

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

**RESERVED ON : 30th JANUARY, 2017
DECIDED ON : 3rd FEBRUARY, 2017**

+ CRL.A.141/2014 & CRL.M.B.10265/2014

SARFRAZ

..... Appellant

**Through : Mr.Aditya Aggarwal, Advocate with
Mr.Lobsay Wangli Bapu, Advocate.**

Versus

STATE

..... Respondent

Through : Mr.Amit Gupta, APP.

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

S.P.GARG, J.

1. The appellant – Sarfraz impugns a judgment dated 19.11.2013 of learned Addl. Sessions Judge in Sessions Case No.146/2013 arising out of FIR No.209/2011 registered at PS Kanjhawala whereby he was held guilty for committing offences punishable under Sections 376/506 IPC. By an order dated 20.11.2013, he was sentenced to undergo RI for ten years with fine ₹10,000/- under Section 376 IPC and RI for three years with fine ₹5,000/- under Section 506 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on the night intervening 29/30.08.2011 at about 03.00 a.m. the appellant committed rape upon the prosecutrix 'X' (assumed name) aged around 15 years after criminal intimidation. Information about the incident was conveyed to the police and DD No.32A (Ex.PW-13/A) came into existence at 05.50 p.m. at PS Kanjhawala. After recording victim's statement (Ex.PW-1/A), the Investigating Officer lodged the FIR. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. During investigation, the accused was arrested and medically examined. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to the Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. In order to establish its case the prosecution examined fifteen witnesses and relied upon various exhibits. In 313 Cr.P.C. statement, the appellant denied his involvement and pleaded false implication in the crime. He examined three witnesses – DW-1 (Sharafat Ali), DW-2 (Shokeen Mohammad) & DW-3 (Nisar) in defence. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the present appeal has been preferred by him.

3. I have heard the learned counsel for the parties and have examined the file. Admitted position is that the appellant and the prosecutrix were acquainted with each other. The appellant was a regular visitor to the house of his brother-in-law who lived in X's neighbourhood.

4. The occurrence took place on the night intervening 29/30.08.2011 at around 03.00 a.m. when allegedly 'X' had gone to answer call of nature to a nearby public toilet. The appellant met her on the way and

took her to his brother-in-law's house where she was sexually assaulted. When the prosecutrix arrived at her house after the incident, she was confronted for the delay. She informed about some 'quarrel' to have taken place. X's father made a call to PCR about the incident of quarrel. The police arrived at the spot. The matter was pacified and no complaint whatsoever was lodged with the police that time. Subsequently, at about 05.00 p.m. on 30.08.2011 intimation about rape was conveyed to the police leading to the recording of the victim's statement (Ex.PW-1/A) forming basis of the FIR in question. No plausible explanation has been offered as to why there was inordinate delay in lodging the report with the police. A futile attempt was made by the prosecution witnesses to justify that initially due to fear 'X' had not narrated the incident correctly to her parents. This explanation does not inspire confidence.

5. On perusal of the statements of the material prosecution witnesses, it can safely be inferred that the prosecutrix was a consenting party throughout. It was the last day of Ramzan and the prosecutrix along with her family members had taken 'Sargi' around 03.00 a.m. Thereafter, the prosecutrix had gone allegedly to answer the call of nature. The appellant did not reside in the vicinity and was not aware if the prosecutrix would go to a public toilet at that odd hour to make a pre-plan to commit rape upon her. It is highly unbelievable that at that odd hour at 03.00 a.m. the appellant would arrive all of a sudden near X's house and take her to the house of his brother-in-law to commit rape. The public toilet where the prosecutrix was expected to answer the call of nature was at a short distance. She did not raise alarm or hue and cry when allegedly being taken away by the appellant who was not armed with any weapon to create apprehension in

her mind. She remained in the company of the appellant for sufficient duration in the house of his brother-in-law. Nothing has emerged on record to infer as to whether the said house was locked that time or somebody was residing therein. The Investigating Officer did not examine any witness from the said house to ascertain as to who else was present inside the house at the time of occurrence. It is also not explained if none else was residing in the said accommodation, how the appellant managed to open its lock. The Investigating Officer did not examine the appellant's brother-in-law to find out as to how the appellant had access to the said house during that night. Even during her presence at the said house, the prosecutrix did not raise any alarm. She came silently to her house after the crime and on the way did not raise any voice. She maintained complete silence. When she was confronted by her father, she did not present true facts and mislead him telling that it was due to a 'quarrel'. The victim's father immediately informed the police who arrived at the spot. The matter was pacified and no complaint whatsoever was lodged against the appellant for commission of rape. Apparently, the prosecutrix being a party to the coitus did not come forward to allege commission of rape upon her. Only in the evening, seemingly she was prevailed upon by her parents and the FIR under Section 376 IPC was lodged against the appellant.

6. Soon after the lodging of the FIR, 'X' was medically examined vide MLC (Ex.PW-9/A) by Dr.Pooja. As per MLC, 'X' was brought to the hospital with the alleged history of sexual assault on 30.08.2011 at around 09.40 p.m. No injuries whatsoever were found on X's body including private parts. There was no bleeding from the vagina. 'X' had taken bath after the occurrence. Her hymen was found torn (old tear). The vagina

admitted two fingers easily. On the face of it, the medical evidence did not exhibit commission of forcible rape upon the prosecutrix.

7. Vital discrepancies have emerged in the statements of the prosecutrix recorded at various stages of the investigation / trial. Apparently, she had concealed material facts to deny her consent for coitus. Initially, she did not reveal if any incident of physical relationship had taken place between her and the appellant. Only in the evening at around 05.50 p.m. DD No.32A (Ex.PW-13/A) was lodged at PS Kanjhawala informing about the commission of rape with a girl aged around 16 years. In her complaint (Ex.PW-1/A), the victim disclosed that when she was going to the toilet at around 03.00 a.m. and had covered some distance from her house, an individual caught hold of her from behind and took her to his house. She identified the perpetrator of the crime to be Sarfraz (the appellant) to whom she knew before the incident. She further disclosed that the accused had taken her to the house of her jija; the house often used to remain closed. Thereafter, the accused established physical relations with her against her wishes. When she tried to save and started crying, he gagged her mouth. She became unconscious. On regaining senses, she gave a push to the appellant and fled the spot. She met her father who was in her search in the gali. Due to shame and fear, she did not disclose to her father about the commission of rape and only told her that a quarrel had taken place. The police arrived at the spot and was sent back without initiating any proceedings. Only in the evening, when her pain increased, she apprised her parents about the incident and the FIR was lodged.

8. In her 164 Cr.P.C. statement recorded on 02.09.2011, she disclosed that she could not raise alarm as her mouth was gagged. She

further disclosed that after her mouth was gagged, she became unconscious. When she opened her eyes, she found that her salwar was lying 'open' and the accused was putting 'on' his pant. She could not see properly due to darkness. Finding an opportunity she fled the spot crying after opening the gate and reached her house. She informed her father about the entire incident. Phone call at 100 was made. She could not give proper answer to the police initially as she was scared and perplexed.

9. In her Court statement as PW-1, she disposed that when she was going to toilet at around 03.00 a.m., on the way the accused caught hold of her from behind; pressed her mouth and took her to his brother-in-law's house. She was made to lie down on the floor. The accused closed the door pushing it hurriedly. When she tried to get up, the accused pushed her down and pressed her mouth. She became unconscious. After some time she regained consciousness and found that her salwar had been put 'off' and the accused had committed rape upon her. She further deposed that at the time the accused was not present inside the house. She immediately got up from the floor and fled the spot as the room was unlocked. Her father met her outside the house. She tried to speak to him but was not able to speak properly. Since her father had seen her coming out of the house of appellant's brother-in-law, she was perplexed and did not reveal the entire occurrence.

10. On perusal of the above statements, it transpires that vital improvements have been made by the prosecutrix at various stages. Major discrepancies have emerged as to how and under what circumstances, the occurrence took place. Apparently, the prosecutrix has not presented true

facts she being a consenting party. It can be inferred that the physical relationship (if any) were with the consent of the prosecutrix.

11. X's age is crucial to ascertain the appellant's guilt. Throughout the prosecution's case is that 'X' was below 16 years of age on the day of incident. The material documents are Ex.PW-14/A (Admission register) and Ex.PW-14/B (School Leaving Certificate of previous school). PW-14 (Shyam Sunder Verma), Principal, Govt.Co.Ed, S.V.Swada (Ghevra) Colony, A Block, Delhi, brought the summoned record. He deposed that as per their record 'X' was admitted in their school on 02.04.2010 in class 6th by admission entry No.629 on the basis of SLC issued by Principal, MC Primary School, J.J.Swada, B Block, New Delhi. The admission register (Ex.PW-14/A) and the copy of the SLC of the previous school (Ex.PW-14/B) were the documents proved by him. As per school record, X's date of birth was 12.03.1997. This witness was not cross-examined. Correctness and genuineness of the documents was not suspected and remained unchallenged.

12. In her Court statement, the prosecutrix claimed herself to be 14 years of age. The appellant did not suggest any other date of birth to the prosecutrix. Since the date of birth of the prosecutrix was recorded in the school record much prior to the incident in question, there was least possibility of X's parents to manipulate her age. No compelling reasons exist to disbelieve the date of birth recorded in the school records. Nothing has come on record that the prosecutrix was above 16 years of age on the date of occurrence.

13. Since the prosecutrix was below 16 years of age, her consent for physical relationship with the appellant aged around 21 years was of no

consequence. 'X' did not know the consequence of the act being of immature age and an unsuspecting minor child.

14. No plausible explanation has been offered by the appellant for false implication. It is highly unbelievable that for a petty quarrel over taking of water from the water tank as alleged by defence witnesses, the victim's parents would level such a serious allegation of commission of rape to tarnish the image of their minor daughter. It is pertinent to note that initially when the prosecutrix did not return to the house after a considerable delay and her parents went for her search, no FIR about commission of rape was lodged. Had the victim's parents nurtured any grievance against the appellant on account of any previous quarrel, they must have lodged the report of commission of rape at that time. No valid reasons exist to disbelieve the prosecutrix about the physical relationship that took place inside the house of the appellant's brother-in-law albeit with her consent.

15. Since the victim was below 16 years of age, her consent for physical relations was immaterial and conviction under Section 376 IPC cannot be faulted. Since the prosecutrix was a consenting party, there was no question of criminal intimidation and the benefit of doubt is to be given to the appellant under Section 506 IPC.

16. The appellant has been sentenced to undergo RI for ten years with fine ₹10,000/- under Section 376 IPC. Nominal Roll dated 19.05.2016 reveals that he has already undergone four years, eight months and nine days incarceration besides remission for seven months and twelve days as on 19.05.2016. Since the prosecutrix was a consenting party and both the appellant and the prosecutrix were acquainted with each other, considering this aspect, the Sentence Order is modified to the extent that the appellant

shall undergo RI for seven years with fine ₹5,000/-; default sentence being SI for one month for commission of offence under Section 376 IPC.

17. The appeal stands disposed of in the above terms. Pending application also stands disposed of. Trial Court record be sent back forthwith with the copy of the order. Intimation be sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

FEBRUARY 03, 2017 / *tr*

