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

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Date of decision: July 4, 2019

+ **CRL.A. 87/2010**

MOHD.CHAND

..... Appellant

Through: Ms. Sindhu Sinha, Advocate.

versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Through: Mr. G.M.Farooqui, APP for the
State.

CORAM:

HON'BLE MR. JUSTICE A.K.CHAWLA

J U D G M E N T

A.K. CHAWLA, J.

By the instant regular appeal under Section 374 Cr.P.C., the appellant, who is convicted of the offences under Section 376/506 IPC and sentenced to undergo 7 years RI for the offence under Section 376 IPC besides fine of Rs.5,000/- in default to undergo 3 months SI for the offence under Section 376 IPC, assails the impugned judgment of conviction dated 08.12.2009 and order of sentence dated 19.12.2009 passed by the learned ASJ, District- South. Here itself, it may be noted that though the appellant is also convicted of the offence under Section

506 IPC, no separate sentence for the commission of the said offence, has been awarded by the Trial Court.

2. The Trial Court conducted the trial for the commission of the offences under Section 376 and 506 IPC by the appellant on the allegations that on 27.09.2007, at about 7.15 P.M., at House No.303, Gali No.5, Khatte Wali Gali, Subhash Camp, Dakshin Puri, New Delhi, the appellant committed rape on the prosecutrix and thereafter threatened to kill her, in the event, she disclosed about the incident to anyone. As per the FIR, on the 7th day of Ramzan in the year 2007, on 27.09.2007, at about 7.15 P.M., the prosecutrix, aged about 14 years, had gone to the house of her Nani (maternal grandmother), who used to live in the house in the backside of their house and there, her Nani informing her that she was to go for fetching vegetables and that she - the prosecutrix should watch TV sitting there, went to the first floor of the house with the cup of tea and in short time, the prosecutrix's mamu Chand - the appellant came in. On entering, he is said to have put on the latch from inside and immediately closing the prosecutrix mouth, made her lie on the bed and removing his own pants and underwear, proceeded to untie the nara (cord) and removing her salwar, committed rape on her. After the incident, the appellant is said to have threatened the prosecutrix to kill her if she informed of the incident either to her mother or anyone else. In the FIR, which came to be registered on the statement of the prosecutrix on 31.10.2007, it was also stated that on account of fear she returned back home at about 8 P.M. and on so reaching the house, she narrated the entire incident to her mother. On

this, as per the contents of the FIR, the mother of the prosecutrix is said to have informed of the incident to the Nani of the prosecutrix and on that, Nani having scolded the appellant, assured the mother of the prosecutrix that they would now get the appellant married to the prosecutrix, to which the mother of the prosecutrix consented. In that direction, as per the FIR, three dates for marriage also came to be fixed and on 22.10.2007, when Nani told them that they would not marry the appellant with the prosecutrix, having discussed with the parents, the prosecutrix came to the police station on 31.10.2007 and on her statement, the FIR came to be registered the same day. On the conclusion of the investigations, charge sheet came to be filed for the trial of the offences under Section 376/506 IPC and charges came to be framed to that effect. Prosecution in support of its case, examined PW1 Ms.Shama Parveen - the mother of the prosecutrix; PW2 Feroz Khan - the father of the prosecutrix; PW3 - the prosecutrix; PW4 Dr.Rehan Nabi Khan; PW5 Dr.Shilpa Singhla; PW6 Head Constable Rambir Singh, PW7 Head Contable Hans Ras; PW8 Contable Komal; PW9 Constable Ombir Singh; PW10 Constable Devender; and; PW11 Inspector Sanghmitra and closed PE. Incriminating evidence was put to the appellant under Section 313 Cr.P.C. In the statement so recorded, the appellant stated that his mother had told the mother of the prosecutrix to marry her, in case, the allegations were correct and in view of the fact that the allegations were false, the mother of the appellant declined his marriage with the prosecutrix. In his such statement, the appellant also stated that the prosecutrix was the daughter of his paternal aunt and thereby, his niece in relation and that he was

falsely implicated at the instance of his Khala (Mausi) Ms.Jahan Ara, with whom, they were not having good relations. No evidence however came to be led by the appellant in his defence. The Trial Court returned the findings of commission of both the offences by the appellant and passed the impugned order on sentence. Aggrieved thereof, the appellant has preferred the appeal in hand.

3. The appellant assails the impugned judgment of conviction and the order on sentence on the grounds viz. delay of more than one month in registration of FIR; depositions of PW1-the mother of the prosecutrix; PW2-the father of the prosecutrix and the prosecutrix PW3 being full of discrepancies, contradictions and not reliable; depositions of PW1 to PW3 being uncorroborated; and, the Trial Court failed to appreciate the evidence in the right perspective.

4. In the submissions of Ms. Sinha, Id. counsel for the appellant, the story put forth by the prosecution was improbable and the evidence led in any case was not sufficient to prove the charge levied against the appellant. It was contended that the evidence led by the prosecution was not at all reliable on account of inconsistencies and contradictions in the depositions of the material prosecution witnesses besides being uncorroborated by independent and scientific evidence. It was also contended that the appellant by himself, as per the conclusions drawn by this Court vide its order dated 21.02.2013 on the issue agitated as regards his juvenility, as on the date of the subject incident, was aged about 18 years only and it was improbable that he would have forced himself on the prosecutrix. In her submissions, a concocted story was

created to falsely implicate the appellant at the instance of a close relation with whom the appellant and his family members were not having good relations. In support of such submissions reliance was placed upon *Radhu vs. State of Madhya Pradesh*, (2007) 12 SCC 57, *Tameezuddin Alias Tammu vs. State (NCT of Delhi)*, (2009) 15 SCC 566 and *Munna vs. State of Madhya Pradesh*, (2014) 10 SCC 254.

5. Mr. Farooqui, Id. APP for the State on his part however contended that the depositions of the prosecutrix and her parents were unshaken and squarely connect the appellant to the commission of the offence of which he has been found guilty by the Trial Court. In his submissions, the prosecutrix and her parents were illiterate and the discrepancies or the inconsistencies in their depositions are not such which would have the effect of belying their depositions. It was also contended that there were catena of judgments which would go to show that even the sole deposition of the victim of rape was sufficient, without the necessity of any corroborative evidence, to return a finding of conviction. In his submissions therefore the impugned judgment and the order on sentence did not call for any interference.

6. The observations of the Trial Court in returning findings of conviction appear in para 20 of the impugned judgment, which are as under:

"20. In the present case, the victim was a minor as per the deposition of both PW1 and PW2, her parents, though without any other proof. As regards the ossification test carried out, same has not been placed

on record, though as per the prosecution case bone x-ray was taken, report thereof has not been placed on record. There is sufficient evidence in the form of testimony of both the parents of the victim, as well as the victim herself, that she was a minor as on the date of the incident, was in the house of the accused and so probably not in a position to give any resistance to the accused, after about one month of the incident as she was medically examined on 31.10.2007 and hence it was not expected that injury marks, if any, on the body of the victim, could have been observed in the medical examination of the victim, after so much time gap. As per medical examination of the victim vide MLC Ex. PW5/A, rape as such is not ruled out and PW5 Dr. Shilpa Singla had stated in cross examination that it is not possible to tell exactly when the last intercourse happened. Victim while deposing as PW3 deposed that she was threatened by the accused that in case she disclosed the incident to her parents, she will be killed by him. Accused in his statement u/s 313 Cr.P.C. stated that mother of the victim, following him, had gone to the house of her sister Imrana, where he was having dinner and made allegations of victim having been raped by him. Accused also stated that his mother also followed the mother of the victim at the house of Imrana. Thus, the incident as such cannot be stated to be false and the delay in making the FIR is reasonably explained since both the accused and victim were the close relatives and mother of the accused had promised to marry the accused with the victim and that is not fatal to the case of the prosecution."

7. But for the foregoing lackadaisical observations, the impugned judgment of conviction does not reflect any serious advertence to the prosecution case and the evidence that came to be led to prove the charge of commission of rape by the appellant. It is a matter of record

that but for the prosecutrix and her parents, no independent witness came to be examined. It is also a matter of record that no scientific evidence of any kind, which could connect or indicate involvement of the appellant in the commission of the offence, has come to be led by the prosecution. Though, the prosecution seeks to explain the delay in lodging the complaint after more than a month of the alleged incident on the premise of assurance extended by Nani of the prosecutrix to get the appellant married, failure of the Investigating Officer to seize any of the clothes of either the victim or the assailant and/or the bed-sheet, where the crime is said to have been committed, more so in the absence of any explanation, cannot be ignored lightly in the given facts and circumstances. The only deposition of Doctor PW5, who medically examined the prosecutrix after more than a month of the alleged incident having found the hymen ruptured, during cross, explained that she could not tell, if, the hymen was fresh or old torn, could be of some corroborative value, if, the other evidence on record was found to be trustworthy and believable. It thus follows that in the given case, the Trial Court was required to consider and ponder upon the prosecution's story with which it came to the Court and the evidence it adduced, but that does not surface from the impugned judgment.

8. FIR came to be registered on the statement of the prosecutrix, who, as per the complaint Ex. PW11/A was of 14 years of age. Was she actually of 14 years or thereabout, a bare perusal of the observation made by the Trial Court would show that no cogent evidence was adduced to prove or even effectively indicate that the prosecutrix was of

14 years or thereabout at the time of the alleged incident. Prosecutrix, who appeared as PW3, by herself did not utter even a word as regards her age, either at the time of entering into the witness box or in her deposition. It is only in the oral depositions of her mother PW1 and father PW2, her age come to be stated to be about 15 years without disclosing any basis thereof. In the given case, the age of the prosecutrix gets relevant in view of the fact that on inquiry conducted as regards the juvenility of the appellant, he was found to be aged about 18 years only and the prosecution case but for the allegations of rape does not state for any injury having been sustained by the prosecutrix or any of her clothes having been torn, to even reflect any resistance put forth by her against the alleged forceful act committed upon her against her wishes much less any attempt made by her to even run away. Suffice to say, there is also no evidence on record to show that the appellant was of such physique that the prosecutrix by his appearance or other conduct got under any fear to submit to his desire. The substantive depositions of the prosecutrix and her parents, who appeared as PW1 to PW3, when gone into, are found to be contradictory on material aspects besides being improbable. The allegation of alleged threat for which the charge was framed for the offence under Section 506 IPC is only after the alleged commission of the offence under Section 376 IPC inasmuch as her deposition is also to the said effect, as follows:

"Mai Apane nani ke ghar gahi thi bahut din pahli, phir Chand aya, ushane muh dabaya aaur mere satha galat kam kiya. Ushke bad usa nai kaha agar apane mammi-papa sai kaha to jaan se mar doonga."

From her such deposition also, it is equally clear that the incident of commission of rape was not under any threat and from the facts and the circumstances, it cannot be deduced that the appellant put the prosecutrix either under any fear and committed the alleged sexual intercourse against her wish. As per the prosecution case and as per the deposition of the prosecutrix PW3, on her return back home, she had narrated the incident to her mother and on that, her mother had gone to the house of her Nani, when Nani assured to get the appellant married to the prosecutrix and on the assurance so given, they had returned back home. During cross, PW2-the mother of the prosecutrix has deposed that it was on the next date of the incident, they went to the house of the mother of the appellant, who happened to be her aunt and she stated for arranging the marriage of the accused with the prosecutrix and on that, they came back, and, after two days thereof, they again went to their house and ultimately after 2-3 days of the mother of the appellant telling that they could do whatever they want, they have gone to the police and lodged the FIR. During her cross, she has also deposed that the house of the appellant was situated in the street behind their house. As per her such deposition, even such promise of marriage after the incident, stood broken within a week or so of the incident, though, as per the complaint and the FIR, the promise or assurance of marriage was given by Nani and not the mother of the appellant. FIR however came to be lodged more than a month of the incident. Delay in lodging the FIR thus remains unexplained.

9. As for the deposition of PW2-the father of the prosecutrix, in his examination-in-chief, he deposed that on 7th day of Ramzan in the year 2007, he was informed by his wife and the daughter that his daughter-the prosecutrix had been raped by the appellant. During cross, he has however deposed for having come to know of the incident after about 10 days while admitting that he used to come back to his house daily from his work. His such deposition is highly improbable and difficult to be believed. Not only that, in his examination-in-chief, he did not depose for any talk or promise made by the Nani of the prosecutrix for arranging the marriage of the appellant with the prosecutrix at any point of time. Suffice to say, as per the complaint Ex. PW11/A, on which the FIR Ex.PW6/A was registered, the assurance to that effect was extended by the Nani of the prosecutrix and none else. The contradictions and improvements in the depositions of the prosecution witnesses PW1 to PW3, who are the victim and her parents only, in the absence of any independent witness, when there is delay in registration of the FIR on the purported promise of marriage, would certainly show that PW1 to PW3 were interested witnesses and their testimonies required stricter scrutiny for being believed. Why, Nani of the prosecutrix, who, as per the complaint Ex.PW2/A, making the prosecutrix sit in a room and watch TV, went away to the first floor with a cup of tea telling that she was to fetch vegetables and shortly whereafter, the alleged incident of rape took place, though, a very material witness, having been not joined and examined for her role, equally casts serious doubt on the veracity of the prosecution case, with which it came before the Court.

10. In *Radhu's* case (supra) the Supreme Court reiterating the law that a finding of guilt in a case of rape can be based on the uncorroborated evidence of the prosecutrix and that absence of injuries on the private part of the victim will not by itself falsify the case of rape, has equally cautioned that the Courts, at the same time, should bear in mind that false cases of rape are not uncommon and that there are some rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of rape either to take revenge or extort money or to get rid of financial liability. Observations to the similar effect have also come to be made by the Supreme Court in *Munna's* case (supra) wherein it is observed that if the statement of the prosecutrix had inherent infirmities creating doubts about its veracity, the same may not be acted upon.

11. Contradictions in the depositions of the material prosecution witnesses i.e. PW1 to PW3; unexplained failure to examine Nani—a very material witness, who was present at the spot before and after the incident and was allegedly involved in talks of marriage immediately after the incident; absence of any cogent evidence for appellant having committed an assault of sexual intercourse against the wish of the prosecutrix—a case, with which the prosecution came to the Court; failure to prove the age of the prosecutrix; and, the other mitigating facts and circumstances taken note of earlier, convince the Court to set aside the impugned judgment and the consequent impugned order on sentence, giving a benefit of doubt.

12. For the foregoing reasons, the impugned judgment and the order on sentence is set aside. Consequentially, the appellant is acquitted of the charges. Appeal stands disposed off accordingly.

A.K. CHAWLA, J.

JULY 4, 2019

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