

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

RESERVED ON : 27th JANUARY, 2017
DECIDED ON : 2nd FEBRUARY, 2017

+ **CRL.A.446/2012**

MAHESH KUMAR @ TAPKA Appellant

Through : Mr.Krishan Kumar, Advocate.

versus

STATE Respondent

Through : Mr.Amit Gupta, APP.

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

S.P.GARG, J.

1. Present appeal is directed by the appellant – Mahesh Kumar @ Tapka against a judgment dated 04.01.2011 of learned Addl. Sessions Judge in Sessions Case No.88/09 arising out of FIR No.189/09 PS Pahar Ganj whereby he was convicted for committing offences punishable under Sections 363/376/506 IPC. By an order dated 06.01.2011, he was sentenced to undergo various prison terms with fine.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on the night intervening 07/08.08.2009 at about 02.00 a.m. the appellant kidnapped the prosecutrix 'X' (assumed name) aged around 13 years from the lawful custody of her parents and thereafter committed rape upon her after criminal intimidation. PW-9 (Sanjay) in his testimony before

the Court informed that on the night intervening 07/08.08.2009 at around 01.00 or 01.30 a.m. after hearing the voice of a girl weeping, he came outside and saw 'X' standing there. He enquired from her as to what had happened. 'X' went to her garage without disclosing anything. He did not inform the police fearing that he himself might be implicated in the case. PW-2 (Jagdish Chand) when came to know about the incident of commission of rape made a telephone call at 100 from Mobile No.9278835514 on 08.08.2009 at about 10.00 a.m. DD No.9A (Ex.PW-11/A) came into existence and the investigation was assigned to ASI Vedwati who along with Const. Nanak Ram reached the spot. The Investigating Officer after recording victim's statement (Ex.PW-8/A) lodged report under Section 363 IPC. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. Sections 376 and 506 were added in the FIR. During further investigation, the accused was arrested and medically examined. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. In order to establish its case the prosecution examined sixteen witnesses. In 313 Cr.P.C. statement, the appellant denied his involvement and pleaded false implication in the crime. 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. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and overlooked vital infirmities and inconsistencies in the statements of the prosecution witnesses. Initially, the complainant had not lodged any report

regarding commission of rape and FIR was under Section 363 IPC only. The victim had not implicated the appellant by name and had denied to have any acquaintance or familiarity with him. There is a considerable delay in lodging the FIR under Section 376 IPC. 'X, a child witness has not presented true facts and conviction based upon her sole testimony is highly risky. Learned APP urged that the statement of the prosecutrix cannot be ignored in the absence of any prior animosity or ulterior motive.

4. The occurrence took place in the night intervening 07/08.08.2009 when at around 01.00 or 01.30 a.m. 'X' was found near the staircase in the gali away from her residence. PW-9 (Sanjay) who lived in the neighbourhood saw her weeping that time. 'X' did not disclose anything and went to her garage. Due to fear of involvement in the crime, PW-9 (Sanjay) did not lodge report that time. DD No.9A (Ex.PW-11/A) came into existence at PS Pahar Ganj at 10.08 a.m. It was informed that on the night intervening 07/08.08.2009 at around 03.35 a.m. incident of rape had occurred with a girl of 13 years of age at garage No.85, Aram Bagh, Pahar Ganj, Delhi. In her complaint (Ex.PW-8/A), 'X' disclosed that when she was sleeping along with her parents, she was kidnapped at around 02.00 a.m. by an unknown individual and was taken to the stairs nearby. When she raised alarm, someone from a nearby house came outside and the assailant fled the spot. Subsequently, in her 164 Cr.P.C. statement (Ex.PW-4/B) recorded on 19.08.2009 she specifically implicated the appellant for committing rape upon her person after criminal intimidation. She assigned a specific and definite role to him. In her Court statement as PW-8 'X' reiterated her version and identified the appellant to be the perpetrator of the crime. She deposed that on 08.08.2009 when she was sleeping outside the

garage along with her parents, she was kidnapped and raped in the mid-night. On her raising alarm, an uncle arrived and upon hearing his voice, the rapist fled the spot. The appellant present before the Court was arrested on her pointing out from Aram Bagh. The appellant had also threatened her not to disclose the incident. In the cross-examination, she disclosed that her parents and neighbours were present at the time of recording of her statement. The appellant had gagged her mouth at the time of commission of crime. The appellant was not known to her before. She denied the suggestion that the appellant was identified at the instigation of the police officials. She volunteered to add that the description of the assailant was given by her to the police.

5. On perusal of the entire statement of the victim, it reveals that despite searching cross-examination, no material infirmities or inconsistencies have emerged to suspect X's version about establishment of physical relations by the appellant. No ulterior motive was assigned to the child witness for leveling serious allegations of rape against the appellant who lived in the neighbourhood since long.

6. It is true that initially the victim did not reveal the incident to her parents and for that reason, no FIR under Section 376 IPC could be lodged. It appears that the prosecutrix was under fear and due to shame did not disclose her parents about the commission of rape by the accused. Possibility of the prosecutrix to be a consenting party to the coitus could be another factor to remain silent. It is highly unbelievable that a child aged around 13 years could be kidnapped without inkling to her parents sleeping there. 'X' did not raise any alarm when she was allegedly taken away by the appellant at odd hours and subsequently physical relations were established

with her. Even when PW-9 (Sanjay) enquired as to what had happened, she did not divulge anything and silently went to her garage. When her statement (Ex.PW-8/A) came to be recorded, again she did not identify the appellant to be the perpetrator of the crime to have established physical relations with her against her wishes. Initially, the prosecutrix did not get herself medically examined and did not report sexual assault to the doctor as recorded in the history in the MLC (Ex.PW-3/A). Subsequently, when appellant's involvement came to light, 'X' was medically examined vide MLC (Ex.PW-3/B). She did not suffer any external injury on her body including private parts. Hymen however was not intact. From all the circumstances, it can be inferred that the prosecutrix was a consenting party to the coitus. The Trial Court in the impugned judgment also considered this aspect.

7. X's age is material to infer the appellant's guilt. In her testimony before the Court recorded on 10.11.2010 'X' disclosed her age around 16 years. She was not cross-examined regarding her age; no specific date of birth was suggested to her. Material testimony is that of PW-7 (Sudarshana Verma), Principal, Raghumal Arya Kanya Vidhyalya, Evening Shift, NDMC, who brought the record and deposed that 'X' was admitted in their school in 2004 in 1st class and she studied there till 2008. On 16.09.2008 her name was struck out due to long absence. As per record, her date of birth was 15.08.1998; it was recorded on the basis of an affidavit given by her father. Certificate (Ex.PW-7/A) was based upon the affidavit (Ex.PW-7/B). The witness was not cross-examined. Correctness and genuineness of the school certificate was not suspected. Nothing was suggested if the date of birth 15.08.1998 did not reflect her exact age. Since

the date of birth came to be recorded much prior to the registration of the FIR in question, there was least possibility of its fabrication. X's parents did not anticipate that any such unfortunate incident would happen in future to manipulate her age that time.

8. PW-5 (Alopi Prasad) – victim's father and PW-6 (Ram Kumari) – victim's mother have corroborated X's version in its entirety. They also disclosed that 'X' was aged around 13 years on the day of incident. It was further deposed that 'X' was scared at the time of occurrence.

9. There are no sound reasons to disbelieve X's testimony. The appellant was identified in the Court by the prosecutrix without any hesitation. The appellant did not deny his presence at the spot at the time of crime. He did not give plausible explanation as to why he took the prosecutrix at odd hours away from her parents without their consent or permission. Seemingly when PW-9 (Sanjay) happened to arrive at the spot, suddenly the appellant fled the spot and the prosecutrix due to fear and shame did not reveal the incident to her parents.

10. Since the prosecutrix was below 16 years of age on the date of crime her consent for physical relations with the appellant was of no consequence. She did not know the consequence of act being of immature age. Settled position is that conviction can be based upon the sole testimony of the prosecutrix once it inspires confidence; no corroboration is required unless there are compelling reasons for it. Conviction under Section 376 IPC warrants no intervention.

11. The appellant was sentenced to undergo maximum RI for ten years with fine ₹5,000/- under Section 376 IPC. Nominal Roll dated 20.11.2014 reveals that he has already undergone five years, three months

and eight days incarceration besides remission for one year, two months and twelve days as on 20.11.2014. Fine has already been deposited by the appellant. It is relevant to note that earlier the appellant was released on bail and the substantive sentence was suspended vide order dated 10.02.2015. The appellant, however, did not appear and subsequently was taken into custody after his production in judicial custody pursuant to the issuance of Non-Bailable Warrants on 15.07.2016. The appellant has remained in custody since then.

12. Since the appellant has already undergone substantial period of substantive sentence and the possibility of the prosecutrix to be consenting party is there, the sentence is modified and the period already undergone by him in this case is taken as his substantive sentence. Other terms and conditions of the Sentence Order are left undisturbed.

13. The appeal stands disposed of in the above terms. 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 02, 2017 / *tr*