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

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Date of Decision: 21.08.2018

% **CRL.A. 430/2018**

OM PRAKASH

..... Appellant

Through: Ms. Saahila Lamba, Advocate

versus

STATE

..... Respondent

Through: Mr. Rajat Katyal, APP with SI Sonu,
PS Seemapuri

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE I. S. MEHTA

VIPIN SANGHI, J. (ORAL)

1. The appellant has preferred the present appeal to assail the judgment rendered by the learned ASJ-01/Special Judge (POCSO), Shahdara District, Karkardooma Courts, Delhi in SC No.70/2016 arising out of FIR 460/2013 under Section 363/376(2)(i)/506 IPC and Section 5(m)/6 of POCSO Act registered at P.S. Seemapuri, whereby the appellant stands convicted of the charge framed against him. The appellant also assails the order on sentence dated 29.01.2018 passed by the learned ASJ. The maximum punishment awarded to the appellant is rigorous imprisonment for life, which shall mean imprisonment for the remainder of his life, for the offence punishable under Section 376(2)(i) IPC with fine of Rs.25,000/-. In default of payment of fine, he has been directed to undergo further simple imprisonment for a period of six months. The fine, if recovered, is payable to the victim.

2. The case of the prosecution is taken note of in the impugned judgment

itself. The same reads as follows:

“1. Accused Om Prakash was sent up for trial by the police of PS Seemapuri for the offences punishable under Section 363/376 (2)(i)/506 of Indian Penal Code, 1860 (herein after referred to as “IPC” in short) and under S. 5(m) / 6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as “POCSO” in short) on the allegations that on 31.08.2013 at about 10:00 p.m., Smt. Rekha along with her husband and daughter came to police station and reported to duty officer that at around 1:00 p.m. when school got off, one TSR driver took her daughter (name withheld) 9 years old/ victim, who was studying in 3rd class, in his TSR from 70 Foota Road. Police officer of PP Tulshi Niketan informed that her daughter is at PP Tulshi Niketan and after that she took her daughter from PP to her home. At home her daughter told that TSR driver did “Galat Kaam with her”. On that duty officer has informed SHO and lodged DD entry vide DD No.38A dt. 31.8.2013 and sent the prosecutrix for medical examination to GTB Hospital alongiwith W/Ct. Pramila and IO was also informed about the DD Entry. Victim girl child was medically examined with alleged history of rape by autorickshaw driver wherein she gave history that autorickshaw was picking her up from outside school at 1:00 p.m. on 31.08.2013 and took her to deserted area, behind, where he started taking off her clothe, panty and when she resisted, he warns her of killing with knife if she shouted. Then he raped her, intercourse was done. After which he took her to petrol pump (nearby) and arranged one auto for her and told her not to disclose to anyone. She was then dropped to home. History of bathing at home. Hymen torn, inflamed and bruises were noted”.

3. The age of the prosecutrix being 9 years on the date of the incident i.e. 31.08.2013 is established. The conviction of the appellant is premised on the testimony of prosecutrix, who was examined as PW-1; the testimony of PW-4 Shakir Malik, who was an auto driver; on the corroborative scientific

evidence, namely, MLC of the prosecutrix (Ex. PW-2/A), which found the hymen of the victim torn, and; the FSL report (Ex. PW-14/A), wherein the DNA of the accused was found in the vaginal swab as well as on the skirt and underwear of the prosecutrix.

4. The submission of learned counsel for the appellant, firstly, is that the prosecutrix had failed to identify the accused when the accused was produced before the court.

5. We do not find any merit in this submission for the reason that, firstly, the prosecutrix was 9 years of age at the time when the incident took place on 31.08.2013, and about 11 years of age when she was examined on 01.08.2015. The examination of the prosecutrix before the court took place nearly two years after the date of the incident. Thus, it was natural to expect that her memory may have faded in the said period. Moreover, when PW1 was cross examined on 03.11.2015 the court made the observation that she appeared to be too terrified, and she was speaking very slowly at a very low pitch. Thus, the possibility of the prosecutrix not identifying the accused, out of fear cannot be ruled out.

6. Secondly, the accused was identified by PW-4 Shakir Malik, who was also an auto driver and he testified that it was the accused who handed over the prosecutrix to him along with the money, to drop her at her residence. PW4 had taken the prosecutrix to the police post and had also called the parents of the prosecutrix to the police post. Thus, the accused was duly identified by PW-4.

7. Thirdly, the prosecutrix while recording her statement under Section

161 Cr PC (Ex. PW-1/DA) gave a detailed description of the auto rickshaw of the accused wherein the offence was committed. The same description was repeated by her while recording her statement under Section 164 Cr PC (Ex. PW-1/A) before the learned Magistrate. On the basis of the said description, the police party conducted search and found the auto rickshaw parked in front of a tea stall at toll tax, Bhopura. In this respect, the statements of PW-11 ASI Mursalin Khan and PW-12 ASI Sarvesh Kumar may be referred to. The owner of the auto rickshaw Babu Lal was called, who disclosed that the said auto rickshaw was on hire till 31.08.2013 with the accused Om Prakash. Babu Lal could not be examined since he had passed away. However, as noticed herein above, PW-4 duly identified the accused as the person who had handed over the prosecutrix to him along with the money for being dropped to her residence. Pertinently, the prosecutrix in her cross examination was emphatic that she identified the auto rickshaw in question on the basis of the baskets installed therein. She was also shown the photographs of the auto rickshaw during her examination, and she affirmed that they were of the auto rickshaw wherein the crime was committed.

8. Fourthly, the scientific evidence clearly establishes that it was the accused who was driving the auto rickshaw in question and who had committed rape upon the prosecutrix, since his DNA was found in the semen collected from the vaginal swab, as well as from the skirt and underwear of the prosecutrix. He has not explained this incriminating circumstance. He simply claimed implantation of samples, but did not state why he would be falsely implicated by the prosecutrix and her family members.

9. Thus, in our view, there is no merit in the submission of learned counsel for the appellant that the identity of the perpetrator of the crime was in doubt. In the present case, the evidence brought on record by the prosecution, in our view, was sufficient to find the appellant guilty of the offence of which he was charged. The testimony of the prosecutrix was credible and was duly corroborated by the other evidence taken note of herein above. The conviction of the appellant is, thus, upheld.

10. Learned counsel for the appellant has contended that the sentence awarded to the appellant by the learned Trial Court is harsh considering the circumstance of the appellant. Learned counsel submits that the appellant is 42 years of age with a family of four minor children and a wife. He is the only sole breadwinner of the family and he comes from a poor background. The appellant had no other criminal past.

11. Learned counsel further submits that though the offence of rape of a minor child itself is reprehensible, there was no brutality exercised by the appellant in the commission of the crime itself. The prosecutrix had not suffered any other injury on her body in the commission of the offence.

12. Learned counsel has drawn our attention to a decision of the Division Bench of this Court in ***Beeru v. State NCT of Delhi***, CrI. A. No.1079/2010 decided on 11.12.2013. In this decision, the Division Bench referred to Section 376 IPC pre-amended (the amendment having been brought into force by Act 13/2013 with effect from 03.02.2013). The Division Bench observed that the legislative intent was to impose the punishment of imprisonment for life in extreme cases of rape and, consequently, in cases of

less severity, the sentence has to be less severe. Whether the sentence should be of imprisonment for life, or otherwise, is left to the judicial prudence of the Judge. Reference was made to ***State of Rajasthan vs. Vinod Kumar***, AIR 201 SC 2301, where the Supreme Court had observed:

“The measure of punishment in a case of rape cannot depend upon the social status of the victim or the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with. The socio-economic status, religion, race, caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required”.

13. Reference was also made to a Division Bench judgment of this Court in ***Khem Chand v. State of Delhi***, ILR (2008) Supp. (5) Delhi 92, wherein the following parameters were laid down for assessing the quantum of punishment in cases of rape upon a child:

“• Criminal and the crime are both important for the purposes of sentence.

• Manner of commission of the crime being with meticulous planning or one on the spur of the moment;

• Violence, If any, accompanying the crime whether injuries suffered were serious and required extensive treatment or have caused any permanent damage to the child bearing capacity or otherwise;

• Whether the offender or accused was in a position of fiduciary trust or exploited a social or family relationship;

• State of the victim, impact of the crime on the victim,

- *The antecedents of the accused, his age, whether a first time offender or repeat offender, possibility of recidivism.*
- *Social backwardness or offender being a poor, illiterate labourer not found to be adequate reason by Courts.*
- *Passage of time since offence committed by itself considered inadequate reasons for reprieve.*
- *Rape victim's marriage or rehabilitation may be considered as a mitigating factor”.*

The Division Bench also took note of couple of instances where the child had been raped by a close relative, and in another case where the child had been raped by the school teacher.

14. In **Beeru** (supra), the Court reduced the sentence from life imprisonment to rigorous imprisonment for a period of 10 years while maintaining the conviction of the appellant.

15. Mr. Katyal, the learned APP submits by reference to Section 375 IPC that several acts constitute rape, and penetration of the penis into the vagina of the prosecutrix is the most severe form of rape. Thus, he submits that the sentence of the appellant should be determined in the light of this circumstance. Moreover, the appellant had taken away the prosecutrix – a 9 year old minor girl, on the pretext of dropping her to her residence and thereafter committed rape upon her after driving his auto rickshaw into a bush. The appellant had threatened the prosecutrix with a knife while committing the said act. She has suffered depression due to her horrific experience at the hands of the appellant and was undergoing treatment for the same, as stated by her.

16. Having considered the rival submissions on the aspect of sentence, and taking into account the circumstances pointed out by Id. Counsel for the appellant and by the Id. APP, we are of the considered view that interest of justice would be met in the facts and circumstances of the case, if the sentence of the appellant is reduced from imprisonment for the rest of his life to a substantive sentence of 16 years rigorous imprisonment i.e. rigorous imprisonment for actual 16 years, without remissions. While the appellant did not resort to brutality, de did threaten the prosecutrix with a knife and made her the object of his lust. The victim/ prosecutrix has been scarred for life. She is living the trauma, as she was undergoing treatment for depression even when she was examined on 03.11.2015 i.e., nearly 26 months after the incident. So far as the fine imposed upon the appellant is concerned, the same is maintained. In case of default of payment of fine, he shall undergo simple imprisonment for a further period of 6 months. The sentence qua the other offences for which the appellant stands convicted remains unaltered. He shall be entitled to benefit of Section 428 Cr.P.C. All the sentences shall run concurrently.

17. The appeal stands disposed of in the aforesaid terms.

VIPIN SANGHI, J

I.S.MEHTA, J

AUGUST 21, 2018

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