

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

**RESERVED ON : 1st JUNE, 2017
DECIDED ON : 26th JULY, 2017**

+ CRL.A. 403/2016

RAJ KUMAR GUPTA Appellant
Through : Mr.Azhar Qayum, Advocate.

VERSUS

THE STATE (NCT OF DELHI) Respondent
Through : Ms.Meenakshi Dahiya, APP.

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

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 18.02.20016 of learned Addl. Sessions Judge in Sessions Case No.101/2014 emanating from FIR No.274/2014 PS Delhi Cantt. by which the appellant – Raj Kumar Gupta was held guilty for committing offence punishable under Section 376 IPC. By an order dated 03.03.2016, he was sentenced to undergo RI for ten years with fine ₹25,000/-.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that around 3 -4 years prior to 10.05.2014 during night time at Servant Quarter, Block No.1, Cariappa Vihar, New Delhi, the appellant committed penetrative sexual assault with the prosecutrix 'X' (changed name), his step daughter, aged around 13

years. It was further alleged that thereafter on 10.05.2014 at Block No.58/6, Baird Place, Delhi Cantt., the appellant again committed penetrative sexual assault upon the prosecutrix in the house during night time; he touched her body with sexual intent and made sexually coloured remarks towards her. The police machinery was put in motion when PW-7 Madhu Rawat made a telephone call at 1098; the prosecutrix had divulged the incident to her. The prosecutrix and other siblings were taken to 'Nirmal Chhaya' as per the orders got from CWC. Police officials went to 'Nirmal Chhaya' where the statement of the prosecutrix 'X' (Ex.PW-1/A) was recorded forming basis of the registration of the FIR.

3. During investigation, 'X' was medically examined; she recorded her statement under Section 164 Cr.P.C. The appellant was arrested. 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 punishable under Sections 376/506 IPC and Sections 4 & 6 POCSO Act. In order to establish its case the prosecution examined eleven witnesses. In 313 Cr.P.C. statement, the appellant denied his complicity in the crime and pleaded false implication. The trial resulted in conviction as mentioned previously under Section 376 IPC. It is relevant to note that the appellant was acquitted of the charges under Section 354A and 10 POCSO Act. State did not challenge the appellant's acquittal under those offences.

4. I have heard the learned counsel for the parties and have examined the record. Admitted position is that the appellant is the

step-father of the prosecutrix aged around 13 years. PW-5 (R.P.Singh), Principal, Rajputana Rifles, HM, Senior Secondary School, Delhi Cantt., proved the relevant record where date of birth of the prosecutrix was recorded as 01.01.2002 at the time of her admission in 1st standard on 27.06.2008 vide admission No.227. The relevant documents (Ex.PW-5/A to Ex.PW-5/C) have remained undisputed; the appellant did not dispute their authenticity and correctness.

5. Rekha – X's mother had remarried the appellant. She was suffering from TB and finally expired in April, 2014. It is also not in dispute that previously the appellant along with the prosecutrix and other family members used to live at Cariappa Vihar, Delhi Cantt. Subsequently, they shifted to Baird Place, Delhi Cantt. in a servant quarter and stayed there for around a year. Rekha used to work as a maid. PW-2 'Y' (changed name) aged around 10 years is X's real sister.

6. In her complaint (Ex.PW-1/A), 'X' implicated the appellant (her step-father) for committing rape and outraging her modesty. She gave graphic detail as to how and in what manner she was sexually assaulted by the appellant in the absence of her mother and sister (PW-2 'Y'). The prosecutrix reiterated her version in her 164 Cr.P.C. statement (Ex.PW-1/D) recorded on 12.05.2014 before the learned Metropolitan Magistrate. In her Court statement, she proved the version given before the police and the learned Metropolitan Magistrate without any major variation. Before recording her statement without oath, the learned Presiding Officer

had put various questions to ascertain if 'X' was competent to depose and was able to give rationale answers to the questions put to her. After satisfying that the witness was able to understand the questions put to her in Hindi and was capable and competent to give rationale answers, her statement was recorded without oath.

7. In her Court statement, she disclosed that her mother Rekha had opted to live with the appellant along with her two sisters and a brother when she was very young. Her mother used to remain ill and get treatment at a hospital. One day when her mother was admitted in the hospital, her sister PW-2 'Y' stayed with her. At night, the appellant came inside the room; opened her pant; and removed her underwear. When she enquired as to what he was doing, the appellant told her that he was not doing anything "dard nahi hoga dard nahi hoga". The appellant gagged her mouth and established physical relations, as a result of which, blood oozed out from her vagina. The appellant removed his hand from her mouth and threatened her to kill if she informed her mother. The witness also narrated the incident when she was molested by the appellant after about three years from that incident. She, however, got an opportunity to escape and went to the Police Station to lodge the report. She was studying in 4th standard at the time of commission of rape. The molestation incident took place when she was in class 6th. She further elaborated that her complaint was not lodged. She confided in her aunt Madhu Rawat who informed the concerned authorities. She further disclosed that she had shared the incident with her sister 'Y'. In the cross-examination, she disclosed that she used to go to school

on foot; her father was an auto-driver. She expressed ignorance if the appellant had borrowed money from Madhu Rawat or if there was any dispute between them over money. She, however, denied that the complaint was lodged at Madhu's behest. She volunteered to add that what was stated was her own version. She further informed that after her mother's death, she along with her siblings had stayed at Madhu's house and there she disclosed the incident to her.

8. On perusal of the entire statement of the prosecutrix, it reveals that material facts proved by her have remained unchallenged and uncontroverted in the cross-examination. No infirmity has been extracted or elicited in the cross-examination to disbelieve her version. No ulterior motive was assigned to the child witness to make serious allegations of sexual assault against her own father upon whom she was economically dependent. In the absence of compelling circumstances, the child witness was not expected to involve her own step-father particularly when she had no shelter and had lost her mother.

9. PW-2 'Y', aged around 10 years, another child witness, has corroborated X's version in its entirety. She also deposed that her sister 'X' had informed her about the sexual assault upon her by the appellant. Her mother had warned them to avoid the appellant's company. She further disclosed that 'X' had divulged the incident to Madhu. She further deposed that she was not interested to live in the company of her father due to fear. In the cross-examination, she disclosed that she was studying in class 3. Madhu Rawat took them to

‘Nirmal Chhaya’. Again, the material facts uttered by the innocent child witness remained un-assailed.

10. PW-6 (Priyanka Tiwari, Welfare Officer), PW-7 (Madhu Rawat), PW-9 (Monisha Banerjee) and PW-10 (Veena Devi), all have corroborated X’s version. They all are independent public witnesses and have no extraneous consideration to falsely involve the appellant with whom they had no prior animosity. To protect the interest of the minor children, they had moved the concerned authorities; they had also provided financial assistance to the destitute children. Obviously, the victim had narrated her ordeal to them in confidence. In the cross-examination, nothing material has been elicited to reject their testimonies.

11. The appellant’s counsel urged that X’s statement cannot be given any weightage as there is considerable delay of three years in lodging the report. The prosecutrix did not raise alarm at the time of the commission of the rape and declined to get herself medically examined. Regarding the other incident of molestation, it happened after three years and for that the Trial Court did not believe the prosecutrix and has recorded acquittal.

12. Well settled position is that delay in lodging the FIR in sexual offences per se is not fatal. It is to be noted that the prosecutrix was aged around ten years at the time of commission of rape upon her. She was dependent upon her step-father economically. It was not easy to lodge a complaint of this nature exposing prosecutrix to the risk of social stigma. A decision to lodge FIR becomes more difficult and hard when the accused happens to be a close family member.

13. In ‘*State of Himachal Pradesh vs. Sanjay Kumar*’, AIR 2017 SC 835, the Hon’ble Supreme Court considered delay of three years in lodging FIR inconsequential where the victim was a child aged around 9 years and the perpetrator of the crime was her uncle. The Supreme Court in para No. 29 noted :

“29. Likewise, delay of three days in lodging the FIR by PW-1, after eliciting the information from her daughter PW-2, is inconsequential in the facts of this case. It is not to be forgotten that the person accused by the prosecutrix was none else than her Uncle. It is not easy to lodge a complaint of this nature exposing prosecutrix to the risk of social stigma which unfortunately still prevails in our society. A decision to lodge FIR becomes more difficult and hard when accused happens to be a family member. In fact, incestuous abuse is still regarded as a taboo to be discussed in public. This reticence hurts the victims or other family members who struggle to report. After all, in such a situation, not only the honour of the family is at stake, it may antagonize other relations as well, as in the first blush, such other members of family would not take charge of this nature very kindly. We also find that the so-called dispute between the parties was so trivial in nature that it would not have prompted PW-1 to lodge a false complaint, putting her minor daughter of impressionable age to risks of serious kinds, as pointed out above.”

14. The statement of the prosecutrix is consistent. The evidence on record contains positive proof. Minor discrepancies are

inconsequential. Statement of the prosecutrix need not to be corroborated. Nothing has been disclosed as to what had prompted or forced the victim to falsely involve her own step-father. In fact, the defence taken by the appellant is inconsistent and conflicting. In the cross-examination of the prosecutrix, no reasons were assigned as to why she had involved him in the crime. It was merely suggested that the complaint was lodged at Madhu Rawat's behest. It was, however, not elaborated as to why Madhu Rawat with whom the appellant had no enmity would implicate him. In the cross-examination of PW-2 'Y', no motive was assigned to her to make a false statement. In the cross-examination of PW-7 (Madhu Rawat) it was suggested that the appellant was implicated in connivance with the prosecutrix as the money borrowed by him was not returned. The appellant, however, did not clear as to when any specific amount was borrowed by him from PW-7 (Madhu Rawat), and if so, for what purpose. The prosecutrix is not expected to favour Madhu Rawat to implicate her own step-father over his inability to pay the alleged borrowed money. In 313 Cr.P.C. statement, the appellant came up with a strange defence for the first time. He alleged that the prosecutrix used to consume tobacco and for that her mother used to scold her. One day when he came to know about her bad habit and found small tobacco pouches hidden at different places, he advised and scolded her to give up the habit. 'X' threatened her stating "mujhe kuch ab tumhare bare main sochana padega". This defence deserves outright rejection. It is unclear as to when the prosecutrix was found to be in possession of any tobacco pouches. No such defence was put to the prosecutrix and

other witnesses in the cross-examination. For trivial incident, the prosecutrix would not involve her own step father in a rape case and that too after three years of the incident to bring herself in dispute.

15. In view of the above discussion, this Court finds no merit in the appeal and it is dismissed.

16. Trial Court record be sent back forthwith with the copy of the order. Intimation be sent to the Superintendent Jail.

JULY 26, 2017 / *tr*

**(S.P.GARG)
JUDGE**



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