

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

Judgment Reserved on: August 22, 2017

% *Judgment Delivered on: August 25, 2017*

+ **CRL.A.491/2017**

ARIF

..... Appellant

Through: Mr.Parikshit Mahipal,
Advocate.

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through: Mr.Kewal Singh Ahuja, APP
for the State.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

1. The appellant/convict Arif has preferred this appeal feeling aggrieved by the judgment dated 15th March, 2017 and order on sentence dated 16th March, 2017 whereby he has been held guilty for committing the offence punishable under Section 376(2)(i) of Indian Penal Code and sentenced to undergo RI for ten years with fine of ₹1000/- and in default of payment of fine to undergo SI for one month

2. Case FIR No.406/2013 (Ex.PW3/A) under Section 354/376 IPC was registered at PS Bhajan Pura on the basis of complaint Ex.PW1/A made by Sh.Maqsood Alam – father of the child victim. As per the said complaint, on 30th September, 2013 at about 1.00 pm, he was present at his house and his three years old daughter ‘M’ (name withheld to conceal her identity) who was playing, went outside the

house. After some time, when he came out to look for his daughter and was searching for her in the neighbouring house, he saw the convict Arif in nude condition and his daughter was also in nude condition at that time. The convict was committing '*galat kaam*' with her. He apprehended Arif. On hearing noise certain persons collected there. The complainant informed his brother and after his arrival, the police was informed. The child victim was sent for medical examination to GTB Hospital. The convict Arif, who was arrested from the spot, was also sent for medical examination. After completion of investigation, he was sent to face trial for the offence punishable under Section 354/376 IPC.

3. On 30th January, 2014, the convict was charged for committing the offence punishable under Section 6 of POCSO Act for committing penetrative sexual assault on the child victim and on 25th October, 2016, in the alternative, the convict was charged for committing the offence punishable under Section 376 IPC.

4. Initially the convict was produced before Juvenile Court as he claimed himself to be a juvenile but subsequently on the basis of his date of birth recorded in the school certificates Ex.PW17/H and H1 and the report of ossification test Ex.PW17/L, he was held not to be a juvenile.

5. Vide impugned judgment, the convict has been held guilty for committing the offence punishable under Section 376(2)(i) IPC observing that the sentence provided under Section 376(2)(i) IPC is more severe and greater in degree than that provided under Section 6 of POCSO Act.

6. Mr.Parikshit Mahipal, learned counsel for the appellant has limited his contention only to the extent that on the basis of MLC and the observation by learned Trial Court recorded in para 16, he could not have been convicted for committing the offence punishable under Section 376(2)(i) IPC for committing the rape but only for an attempt to commit rape. In support of his contentions, learned counsel for the appellant has relied upon the findings of the learned Trial Court in para 16 of the impugned judgment and the decision of the Apex Court in Guddu @ Santosh vs. State of Madhya Pradesh in Appeal (Crl.) No.1491/2005 and of Kerala High Court in the case Mohammed Kunju vs. State of Kerala 2007 Crl.L.J. 3929.

7. Mr.Kewal Singh Ahuja, learned APP for the State has submitted that it is a case of committing rape on a child who was just three years old. There is an eye witness account of the incident by her father who saw his daughter and the convict in nude condition and the convict was apprehended from the spot. Learned APP for the State has further submitted that the injuries referred to in the MLC of the child victim shows that it was a case of rape as even the slightest penetration is sufficient to complete the offence.

8. Since the incident as well as the involvement in the occurrence is not disputed by the convict, the limited scope within which the impugned order has to be examined is whether it was a case of rape or attempt to rape. Para 16 of the impugned judgment reads as under:-

'16. It is a matter of record that PW-1 never deposed that the victim was crying when he saw her or anyone had heard her shrieks etc. There are various means of enticing a small child and to keep him/her quiet. The

medical examination of the victim shows that there was no penile penetration which would have caused great pain to her and as such, there was no question of the victim crying. Hence, these arguments advanced by the ld. Defence Counsel at bar have no merits in my opinion.'

9. The MLC Ex.PW10/A of the convict records as under:-

'L/E : No fresh external injury seen at the time of examination.

1. Scrotum – well developed in shape & size

2. Penis – well developed in shape & size

3. Prepuce – circumcised

4. Smegma – absent

5. Testis – well developed in shape & size

Sexual character – Axillary hair & public hair well developed.

Impression – There is nothing to suggest that Arif is not able to perform sexual intercourse.'

10. Once learned Trial Court had returned a finding that it was not a case of penile penetration, in the absence of medical opinion confirming even the slightest penetration, he could not have been convicted for committing the rape. It is necessary to mention here that as per the statement of the complainant, he saw his daughter being made to sit in his lap by the convict and the private part of the convict was wet due to ejaculation.

11. In what circumstances a person can be convicted for attempt to commit rape were considered in detail in the case of Koppula Venkat Rao vs. State of Andhra Pradesh AIR 2004 SC 1874. It was observed as under :

'11. In order to find an accused guilty of an attempt with intent to commit a rape, Court has to be satisfied that the accused, when he laid hold of the Prosecutrix, not only desired to gratify

his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.

12. The sine qua non of the offence of rape is penetration, and not ejaculation. Ejaculation without penetration constitutes an attempt to commit rape and not actual rape. Definition of "rape" as contained in Section 375 IPC refers to "sexual intercourse" and the Explanation appended to the Section provides that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Intercourse means sexual connection. In the instant case that connection has not been established. Courts below were not correct in their view.'

12. In Mayne's Criminal Law of India 4th Edn., p.602, it is said:

'where a full grown man has carried the offence upon a child beyond the minimum degree of penetration which brings him within the law, it is probable that he will cause injuries for exceeding the mere destruction of virginity which are often evidenced by ruptures; or lacerations of a dangerous or fatal character.'

13. In the case Guddu @ Santosh vs. State of Madhya Pradesh in Appeal (Crl.) No.1491 of 2005 decided on 27th April, 2006, the Apex Court has reiterated the observations made in Aman Kumar & Anr. vs. State of Haryana (2004) 4 SCC 379 wherein it was held as under:-

'Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (See Joseph Lines IC & K.

.....*The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.*

.....

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Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect.'

14. In view of the findings of the learned Trial Court to the effect that there was no penile penetration, which has not been challenged by the State, it was a case of only an attempt to commit rape. Hence, the convict could have been convicted only for committing the offence punishable under Section 376/511 IPC.

15. In view of the above discussion, the conviction of the convict is altered from Section 376(2)(i) IPC to Section 376/511 IPC. The substantive sentence of ten years awarded to the convict is reduced to five years. The sentence of fine is maintained.

16. The appeal is allowed in above terms.

17. The appellant be released after undergoing the above modified sentence, if not wanted in any other case.

18. TCR be sent back alongwith copy of this order.

19. A copy of this order be sent to the concerned Jail Superintendent for information and compliance.

PRATIBHA RANI
(JUDGE)

AUGUST 25, 2017
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