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

+ **CRL.A. 490/2013**

MANOJ

..... Appellant

Through: Mr. Madhav Khurana,
Advocate (Amicus) with Mr.
Vignaraj Pasayat, Advocate.

versus

STATE NCT OF DELHI

..... Respondent

Through: Mr. Hirein Sharma, APP for
State

+ **CRL.A. 561/2013**

AMIT

..... Appellant

Through: Mr. Habibur Rahman,
Advocate

versus

STATE

..... Respondent

Through: Mr. Hirein Sharma, APP for
State

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE I.S. MEHTA**

JUDGMENT
07.05.2018

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Dr. S. Muralidhar, J.:

1. These two appeals are directed against the judgment dated 11th February 2013 passed by the learned Additional Sessions Judge-II (North-West), Rohini Courts in Sessions Case No.31/2012 arising out of

FIR No.23/2012 registered at Police Station ('PS') Kanjhawla convicting the Appellants for the offences under Sections 363, 366, 376 (2) (g) and 506 Indian Penal Code ('IPC').

2. These appeals are also directed against the order on sentence dated 19th February 2013 whereby both the Appellants were sentenced as under:

- (i) For the offence under Section 363 IPC: both Appellants have been sentenced to rigorous imprisonment for 5 years and fine of Rs.5,000/- and in default of payment of fine, to undergo simple imprisonment for 15 days.
- (ii) For the offence under Section 366 IPC: both Appellants have been sentenced to rigorous imprisonment for 7 years and fine of Rs.5,000/- and in default of payment fine, to undergo simple imprisonment for 15 days.
- (iii) For the offence under Section 376 (2) (g)/506 IPC: Manoj (A-1) has been sentenced to rigorous imprisonment for life and fine of Rs.50,000/- and in default of payment of fine, to undergo simple imprisonment for 3 months; Amit (A-2) has been sentenced to rigorous imprisonment for 10 years and fine of Rs.10,000/- and in default of payment of fine, to undergo simple imprisonment for 1 month.

The case of the prosecution

3. A complaint was lodged at PS Kanjhawla by the prosecutrix (PW-10)

wherein she stated that on 6th February 2012 she had gone to fetch milk when A-1, to whom she was known, came in a black coloured car. One other boy, whom she subsequently learned to be A-2, was sitting beside him in the passenger's seat. A-1 asked PW-10 where her sister (PW-18) was and PW-10 informed A-1 that PW-18 was at home. According to PW-10, A-1 came out of the car and at the same time A-2 opened the rear seat window. A-1 forcibly pushed her into the car and when she raised an alarm, A-1 threatened to kill her. Thereafter, both A-1 and A-2 took her in the car to an isolated place where they raped her one after the other in the rear seat of the car. They then dropped her there itself. She somehow managed to reach home but did not mention anything to her family. The following morning, she disclosed the incident to her mother (PW-19) and her sister (PW-18) who then brought her to the PS.

Investigation

4. On the basis of the above statement, a *rukka* (Ex.PW-9/A) was prepared on 7th February 2012 at around 3:30 pm and sent for registration of the FIR. Sub-Inspector Rajesh Kumar (PW-22) stated that initially on 6th February 2012 itself, at around 11pm, information was received and noted as DD No.82B at PS Kanjhawla that three boys had lifted the sister of the informer in front of the Shilpa Gas Agency Police Chowki. Upon receiving that information, PW-22 along with Constable Jagdish and Constable Rajbir Singh (PW-1) met the complainant and other family members. They informed PW-22 that PW-10 had left home for purchasing milk at around 7 pm but had not returned. The father of the prosecutrix (PW-20) informed them that his elder daughter, PW-18, had seen three boys

talking to PW-10 a few days ago and therefore, they made a call to the PCR regarding the three boys based on this suspicion. He, however, could not provide the details.

5. Since PW-10 had a mobile phone, PW-22 along with the family members of PW-10 tried to contact PW-10 on it. After sometime, PW-22 managed to talk to PW-10 and she informed him that she was returning home. Thereafter, Constable Sudhir along with PW-18 brought PW-10 from Budh Vihar. Initially, the father of PW-10, i.e. PW-20, stated that his daughter was safe and that there was no mishap. Accordingly, PW-22 left PW-10 at home and returned to the PS.

6. The following day, i.e. 7th February 2012, PW-22 was called by the Duty Officer (DO) to his room in the PS where PW-10, her mother (PW-19) and her elder sister (PW-18) were present. The DO told PW-22 that PW-10 and her relatives had told him about rape having been committed on PW-10 the previous day in the night hours. After making inquiries from PW-10, PW-22 called an NGO represented by Anuradha (PW-9). Thereafter, PW-9 counselled PW-10 and the statement of PW-10 (Ex.PW-9/A) was recorded by PW-22 in the presence of PW-9.

7. PW-10 was then taken to the SGM Hospital along with Lady Constable Kanta (PW-16) and PW-18. The MLC of PW-10 (Ex.PW-11/A) reveals that she was brought there at 10.20 am on 7th February 2012. It noted that PW-10 informed the doctor that she had been sexually assaulted by two men of whom one was known to her. It was noted “no internal injury. No hymen

integrity maintained. The vaginal swabs were taken.” The samples were handed over to the IO.

8. PW-22 along with Constable Sudhir, PW-10 and PW-18 went to the place of occurrence from where PW-10 had been lifted. He prepared a site plan (Ex.PW-10/A) at the instance of PW-10.

9. The address of A-1 was furnished to PW-22 by the brother-in-law of PW-10. PW-22 reached that address where the father of A-1 met them. A-1 was also present and PW-10 identified him. He was arrested and a personal search was conducted. He also made a disclosure statement where he named the co-accused, A-2. They reached the house of A-2 and found it locked. A-1 was taken to the SGM Hospital and his medical examination was got conducted. He was then kept in the police lock-up and was produced in Court on the following day.

Victim's statement under Section 164 Cr PC

10. On 8th February 2012, the statement of PW-10 was recorded by the learned Metropolitan Magistrate ('MM') under Section 164 Cr PC. In this statement, she more or less deposed along the lines of her initial statement to the police. However, she did not state that she received any phone call from A-1 before she went to buy milk. She did not specifically state that A-1 spoke to her when he came in the car and before he pushed her into the car. She also did not mention any door or window of the car. As far as A-2 was concerned, she stated that he had gone to get something and she was left alone with A-1 whereas she had not stated this in her previous statement.

She also mentioned about A-1 going away after raping her. However, even in the statement under Section 164 Cr PC, she clearly mentioned that she was raped by A-1 and A-2 one after the other.

Arrests and recoveries

11. On 8th February 2012 itself PW-22 handed over the file for further investigation to Sub-Inspector Naresh Kumar (PW-21). A-1 was again interrogated by PW-21 as regards the details of A-2. He stated that he knew the whereabouts of A-2 and could get him apprehended. A raiding party was prepared and they went along with A-1 to Mangolpuri. A-1 took them to a public park and pointed out towards three boys who were smoking cigarettes, one of whom was A-2. A-2 was then apprehended and interrogated. He also gave a disclosure statement.

12. Further inquiries were made with A-2 about the vehicle in which the offence was committed. He disclosed that the vehicle belonged to his paternal uncle/son of the paternal uncle. The vehicle was then seized after A-1 took them to the I-Block road where the car was parked. On 9th February 2012, PW-10 came to the PS and identified the car as the same one in which she was raped.

13. Upon completion of the investigation, the charge sheet was filed. Charges were framed against both the accused by the trial Court on 10th May 2012.

Trial

14. On behalf of the prosecution, twenty-two witnesses were examined.

Incriminating circumstances were put to the accused, both of whom denied them. According to A-2, he was falsely implicated and had nothing to do with the incident.

15. A-1 stated that he was known to PW-10 and her family and they had no objection to PW-18 and PW-10 going out with him. He stated that on the date of the alleged incident, he in fact helped the family of PW-10 search for her. He stated that he had been falsely implicated with *mala fide* intention.

16. Three witnesses were examined for the defence. Rajesh Kumar (DW-1) claimed to have known A-1 since his childhood. He claimed that at around 7:30-7:40 pm, he along with A-1 and another boy, Mohan, were standing on the road and a Santro car reached there in which one Sukhbir from PS Begumpur and two girls, one of whom was PW-18, were present. Sukhbir and the other girl came out from the car and Sukhbir took A-1 away from there. In his cross-examination, DW-1 admitted that he did not personally know either PW-18 or the other girl and volunteered that he was informed by A-1 as to who they are.

17. The other defence witness was Ram Pyarey (DW-2), a neighbour of A-1 and his father. According to him, at around 2:30 am on 7th February 2012, he noticed two police officials in the neighbouring house and he came to know that the police had taken away A-1. In his cross-examination, he stated that he knew A-1 since his childhood and that he did not make any complaint regarding the lifting of A-1 by the police. He admitted that he had come to the Court on the asking of the family of A-1.

18. Head Constable Sukhbir attached to PS Begumpur was examined as DW-3. He knew A-1 to be a secret informer of the police. He claimed that PW-18 had come to the police along with A-1 to report about PW-10 having gone missing. Since he was on leave, he called up the SHO and conveyed to him the complaint of PW-18. He then took Constable Ram Avtar from the PS and went along with PW-18 to search for her sister along with another girl. The other girl expressed her suspicion against A-1. DW-3 then contacted A-1 who stated that he was at SGM Hospital. They then picked him up from there. PW-18 then expressed her suspicion against A-1 and said that A-1 had passed on her sister to some other boy, namely, Amit (A-2) and, in order to create an alibi, had come to SGM Hospital. According to DW-3, A-1 remained with them till PW-10 was recovered from Budh Vihar Ganda Nala. In his cross-examination by the APP, DW-3 stated that A-1 was residing with the other girl and had helped him only in one case. He did not make any entry in the PS while leaving for the search of PW-10. According to him, there was some previous dispute between A-1 and the other girl with whom he was staying and that girl would come to the PS with PW-18.

Impugned judgment of the trial Court

19. By the impugned judgment dated 11th February 2013, the trial Court concluded that the evidence of PW-10 was consistent and truthful. The medical evidence also corroborated her evidence. Further, the DNA Finger Printing report established that the profile generated from the vaginal swabs matched the DNA finger printing profile generated from the blood sample of

A-1 and this conclusively connected A-1 to the offence.

20. Further, PW-10 had named both A-1 and A-2 in all her statements. There being no previous enmity between PW-10 and A-2, there was no reason why she would falsely implicate A-2. Accordingly, the evidence against both the accused were held to be proved. The accused were sentenced in the manner indicated hereinbefore.

Contradictions in victim's statement not material

21. On behalf of A-1, Mr. Madhav Khurana, and on behalf of A-2 Mr. Habibur Rahman, the learned counsel, pointed to the discrepancies in the statements made by PW-10 first before the police (Ex.PW-9/A), then before the learned MM (PW-12/A) and finally her deposition in Court. The contradictions pointed were in the matter of:

- (i) PW-10 receiving the phone call from A-1 before she went to buy milk in her first statement whereas she makes no mention of the phone call in her subsequent statements.
- (ii) About A-1 coming in a black car which she mentioned in her statement to the police and in her statement before the MM whereas in Court, she deposed that A-1 first came to her and A-2 later came in the car.
- (iii) That A-1 spoke to her before pushing her into the car which she maintained in Court whereas in the statement to the learned MM, she stated that A-1 came in the car, stopped and pushed her in. There was no mention of A-1 speaking to her before pushing her into the car.

- (iv) In her statement to the police and in her deposition in Court, she mentioned that she was pushed into the car through the window and the door respectively whereas in her statement before the learned MM she made no mention of the door or window of the car.
- (v) Whereas in her statement under Section 164 CrPC, she stated that while A-1 raped her, A-2 had gone to fetch something leaving her alone with A-1, in her statement to the police and her deposition in the Court, she did not mention this.
- (vi) Lastly, while in her statement before the learned MM and the deposition in Court, she stated that A-1 had gone away after committing rape, in her statement to police, she stated that both A-1 and A-2 dropped her and went away after raping her.

22. The Court does not consider the above contradictions to be material enough to doubt the credibility of this witness. In this regard, the law regarding appreciation of the evidence of a victim of rape requires re-capitulation. In *Ugar Ahir v. State of Bihar AIR 1965 SC 277*, the Supreme Court held as under:

“The maxim *falsus in uno, falsus in omnibus* (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest.”

23. Specific to the testimony of a victim of sexual assault, the Supreme

Court in *State of Punjab v. Gurmit Singh AIR 1996 SC 1393*, explained:

“We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.”

24. Again, in *Om Prakash v. State of U.P. AIR 2006 SC 2214*, it was observed:

“13. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the

fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short 'Evidence Act') similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case.”

Age of the victim

25. Mr. Khurana then made elaborate arguments with respect to the age of the prosecutrix. He referred to the decision in ***State v. Charan Singh (2017) SCC Online Del 8186*** where, in the absence of any clear evidence through the school register, the Court was not prepared to interfere with the judgment of the trial Court which held that the prosecution had failed to prove that the victim was a minor.

26. In the present case, however, as noted by the trial Court, the age of the prosecutrix has been proved. Ms. Sharadha, a teacher of Sarvodya Kanya Vidyalaya, Karala, had brought the admission record of the prosecutrix which showed that the date of birth as per the school record was 5th January 1999. This was made on the basis of the transfer certificate of the primary school where PW-10 had previously studied. In the cross-examination, she admitted that no date of birth certificated issued by MCD was filed in the school at the time of admission.

27. The trial Court noted correctly that the accused had not been able to controvert the above evidence in the form of school record and, therefore, there was no reason to disbelieve it. The prosecutrix was just 13 years old at that point in time. There was no occasion, therefore, for the trial Court to order any ossification test when the school record was sufficient for proving that PW-10 was below 15 years of age.

28. In the facts of the decision cited, the trial Court had noted that the prosecutrix therein was around 17 ½ years old. The witness who brought the register had no knowledge of who had filled the particulars. No witness from the primary school had been examined. As far as the present case is concerned, there is nothing to suggest that PW-10 was anywhere close to the age of 16 years, i.e. age at which she could have consented to any sexual intercourse. The Court, therefore, concurs with the trial Court that the accused had been unable to create any doubt as regards the age of PW-10.

Corroboration of the victim's evidence

29. It was next contended on behalf of A-2 that since there were material contradictions in the statements of PW-10, there can be no presumption that she spoke the truth and her evidence required corroboration by other evidence. Reliance is placed on the decision in ***Abbas Ahmad Choudhary v. State of Assam (2010) 12 SCC 115***.

30. In the present case, the Court is not persuaded that PW-10 is an unreliable witness. The contradictions pointed out by learned counsel for the

accused are not substantial and do not, in any way, affect the credibility of her testimony. On the material aspects, PW-10 has remained consistent throughout.

31. Moreover, the testimony of PW-10 has received full corroboration by the medical evidence. She was examined by Dr. Rashmi Verma (PW-11) who clearly deposed that although no external injuries were found, on examining the vagina she found the “hymen ruptured”. There was no cross-examination of this witness by the counsel for the accused. The further corroboration was in the form of the DNA finger printing report which was proved by Ms. Shashi Bala Pahuja, Sr. Scientific Officer, FSL Rohini (PW-14). It completely confirmed the involvement of A-1.

32. As far as A-2 is concerned, as rightly pointed out by the trial Court, he has been named by PW-10 in her initial statement to the police and then in her statement before the learned MM as well as in her deposition in the Court.

33. Learned counsel for A-1 and A-2 both referred to the decision in ***Pratap Mishra v. State of Orissa (1977) 3 SCC 41*** to contend that the absence of the injuries on the body of the victim would give rise to doubts about her version. However, the said decision has to be seen in the context of the facts of that case. That is not a case where the prosecutrix was of as young an age as PW-10 was at the time of this incident. In the present case, both A-1 and A-2 were in their early 20s and would have had no difficulty in overpowering PW-10. The mere absence of injury marks would not give rise to any inference about the rape not having happened. This is particularly so

when the fear of life must have been put into the victim's mind when the assault happened all too suddenly and therefore, disoriented her. It is not hard to imagine her plight in those circumstances.

34. With the evidence of PW-10 being corroborated by medical and forensic evidence, the trial court rightly based the conviction of both accused on her evidence.

Other discrepancies

35. Learned counsel for the accused sought to point out the discrepancies in the evidence of the other witnesses, particularly, PWs- 18, 19 and 20. With the evidence of PW-10 itself lending assurance to the Court, the above discrepancies would not really matter. The non-examination of the milk vendor from whom PW-10 had gone to buy milk or the passers-by in the busy area from where PW-10 was picked up by the two accused would not weaken the case of the prosecution. None of the defence witnesses actually helped the case of the accused.

36. Some arguments were made regarding the tampering of the case material. It was sought to be contended that as per the storeroom register, the brassiere which was deposited was red and black in colour whereas the one sent to the FSL was red and white in colour. Nothing really turned on the brassiere at all. For that matter, nothing really turned on the delay in recovery of the bloodstained *baniyan* from the car. The vaginal swab collected during the medical examination of PW-10 matched the DNA finger print of the blood samples of A-1. Therefore, the above discrepancies hardly created a dent in the case of the prosecution. The non-collection by

the police of the CDRs of the mobile phone of PW-10 or of A-1 and A-2 again was not material enough to derail the prosecution's case. This is a case based on the eye-witness testimony of the prosecutrix which otherwise stands corroborated by both medical and forensic evidence.

37. For the aforementioned reasons, the Court is satisfied that the prosecution has been able to prove the guilt of the two Appellants for the offences with which they were charged, namely Sections 363, 366 and 376 (2) (g)/506 IPC.

Sentence

38. Turning now to the question of sentence, the Court finds no reason to interfere with the sentence awarded to each of the Appellants for the offences under Sections 363 and 366 IPC as well as the fine amount and default sentences.

39. As far as the offence under Section 376 (2) (g) IPC is concerned, the Court finds nothing much to differentiate between the two accused. While maintaining the sentence on account of default fine awarded to A-2 for the offence under Section 376 (2) (g)/506 IPC, the Court modifies the sentence awarded to A-1 for the aforementioned offence from rigorous imprisonment for life to rigorous imprisonment for 10 years with the fine amount of Rs.50,000/- and the default sentence being maintained as awarded by the trial Court.

40. Consequently, the impugned judgment of the trial Court convicting the two accused is upheld and the order on sentence is modified to the slight

extent qua the sentence awarded to A-1 for the offence under Section 376 (2) (g) IPC as indicated hereinabove.

41. The appeals are disposed of and the applications are dismissed. The trial Court record be sent forthwith along with a certified copy of this judgment.

S. MURALIDHAR, J.

I.S. MEHTA, J.

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