

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

+ **CRL.A 1368/2015**

% Reserved on: 19th July, 2016
Decided on: 1st August, 2016

RAJESH

..... Appellant

Represented by: Ms. Satya Siddiqui, and
Mr. Sarfaraz A. Siddiqui,
Advocates.

versus

STATE

..... Respondent

Represented by: Mr. Hirein Sharma, APP for
the State.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the instant appeal, Rajesh challenges the impugned judgment dated 3rd December, 2015 whereby he has been convicted for the offences punishable under Sections 376/506 IPC in FIR No. 158/2012 registered at PS K.N. Katju Marg and the order on sentence dated 7th December, 2015 directing him to undergo rigorous imprisonment for a period of seven years and to pay a fine of ₹ 20,000/- in default to undergo simple imprisonment for one year for the offence punishable under Section 376 IPC and rigorous imprisonment for a period of three years and to pay a fine of ₹ 10,000/- in default to undergo simple imprisonment for six months for the offence punishable under Section 506 IPC.

2. Briefly the prosecution case is that on 7th May 2012, in the evening the prosecutrix came to the police station along with her friend Laxmi PW-

10 and gave a written complaint to PW-13 W/ASI Sajjani. In the complaint, the prosecutrix had stated that she got married to Dharamvir on 16th June 1997 and stayed with him for around 1 ½ - 2 years. 4-5 months ago they were divorced and she had a daughter aged 12 years who stays in the hostel. She used to work in a beauty parlour but one month ago she left the job. Around 20-25 days ago, when she had gone to meet her friend Rakhi at Jahangirpuri, she had purchased ½ kgs rasgullas from Aggarwal Sweets and when she was paying, the boy at the counter asked her about her vocation and name. She told him her name and said that she had no job. When she stated that she needed a job, the boy told her that his name was Rajesh and they wanted a lady for the counter in the shop. Rajesh told her that he would ask his father and let her know. Rajesh gave her a mobile number which she did not remember but her mobile number was 9289565094 which was lost on 5th May 2012. On 4th May 2012 she gave a missed call to Rajesh and when Rajesh called back, he asked her to come to Jahangirpuri so that they could talk to his father. She reached Jahangirpuri and Rajesh picked her up on his bike from the metro station. Thereafter, Rajesh took her to Sector-16 Rohini, house no. B-3/116 and B-3/117 for verification. She asked Rajesh that he said he would talk to his father but there was nobody. When she was about to leave, Rajesh sexually assaulted her and committed rape on her. She did not inform the police and came back home in TSR. On 7th May 2012, the prosecutrix narrated the incident to her friend Laxmi PW-10 who brought her to the police station to file a complaint against him. Thereafter the prosecutrix was taken to BSA Hospital for medical examination. The examination was conducted by Dr. Megha Malik Aneja, PW-1 who prepared the MLC Ex.PW-1/A.

3. Learned counsel for the appellant contends that the prosecutrix has not supported the prosecution case and has resiled from her previous statement. She did not identify the appellant in the court and also stated that she has not made the statement before the police. PW-10 Laxmi who was the friend of prosecutrix also did not support the prosecution case. As per the MLC, no external injury marks were found on the body of the prosecutrix. Furthermore, the evidence of PW-7 Laxman Singh also does not substantiate the prosecution case.

4. Learned APP for the State on the other hand contends that even if the prosecutrix has not supported the prosecution case, as per the FSL report, underwear of the prosecutrix on examination was found to contain DNA alleles of the appellant.

5. PW-9, the prosecutrix resiled from her earlier statements made before the police and under section 164 Cr.P.C. She stated that she did not recollect when she met the police in connection with this case and she did not state anything to the police when she met. During her cross examination, she stated that she had never gone to meet Rakhi at Jahangirpuri. She also stated that no mobile no. 9289565094 was ever given by her to Rajesh. She further denied knowing any lady by the name of Laxmi PW-10.

6. PW-10 Laxmi stated that she knew the prosecutrix who was earlier her friend. When the prosecutrix visited her house, she informed her that someone took her and committed rape upon her. PW-10 stated that she does not remember the name of the person against whom the prosecutrix leveled the allegations. She took the prosecutrix to the police station and the prosecutrix lodged the FIR. During her cross examination, she stated that she never heard the name of Rajesh from the prosecutrix and she did not

know that Rajesh runs a sweet shop in Jahangirpuri. She denied the suggestion that the prosecutrix told her the name of Rajesh by stating that he took her to the place of incident and committed rape upon her against her will.

7. PW-7, Laxman Singh is the owner of house no. B-3/117, Sector 16, Rohini, First Floor. He stated that his mother used to reside alone in that house and due to old age, she was unable to hear and see properly. He further stated that he did not know Rajesh and he had never seen him visiting the house of his mother. During cross examination, he denied that on 4th May, 2012 he had gone to meet his mother in the evening and his mother told him that Rajesh had come to meet her in the noon.

8. PW-11 Ms. Shashi Bala Pahuja, Senior Scientific Officer (Biology), FSL conducted biological examination as well as DNA examination on the exhibits. As per the FSL report Ex.PW-11/A the alleles from the source of exhibit '1d'(underwear of victim) were accounted in the alleles from the source of exhibit '3a' (blood in gauze cloth piece of accused). Female DNA profile was generated from the source of exhibit '2q1' (blood sample of victim). The DNA fingerprinting performed on the source of exhibit '1d' (underwear of the victim) & '3a' (blood in gauze cloth piece of accused) was sufficient to conclude that the stains i.e. seminal stains present on the source of exhibit '1d' (underwear of victim) & blood stains on the source of exhibits '3a' (blood in gauze cloth piece of accused) were from the same source.

9. Short issue in the present appeal would be whether in the absence of an evidence that the sexual intercourse with the prosecutrix was contrary to her wishes, the appellant can be convicted for offence punishable under

Section 376 IPC. The essential ingredients for an offence punishable under Section 376 IPC are that a man commits rape with a woman against her will or without her consent or with her consent when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt, or with her consent when the man knows that he is not her husband and her consent has been given on the belief that she is lawfully married to that person or when such consent is given by reason of unsoundness of mind or intoxication etc.

10. Though the evidence of FSL expert proves sexual intercourse, however there is no evidence on record to show that the same was contrary to the wishes of the prosecutrix or without her consent. prosecutrix is not a minor.

11. The learned Trial Court while convicting the appellant for offence punishable under Section 376 IPC relied upon the statement of the prosecutrix made under Section 164 Cr.P.C. before the learned Metropolitan Magistrate. No doubt that a statement made before a Magistrate under Section 164 Cr.P.C. is on oath, however still the same is not substantive evidence and is akin to a previous statement and can be used for the limited purpose as provided under Section 145 of the Indian Evidence Act. [See Ram Kishan Singh Vs. Harmit Kaur and Anr. (1972) 3 SCC 280]

12. To convict an accused for an offence punishable under Section 376 IPC the onus is on the prosecution to prove beyond reasonable doubt the ingredients of the offence alleged. As noted above, the prosecution has not been able to prove that the sexual intercourse was contrary to the wishes of the prosecutrix, thus one of the essential ingredients of Section 376 IPC missing, the appellant is acquitted of the charge under Section 376 IPC.

There is no evidence on record to prove that Rajesh threatened the prosecution. Thus he is also acquitted for the offence punishable under Section 506 IPC.

13. Appeal is disposed of. The appellant who is in custody be released forthwith if not required in any other case.

14. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

15. TCR be returned.

(MUKTA GUPTA)
JUDGE

AUGUST 01, 2016
‘vn’