No.14 (Ex.PW-4/A) came into existence at 12.45 p.m. on 05.04.2012. The Investigating Officer after recording victim's statement (Ex.PW-13/A) 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. The accused was arrested and taken for medical examination. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation a charge-sheet was filed against the appellant for commission of offence under Sections 376/506/341 IPC. In order to establish its case, the prosecution examined twenty witnesses and relied upon various documents. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. He, however, did not examine any witness in defence. The trial resulted in his conviction under Sections 376/341 IPC. It is relevant to note that the appellant was acquitted of the charge under Section 506 IPC and the State did not challenge it. Being aggrieved and dissatisfied, the instant appeal has been filed.

3. I have heard the learned counsel for the parties and have examined the file. Admitted position is that the prosecutrix and her family members were resident of House No.851/54, Lekhoo Nagar, Tri Nagar, Delhi on the ground floor. The appellant was a tenant on the third floor of the said premises. Both the appellant and the family members of the prosecutrix were acquainted with each other and had visiting terms.

4. In her statement (Ex.PW-13/A), the prosecutrix gave detailed account as to how and in what manner she was sexually assaulted by the appellant when her parents were away. She disclosed that at about 02.00 - 02.30 p.m. she was alone at home and her siblings had gone outside to play. At that time, the appellant called her inside his room and committed rape upon her after criminally intimidating her. At around 04.00 – 04.30 p.m. when her mother arrived, she narrated the incident to her. Her father arrived at around 10.00 p.m. and her mother apprised him of the entire occurrence.

5. In her 164 Cr.P.C. statement (Ex.PX3) recorded on 17.04.2014 the victim reiterated her version and implicated the appellant for committing sexual assault upon her in the absence of her parents inside his room.

6. In her Court statement as PW-17 the child witness proved the versions given to the police and before the learned Metropolitan Magistrate in entirety without any major variations. She deposed that on 04.04.2012, she along with her two brothers had gone to school at around 07.00 a.m. At around 01.00 p.m. she and her brothers returned from school. After her brother went in the gali to play, the appellant came there at around 02.00 – 02.30 p.m. and called her in the staircase. Thereafter, he caught hold of her by hands and took her to his room forcibly and committed rape upon her. She narrated the incident to her mother at around 04.00 – 04.30 p.m. who in turn informed her father at 10.00 p.m. The matter was lodged with the police. In the cross-examination, she disclosed that the appellant used to visit their house many times in the presence of her parents and used to talk with her and her siblings. She informed that about 2 or 3 days before the incident the appellant has teased / misbehaved with her and she had informed her mother about it. She had advised her not to meet the appellant.

She fairly admitted that the accused did not bite her on her body. No blood oozed out at the time of commission of sexual intercourse and her clothes were not torn. She did not sustain any injury. She was freed after five minutes by the accused. She admitted that she did not raise any alarm after the incident and reasoned that nobody was present in the house. She further elaborated that no call was made to her mother as the STD booth was far away from the house. She denied that the accused had come to the house with his mobile phone objecting to the messages received by him from her father who falsely implicated him thereafter.

7. On scrutinising the whole testimony of the victim, it reveals that despite lengthy and searching cross-examination no material infirmities could be extracted to discredit her version. Material facts deposed by the victim have remained uncontroverted. In the cross-examination, no ulterior motive was assigned to the prosecutrix to level serious allegations of rape against the appellant who had close familiarity with her family members before the incident. No valid reasons exist to suspect the testimony of the child witness. The FIR was lodged promptly and the appellant was named in the complaint (Ex.PW-13/A).

8. PW-13 (Shyam Narayan @ Mahender) and PW-16 (Bimla Devi) are victim's parents. They have corroborated her version without any inconsistency. Soon after coming to know about the occurrence they informed the police about the incident. PW-13 (Shyam Narayan @ Mahender) disclosed that after coming to know about the rape incident, he called the appellant and enquired from him as to why he had committed rape. Thereto, he apologized and promised not to repeat such acts in future. He was given slaps 2 or 3 times and the appellant fled the spot. He reasoned

that due to the feeling of insult and nervousness, he did not go to the police station at night time and on the next morning went to the Police Post Shanti Nagar of Police Station Keshav Puram along with his daughter and wife and apprised them of the entire episode. Victim's parents are not imagined to make false allegations of commission of rape upon their daughter of tender age to put her honour at stake. They were not going to be benefitted by implicating the appellant in this case.

9. Soon after the incident, the prosecutrix was medically examined vide MLC (Ex.PW-9/A) on 05.04.2012. PW-10 (Dr.Mamta) medically examined her vide MLC (Ex.PW-10/A). Her hymen was found torn. There is thus no conflict between the ocular and medical evidence. The clinching evidence is DNA report (Ex.PW-15/A). As per this report, the DNA profile from the source of Ex.2a-1 (underwear), Ex.2h-1 & 2h-2 (Two micro slides), Ex.2h-3 (cotton wool swab), Ex.2i-1 & 2i-2 (Two micro slides) and Ex.2i-3 (cotton wool swab) was similar with the DNA profile of Ex.4 (Blood sample of Suryabhan – the appellant). It lends credence to the version given by the prosecutrix regarding the incident.

10. In 313 Cr.P.C. statement the appellant did not give plausible explanation to the incriminating circumstances proved against him. He did not examine any witness to prove if any quarrel had taken place any time with the victim's parents over any serious issue. Contents of the alleged SMSs received on his mobile allegedly sent by victim's father were not brought on record. Moreover, for that trivial issue, the victim and her parents were not imagined to set the police machinery into motion at the costs of reputation of their unmarried child. No complaint whatsoever was

lodged by the appellant against victim's parents for any such quarrel. The defence deserves outright rejection.

11. The prosecution was able to prove that the victim was aged around twelve years on the day of incident. PW-11 (Sunita Mehta), Vice Principal, Government Girls Sr. Secondary School, Narang Colony, Tri Nagar, deposed that the prosecutrix was admitted in their school on 01.04.2011 vide Sl.No.6889 in class 6th and photocopy of admission register was Ex.PW-11/A. Her date of birth was recorded as 09.06.2000. Admission form filled by Mahender Singh - her father was Ex.PW-11/B. She further deposed that at the time of admission, previous School Leaving Certificate and class 5th report card of MCD School, Tri Nagar, was also submitted and photocopies of which are Ex.PW-11/C and Ex.PW-11/D. She had issued certificate (Ex.PW-11/A) showing the date of birth of the prosecutrix. The prosecutrix and her parents also claimed that the child was aged around 12 years and was a student of 7th standard. In 313 Cr.P.C. statement while putting question No.25 the age of the prosecutrix was disclosed as 12 years which was admitted by the appellant. He did not claim if the prosecutrix was above 16 years of age on the day of incident or that physical relations (if any) were with her consent. Since the prosecutrix was below 16 years of age her consent (if any) for physical relations was immaterial and was of no relevance. She was incapable of thinking rationally and giving any consent being of immature age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequence of the intended action. Therefore, a duty is cast on the other partner in the

sexual act not to take advantage of the so called consent given by a girl who is less than 16 years of age.

12. The impugned judgment based upon fair and proper appreciation of the evidence deserves no intervention. Sentence is based upon fair reasoning. The appellant was aged around 30 years. He ravished the child aged around 12 years who reposed trust in him being a neighbour. The appellant was well aware of the consequence of his intentional act. He deserves no leniency.

13. The appeal 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

APRIL 22, 2016 / tr