

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

CRL.A. 549/2015

Reserved on : 22.07.2019

Date of Decision : 08.08.2019

IN THE MATTER OF:

MAHINDER & ANR

..... Appellants

Through: Mr. Sumeet Verma and
Mr. Mahinder Pratap Singh, Advocates for
appellant No.1
Mr. Biswajit Kumar Patra, Advocate for
appellant No.2

versus

STATE (NCT OF DELHI)

..... Respondent

Through : Ms. Manjeet Arya, APP for State

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present proceedings are instituted challenging the judgment of conviction dated 19.12.2014, passed by ASJ-01(West), Tis Hazari Courts, Delhi arising out of SC No.28/13 in FIR No.84/10 registered under Sections 363/368/342/376 (G) IPC at P.S. Hari Nagar, Delhi whereby the appellants were convicted for an offence punishable under Section 376 (2) (g) IPC and vide order on sentence dated 22.12.2014, the appellants were directed to undergo RI for ten years each with a fine of Rs.5,000/- each, in default of which, the appellants were directed to undergo SI for a further period of fifteen days. The benefit of Section 428 Cr.P.C. was granted to the appellants.

2. The facts of the prosecution, as noted by the trial court, are:

“In brief, the case of the prosecution is that on 26.3.10 Shri Manish Pandey, the father of the prosecutrix aged about 13 years, lodged the missing report of the prosecutrix. On the basis of that missing report, the FIR has been registered. During investigation, on 27.3.10 the prosecutrix was recovered from the house of the accused Mahender and Smt. Sheela at Tilangpur, Kotla Vihar, Phase-I, Delhi. The police recorded the statement of the prosecutrix and also got recorded her statement U/S 164 Cr.P.C.. The prosecutrix was got medically examined from DDU Hospital. The prosecutrix in her statement alleged that on 23.3.10 at Dukh Niwaran Temple, she was ganged rape by the accused persons namely Mahender and Vinay Mishra. She was forcibly taken by the accused Mahender to his house and where she was wrongfully confined by the accused Smt. Sheela, who is the mother of the accused Mahender. On 27.3.10, the accused persons Vinay Mishra and Mahender were arrested. On 21.4.10, the accused Smt. Sheela surrendered in the court and she was arrested with the permission of the court. Accused persons were got medically examined from DDU Hospital.

2. After investigation of the case, the police has filed the charge-sheet U/s 363/368/342/376 (G) IPC against the accused persons. Charge U/s 376 (2) (g) IPC has been framed against the accused Mahender Singh and Vinay Mishra and a charge U/s 368 IPC has been framed against the accused Mahender Singh and Smt. Sheela. The accused had pleaded not guilty to the charges”.

3. During the trial, the prosecution examined a total of 17 witnesses. The prosecutrix was examined as PW-1. Dr. Rishi and Dr. Yogendra Nath Maurya were examined as PW-3 and PW-6 respectively to prove the MLC of the prosecutrix. Dr. Ajay Sharma (PW-9) proved the MLC of the accused Mahinder and Vinay Mishra. Dr. Sushma Setia (PW-2), Principal from Sarvodaya Vidhayala, Hari Nagar proved the age of the

prosecutrix on the basis of the school records. Mr. Manish Pandey, father of the prosecutrix was examined as PW-16.

4. The other witnesses, who were examined, were police officials associated with the various parts of the investigation.

MATERIAL WITNESSES

5. Dr. Sushma Setia, Principal from Sarvodaya Vidhayala, Hari Nagar appeared as PW-2 and proved the school record of the prosecutrix as Ex.PW2/A to Ex. PW2/D. As per the school record, the date of birth of the prosecutrix is 02.06.1997. The incident had taken place on 23.03.2010. As such, the prosecutrix was aged about 13 years of age on the day of the incident.

6. The prosecutrix was examined as PW-1. She deposed that she was 13 years of age and was studying in class 8th in Sarvodaya Vidhyalaya, Clock Tower, Hari Nagar, Delhi. She deposed that on 23.03.2010, she has gone with her father to a park where she met her friend, Shivani. Thereafter, she along with Shivani went to the house of another friend, Chinki. From the house of Chinki, she came back to the park. As her father was not there, she sat there. During this time, the accused Praveen (the juvenile) came there and took her to a nearby temple, where he committed rape upon her. She further deposed that the present appellants also came inside the temple and raped her one after the other. Thereafter, she was taken by the appellant Mahinder to his house where his mother was also present, who provided her daughter's clothes to the prosecutrix. It has also come in the testimony of the prosecutrix that her clothes were washed as they had become dirty due to the rape. The prosecutrix did not level any allegations against the mother of the accused Mahinder. She

further deposed that on the next day, she had called one Rahul, her class fellow whereafter the police came and recovered her from the house of the appellants Mahinder. The prosecutrix also proved her statement that was recorded under Section 164 Cr.P.C. as Ex.PW-1/A.

7. During the cross-examination, she replied that all the three accused namely, Praveen and the present appellants were present in the room and all three of them had pressed her mouth. The prosecutrix answered that she had taken a bath in the house of the appellant Mahinder. On behalf of the appellant Mahinder, a suggestion was given that during this period when she was at his house, whether the appellant Mahinder committed any wrong with her, which was denied. It was also suggested that the accused Praveen had played a blue film in the temple. The prosecutrix deposed that the present appellants had also reached when the said film was shown.

8. The father of the prosecutrix was examined as PW-16. He deposed that on the day of the incident, he had taken the prosecutrix along with him to an optical shop to repair her spectacles. As the shopkeeper had asked him to wait for one hour, he had taken the prosecutrix to a nearby park where the prosecutrix met her friend, Shivani and both of them left away. When after some time, the prosecutrix did not return, he lodged a missing report where his statement (Ex.PW-11/A) was recorded.

9. SI Satbir Singh was examined as PW-5, who deposed that on 27.03.2010, the prosecutrix was recovered from the house of the appellant Mahinder. He further deposed that the appellants were arrested on the pointing out of the prosecutrix. The testimonies of SI Parveen

Kumar (PW-14) and W/ASI Krishan (PW-13) is cumulative to the testimony of PW-5.

MLC

10. The prosecutrix was taken to DDU Hospital for her medical examination by W/Ct. Mamta (PW-10). Initially, the prosecutrix was medically examined on 27.03.2010 vide MLC (Ex.PW-3/A) at about 1:50 P.M. where it was recorded that the prosecutrix was not willing for any kind of internal examination. However, vide MLC (Ex.PW-6/A), recorded on the same day at 4.10 P.M., she was medically examined, where, hymen torn was noted. It was also observed that there was no active bleeding and no fresh injuries were noted.

FSL

11. The exhibits seized during the investigation were sent for the FSL examination. As per the FSL report (Ex.PX) though human blood was found on some of the exhibits, however, no blood grouping could be obtained.

ANALYSIS

12. Mr. Sumeet Verma, learned counsel for the appellant Mahinder has argued that the appellant was falsely implicated. He submits that the testimony of prosecutrix is not reliable and creditworthy. He further submits that the conduct of the prosecutrix in accompanying the appellant Mahinder and staying at his house after the incident, is unnatural. He also submits that there were two MLCs of the prosecutrix within a gap of 2 ½ hours and no fresh injury was noted in the MLC. He also submits that no semen was detected in the FSL Report on the

clothes or other exhibits of the prosecutrix. He next contended that just before the incident, the prosecutrix was with two of her friends, who were not examined during the trial.

13. Mr. Biswajit Kumar Patra, learned counsel for appellant No.2 has adopted the arguments of Mr. Sumeet Verma, learned counsel for appellant No.1.

14. *Per contra*, Ms. Manjeet Arya, learned APP for the State has supported the impugned judgment. She has submitted that the testimony of the prosecutrix is cogent and reliable.

15. A perusal of the previous statements of the prosecutrix as well as her testimony reveal that the prosecutrix was consistent, cogent and reliable in describing the incident and role of the appellants. She has constantly stated that she was taken from the park by the accused, Praveen, where he committed rape upon her. Thereafter, the appellants also came in the temple and committed rape upon her, by taking turns. Although the appellants were not known to her, she was recovered from the house of the appellant Mahinder and on her pointing out the appellants were arrested. Both of the appellants were identified by her in the Court.

16. Mr. Verma, learned counsel for the appellant has argued that the conduct of the prosecutrix in staying at the house of Mahinder belies the allegation of rape, as according to him, it was unnatural for the prosecutrix to remain at the house of Mahinder after the incident. In this regard, it is noteworthy that the prosecutrix was a minor aged about 13 years and having been raped by three people was under trauma. Another aspect which lends credence to her story is that she did not level any

allegations against the mother of Mahinder. Rather, she deposed that the appellant's mother did not compel her to stay at their house. The prosecutrix was not known to Mahinder earlier. Neither such a suggestion was given to the prosecutrix in the cross examination.

17. Learned counsel for the appellants has urged that the presence of the two MLCs of the prosecutrix on the same day at an interval of 2 ½ hours creates a doubt on the prosecution case.

18. A perusal of the records show that this argument has been taken for the first time in the appeal. Neither any such argument was raised during the trial nor any such suggestion was given either to W/Ct. Mamta (PW-10) or to the two doctors, who had examined the prosecutrix and were in a position to answer such a suggestion. Even otherwise, it is not in dispute that the 2nd MLC relates to the prosecutrix only. It is not the case of the appellants that there is any inconsistency in observations of the two MLCs. At the time of first MLC, the prosecutrix had refused her internal examination, however, the same was conducted within 2 ½ hours at the time of 2nd MLC.

19. The next contention raised was with respect to absence of injuries. In this regard, it is relevant to note that the prosecutrix was medically examined after four days of the incident. So far as the other contention raised that no semen was detected on the clothes of the prosecutrix in the FSL examination is concerned, it is relevant that during her testimony, the prosecutrix had stated that her clothes were washed at Mahinder's house.

20. It is well settled that in a case of rape, the finding of guilt can be recorded even on the basis of uncorroborated testimony of the

prosecutrix provided it is cogent and reliable. Reference in this regard is made to the decisions rendered by the Supreme Court in Vijay@Chinee Vs. State of Madhya Pradesh reported as **2010 (8) SCC 191** and Rajinder @ Raju Vs. State of H.P. reported as **2009 (16) SCC 69**.

21. So far as testimony of a child witness is concerned it has to be evaluated even more carefully as the same is susceptible to tutoring. In State of Madhya Pradesh Vs. Ramesh reported as **(2011) 4 SCC 786**, the Supreme Court held that:

“14. In view of the above, the law on the issue can be summarised to the effect that the deposition of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with grater circumspection because he is susceptible to tutoring. Only in case there is evidence or record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his depositions”

22. Similarly, in Ranjeet Kumar Ram V. State of Bihar reported as **2015 SCC OnLine SC 500**, it was observed:

“14... Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one...”

CONCLUSION

23. In the present case, the prosecutrix has remained consistent about the incident as well as the role of the appellants in all of her statements

whether made during the investigation or the trial. She deposed that it was accused Praveen who took her inside the temple and then raped her. The present appellants came thereafter and raped her, by taking turns. In the MLC, hymen torn was observed. This Court is of the view that the testimony of the prosecutrix is cogent, reliable and creditworthy.

24. In view of the testimony of the prosecutrix, her MLC, identification of the appellants in the Court and the fact that she was recovered by the police from the house of the appellant, Mahinder, there is no infirmity in the judgment of conviction and order on sentence passed by the trial court. The same is upheld. Consequently the appeal is dismissed.

25. It has been pointed out by learned counsel for the appellants that both the appellants have already served their sentence. The nominal roll of the appellants was called for and it also indicate that the appellants were released after completion of the sentence.

26. LCR be returned to the trial court alongwith a copy of the judgment.

(MANOJ KUMAR OHRI)
JUDGE

August 8th, 2019
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