2023:DHC:5985

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

% ***Reserved on: 02.08.2023***
Pronounced on: 21.08.2023

\+ **CRL.A. 104/2009**

RAHUL ..... Appellant

Through: Mr. Rohan J. Alva, Advocate (DHCLSC) alongwith appellant

versus

STATE OF DELHI ..... Respondent

Through: Mr. Satish Kumar, APP for the State with SI Anil Kumar, P.S. Najafgarh

CORAM:
HON'BLE MS. JUSTICE SWARANA KANTA SHARMA

JUDGMENT

SWARANA KANTA SHARMA, J.

1. The instant appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (*'Cr.P.C.'*) has been filed on behalf of appellant seeking setting aside of judgment dated 07.11.2008 and order on sentence dated 11.11.2008 passed by the learned Additional Sessions Judge, Dwarka, New Delhi (*'learned Trial Court'*) whereby

the appellant was convicted under Section 376 read with 511 of Indian Penal Code, 1860 (*'IPC'*) and was sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 5,000/- and in default of the fine, to further undergo simple imprisonment for six months. The appellant was also convicted under Section 342 IPC and for the same, he was sentenced to undergo rigorous imprisonment for one year.

2. Briefly stated, facts of the present case are that the present FIR was registered on the complaint of the complainant Malti, i.e. the mother of victims 'X' and 'Y' aged seven years and five years respectively, wherein it was stated that the appellant/accused Rahul was their neighbour and used to visit their house regularly. It was alleged that on 12.07.2006, when the complainant was not at home, accused Rahul had taken 'X' and 'Y' to a room, and had forcibly established physical relations with 'X', and had tried to do the same with 'Y'. Thereafter, when the complainant had returned to her home, she had been informed by her younger son 'S' that accused Rahul had confined her daughters'X' and 'Y' in a room, and that she also heard the weeping sounds of 'X'. Thereafter, the accused had fled from the spot after seeing the complainant. The accused was arrested by police on 13.07.2006.

3. During the course of trial, prosecution had examined 17 witnesses. The material witnesses were PW-9 i.e. Complainant/ mother of the victims, PW-4 i.e. 'X', PW-10 i.e. 'Y', and PW-16 i.e. husband of the complainant.

4. After completion of trial, the appellant was convicted by the learned Trial Court *vide* judgment dated 07.11.2008 and order on sentence was passed on 11.11.2008. The concluding portion of judgment dated 07.11.2008 reads as under:

> "47. In view of the above discussion, it is proved on record that the prosecution has been able to prove beyond all reasonable doubts that the accused confined 'X' in his house and committed the offence of attempt to rape and as such accused Rahul is convicted for the offence punishable u/s 342 IPC as well as u/s 376 read with Section 511 IPC. So far as victim 'Y' is concerned, no offence u/s 342 of confining her or u/s 354 is made out against the accused..."

5. Aggrieved by the aforesaid judgment and order passed by the learned Trial Court, the present appeal was filed. The appeal was admitted *vide* order dated 11.02.2009 and the sentence of appellant was suspended *vide* order dated 24.07.2009.

6. Learned counsel for the appellant argues that the appellant/accused has wrongly been convicted by the learned Trial Court. It is stated that the learned Trial Court has failed to take note of the contradictions in the statements of witnesses, and that the prosecution could not prove its case beyond reasonable doubt. It is contended that the complaint was filed by the mother of victims who had stated that the appellant had induced PW-4 and PW-10 to come to his room by offering biscuits, which she had not mentioned in her statement recorded under Section 164 Cr.P.C. As argued, this is an instance of complete contradiction from the version given in the FIR and the statements recorded under Section 164 of Cr. P.C. where it is

said that PW-10 was also taken inside the room. It is further submitted that in her statement under Section 164, PW-4 had stated that a wrong act was committed on PW-10 too but in cross-examination of PW-4, there is a contradiction since PW-4 states that PW-10 was outside the room. It is argued that a new detail had emerged in the testimony of PW-10 that the victim's other brother was outside the room where the incident had occurred, which was not stated earlier. It is further stated that the said brother had informed PW-9 of the incident, but according to the FIR, PW-9 stated that son namely 'S' informed her of the incident. It is stated that the medical evidence does not support the case of the prosecution. The doctor who conducted the MLC was examined as PW-7 and a perusal of the testimony shows that it does not support the case of the prosecution with regard to the commission of the offences for which the appellant was charged. It is argued that the impugned judgment does not properly take into consideration the contradictions in the testimonies regarding whether 'Y' was present in the room or not at the time the incident had occurred. It is also argued by learned counsel that one hand, the impugned judgment holds that testimony of PW-4 was full of contradictions and hence cannot be fully relied on and the appellant cannot be convicted for the offence under Section 376 IPC, however, on the other hand, based on the same testimony which is doubted, the impugned judgment holds that the case of Section 376 read with Section 511 of IPC was made out.

7. On the other hand, learned APP for the State argues that the contentions raised on behalf of the accused for considering the

reversal of his acquittal have already been raised before the learned Trial Court. It is stated that the testimonies of the complainant and the victims clearly support the case of the prosecution. It is argued that the medical evidence establishes that the act of attempt to rape was committed by the accused. It is stated that the victims in the present case were about seven years and five years of age, and the incident was reported by their mother, who had seen the accused in room with her daughters and had fled from the spot after seeing her. It is therefore stated that there are no reasons to interfere with the impugned judgment.

8. This Court has heard arguments addressed by both the learned counsel for appellant and learned APP for the State, and has perused the material on record.

9. Learned counsel for the appellant had argued that the complainant had not lodged the complaint immediately as she had awaited for her husband and even thereafter, they had deliberations with the neighbours and only after consultations with them, the present FIR was got registered and as such not only the FIR is belated but also afterthought to falsely implicate the appellant. In this regard, this Court notes that the present case involves two minor daughters of PW-9 who had experienced a distressing incident. The concern here is that if this matter was made public by their illiterate mother, it could have potentially caused damage to the reputation of these young girls for the rest of their lives. Given her lack of education, the mother understandably would have had doubts about whether any action would be taken if she reported it to the police and what

challenges they might face if they did so. After receiving reassurance from her husband and support from the neighbors, the parents of the minor victims had decided to file an FIR. The complainant had admitted that she lacked concrete knowledge of the events that what should be her course of action after finding her daughters in such a state, and hence discussed the same with her husband. Additionally, she unequivocally stated that her daughters had informed her about the incident before her husband arrived and before she consulted with the neighbors. Therefore, it is evident that the consultations were not about determining the details to include in the complaint, but rather whether to file a complaint and the potential consequences of doing so.

10. The testimony of complainant/PW-9, i.e. mother of the victims reveals that on 12.07.2006, when she had returned from work at around 6 PM, her younger son S had informed her that appellant Rahul had taken 'Y' and 'X' into his room, which was locked from the inside and S had heard 'X' crying in distress. Thereafter, PW-9 had gone to that room and she had also heard cries of distress. Thereafter, she had knocked on the door, which was then unlocked from the inside. 'X' had come out in tears, and she had noticed the appellant hastily adjusting his clothing and then he had fled from the spot. 'Y' was also found in the appellant's room. Thereafter, PW-9 had returned to her house with her daughters and had discussed the matter with her husband, who had arrived home at 8 PM. 'X' had then disclosed that the appellant had removed her undergarments and his own clothes, after which he had made her lie on a cot and had

forcibly established physical relations with her, which had caused her pain. 'Y' confirmed that the appellant had made her sister lie on a cot and had indulged in inappropriate behavior with her while 'Y' had hidden herself near the door. PW-9 reported these facts to her husband, who promptly contacted the police. This statement was later recorded as Ex. PW9/A.

11. According to the testimony of PW-4 i.e. victim 'X,' she was playing with her siblings at home when her parents were not present. The accused, who she correctly identified, had enticed her and her younger sister with biscuits and had taken them to his room. 'X' was taken inside a room, while 'Y' was asked to wait outside. The accused had then locked the door, removed his clothes and undergarments of ‘X’, after which, he had forcibly established physical relations with her. When her mother had arrived and knocked on the door, the accused had fled through another exit. 'X' had clarified that she was the one who had opened the door in response to her mother's knocking. Her mother had then taken her and 'Y' to their home and when her father had returned at 7 PM, her mother had informed him of the incident, and they had immediately contacted the police, leading to the arrest of appellant. Thereafter, 'X' underwent a medical examination as part of the investigation.

12. In her testimony, PW-10 i.e. victim ‘Y’ stated that the appellant had taken her and her sister to his house by promising to give them biscuits. Once inside, the accused had removed 'X's undergarments and his own clothes, and all this while, their elder brother had stood outside the house of the accused. 'Y' recalled in her

testimony as to how 'X' had started crying when the appellant had engaged in inappropriate behavior with her. Her brother had then informed their mother about the incident, who then had arrived at the scene.

13. Having considered the testimonies of the material witnesses, it is clear from the statement of PW-4 'X' that she alone was led into the room, while her younger sister waited outside. According to her statement, the accused had made a quick exit through another door, but it was she who had responded to her mother's call by opening the door. During her cross examination, it was noted that she had initially mentioned her younger sister being inside the room but at a distance while Rahul was undressing, which had caused her sister to cry. However, she promptly clarified this statement, asserting that her sister 'Y' was, in fact, outside the room. Furthermore, as per PW-10, she had not initially asserted that the appellant had done anything inappropriate with her. Even in her statement under Section 164 of the Cr.P.C., her account lacked specific details and indicated that whatever the appellant had done to her sister, he had also done the same with to her. Additionally, her testimonydid not definitively establish her presence inside the room during the incident. Perusal of examination-in-chief of PW-9 reflects that so far as 'Y' is concerned, except that she was also found in the room of appellant and that she had hid herself on seeing that wrong act was being committed with her sister, no further act with 'Y' on part of the appellant has been attributed.

14. Now considering the aspect of commission of rape, it is clear from the testimony of PW-4 that there was penetration effected by the accused. It is has also been stated by PW-10 that the appellant had laid upon her sister, and had removed her clothes. PW-9 had also stated in her testimony that 'X' had informed her that appellant had removed her clothes, and had done wrong acts with her

15. In her examination-in-chief, PW-4 'X' had stated that the appellant had brought her into the room while her younger sister was instructed to wait outside, however, during her cross-examination, she initially mentioned that her younger sister was also inside the room but later clarified that her sister was, in fact, outside the room. Thus, her assertion that the appellant had inserted his penis into her vagina should be approached cautiously, especially as she had stated that it was only afterward that she experienced pain. Therefore, the nature of the offence needs to be carefully considered, whether it constitutes rape or an attempt to commit rape. It is essential to acknowledge that even minimal penetration is sufficient to establish sexual intercourse.

16. The fact that PW-4 was seven years old and that the appellant was an adult also becomes more significant. In that regard, it is noted that PW-7 who had examined 'X' had proved the MLC as Ex. PW7/A. According to the MLC, the hymen was not ruptured, there was no external sign of injury, and there was no fresh bleeding, but she also stated that there was tenderness in the external genitalia. According to the MLC, the forchette was found undamaged. She stated that the likelihood of the hymen being ruptured in the case of a

minor, if physical relations are established, is considerably higher than the likelihood of it happening in a mature female. Thus, in the doctor's opinion, penetration can be ruled out.

17. From a comprehensive analysis of the material on record and from the statement of PW-7, it is clear that although rape has been ruled out because there has been no penetration, there has been an attempt of rape because the appellant tried to penetrate, thereby causing tenderness, because of which PW-4 had begun feeling pain. However, the appellant was unable to complete the act since the victim's mother had arrived on the spot.

18. The argument of the learned counsel for the appellant that PW-4 is a child witness and that her statements should not be considered seriously especially since during her cross-examination, she said that her mother had instructed her about what needed to be testified before the Court, is devoid of any merit, as her mother may have generally explained to her as to why was she being questioned as a witness in this matter and why she must state the facts correctly. It cannot be said that the victim was deposing in accordance with any tutored version, especially in absence of any specific suggestion made to that effect during the trial.

19. Thus, in view of the observations made in the preceding discussion, this Court finds no infirmity with the impugned judgment and the conviction recorded by the learned Trial Court.

20. Accordingly, the present appeal stands dismissed.

21. In view thereof, the appellant is directed to surrender before the concerned Trial Court within a period of fifteen days to serve the remaining portion of the sentence.

22. A copy of this judgment be forwarded to the concerned Trial Court for necessary information.

23. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

AUGUST 21, 2023/ZP