

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

% Reserved on: 21st March, 2017
Decided on: 17th April, 2017

+ **CRL.A. 1283/2014**

MAHENDER Appellant
Represented by: Mr. M.L. Yadav, Adv.

versus

STATE Respondent
Represented by: Mr. Hirein Sharma, APP with
SI Karamvir, PS Narela.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. Convicted for offence punishable under Section 376 IPC, Mahender challenges the impugned judgment dated 26th March, 2014 and the order on sentence dated 28th March, 2014 directing him to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹20,000/-.

2. Assailing the conviction, learned counsel for Mahender contends that there was delay in lodging the FIR as the alleged the incident took place on 12th February, 2011 and the FIR was lodged on 15th February, 2011. There was no allegation of rape in the FIR. The allegation surfaced for the first time in the statement of the prosecutrix recorded under Section 164 Cr.P.C. on 5th March, 2011. Thus, the allegation of rape is an afterthought. There are contradictions with respect to the date of incident as PW-5, father of the prosecutrix, initially stated that the alleged incident took place on 26th January, 2011 and later on he stated that it took place on 5th March, 2011. The CFSL report does not support the prosecution case as it does not link

Mahender with the alleged offence. As per the medical examination, no fresh injury was found on the prosecutrix. Thus, the medical evidence also does not support the prosecution case. It is admitted by the prosecutrix and her family members in the cross-examination that there was previous enmity between her father and Mahender. The defense witnesses have deposed that the relations between the appellant and father of the prosecutrix were inimical, fortifying that the appellant has been falsely implicated.

3. Per contra learned APP for the State submits that the testimony of PW-1 prosecutrix coupled with the testimony of PW-2 Dr. Arti proves the prosecution case. As per the MLC, the hymen was found to be ruptured, thus, fortifying the factum of rape. Further from the testimony of PW-10, Dr. P. Arioli, the age of prosecutrix stands proved and she was minor at the time of incident. Mahender has been rightly convicted for offence punishable under Section 376 IPC on the basis of oral evidence and the circumstantial evidence on record and there is no infirmity in the impugned judgment of conviction or order on sentence.

4. FIR No. 69/2011 was registered under Section 354 IPC at PS Narela on the complaint of PW-5, father of the prosecutrix who alleged that Mahender touched private part of PW-1, the prosecutrix, his daughter. The prosecutrix was taken to SRHC Hospital for the medical examination. Mahender was apprehended at the instance of father of the prosecutrix. Statement of the prosecutrix was recorded by PW-11 Sh. Sunil Gupta, learned Metropolitan Magistrate under Section 164 Cr.P.C. wherein she leveled allegation of rape. Thus charge sheet was filed against Mahender for commission of offence punishable under Section 376 IPC.

5. The prosecutrix who was examined as PW-1 deposed in Court that Mahender had called her to his house and requested her to bring cigarette and match box from the market. She brought the same and gave it to Mahender. Thereafter, he opened her salwar by opening the nada, laid her on the bed and forcefully did wrong act with her. By wrong act, she meant sexual intercourse which husband generally does with his wife. Mahender had also put his hand into her vagina. When he committed the wrong act with her, she cried and blood was also coming out of her vagina. She further stated that after committing rape, Mahender himself left the prosecutrix at her house. He gave her a five rupee note. Thereafter, she narrated the incident to her mother who in turn informed it to her father.

6. During her cross examination, the prosecutrix stated that the date of incident was 15th February, 2011. When Mahender was committing rape upon her, she had raised alarm. She did not sustain any injury. Blood was oozing from her private part and her clothes were torn. When she raised alarm, her mother and father reached there. She admitted that a quarrel had taken place between her father and Mahender as her father used to tie cattle outside the house of Mahender. She also admitted that the waste of cattle was thrown in front of the house of Mahender which was objected by him. She also admitted that her father had threatened Mahender to send him to jail.

7. PW-5, father of the prosecutrix corroborated the version of the prosecutrix. He stated that on 26th January, 2011, Mahender had committed rape upon the prosecutrix. He further stated that the prosecutrix was slightly insane from her mental capabilities. Though the learned APP got clarified from this witness by putting leading question that the incident took place on

12th February, 2011 but in cross-examination again he stated that the incident occurred on 5th March, 2011 which was certainly incorrect as FIR had been registered on 15th February, 2011. He admitted that a quarrel between Mahender and him took place because Mahender used to tie his buffalo in front of their house and the buffalos used to excrete dung.

8. PW-6, mother of the prosecutrix, also corroborated the version of the prosecutrix and father of the prosecutrix. She further added that after the prosecutrix narrated the incident to her, she narrated the same to PW-5, after which, they had gone to the house of Mahender to inquire from him. Mahender quarreled with them and she had sustained injuries on head and hand and he had threatened them to burn their house. She further stated that the prosecutrix was mentally weak. During her cross examination, she stated that she was deposing whatever her advocate had tutored her and whatever happened with the prosecutrix.

9. PW-2 Dr. Arti, SR Gynae SRHC Hospital, stated that on 15th February, 2011, she had examined the prosecutrix and on local examination, the hymen was found ruptured. However, in cross-examination, the witness stated that the hymen ruptured was not fresh.

10. PW-7 Dr. Abhilasha, SR Gynae, BSA Hospital, stated that she had examined the prosecutrix on 19th February, 2011. On local examination, she found that the hymen was torn but there was no evidence of any external injury visible over genitalia or other body parts. No scratch marks were visible over genitalia or other body parts were visible. The MLC of the prosecutrix was exhibited as Ex. PW-7/A.

11. PW-10 Dr. P. Arioli, CAS, Dental, SRHC Hospital, stated that she had seen the bone age estimation report of the prosecutrix which was prepared by

Dr. Sahaj Chopra, Radiologist and who had left the services of the hospital. As per the bone estimation report Ex. PW-10/A, the age of the prosecutrix was opined to be 'not less than 14 years and not more than 16 years.

12. The defence of Mahender is his statement under Section 313 Cr.P.C. and evidence led is that he was falsely implicated due to enmity. DW-1 Smt. Mukesh, daughter-in-law of Mahender, stated that it was a false case due to previous enmities/grudges between father of the prosecutrix and Mahender. On 12th February, 2011, she along with her husband, three children, mother-in-law, grand mother-in-law and Mahender stayed at her house throughout the day and nobody had gone out. She also stated that PW-5, father of the prosecutrix, used to tie goats in front of their house and quarrel used to take place between him and Mahender. DW-2 Sunil, son of Mahender, corroborated the version of DW-1, Smt. Mukesh.

13. In the FIR registered by the father of the prosecutrix after 3 days of the alleged offence, the father of the prosecutrix admitted that he discussed with his friends and then registered FIR. Still the allegation in the FIR was of touching the private part and not rape. In the statement of the prosecutrix under Section 164 Cr.P.C. recorded on 5th March, 2011 i.e. after 24 days of the alleged incident, offence of rape was alleged. In the statement under Section 164 Cr.P.C., the prosecutrix stated that the incident was witnessed by her brother who told it to her mother. However, the brother has neither been cited as a witness nor deposed to by the parents. Even as per the parents of the prosecutrix, she had low IQ. As per the defence witnesses, the prosecutrix repeated whatever was stated by anyone else. Thus, as a rule of prudence it would be appropriate to look for corroboration. Learned Trial Court has used the presence of blood on the salwar of the prosecutrix as

corroboration. Learned Trial Court failed to notice that the salwar was seized on 15th February, 2011 though alleged offence took place on 12th February. There is no evidence on record to show that the salwar of the prosecutrix seized on 15th February, 2011 was the same which she was wearing at the time of the alleged offence. Further as per the FSL report the blood on the salwar was not connected to Mahender.

14. As noted above, the prosecution witnesses have admitted enmity and tutoring. Further there are material improvements from the FIR which was also registered after deliberation. There is no corroboration to the version of the prosecutrix either from medical evidence as the hymen was old ruptured and as per the FSL report the blood on the salwar was not connected to the appellant. In view of the evidence on record, it can be safely held that the prosecution has not proved beyond reasonable doubt that Mahender committed the offence punishable under Section 376 IPC.

15. The impugned judgment of conviction and order on sentence are set aside. Mahender is acquitted of the charge for offence punishable under Section 376 IPC. Superintendent, Tihar Jail is directed to release the appellant forthwith, if not required in any other case.

16. Appeal is disposed of. Trial Court record be sent back.

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

(MUKTA GUPTA)
JUDGE

APRIL 17, 2017
‘v mittal’