

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 03.02.2020

+ **CRL. A. 576/2017 and CRL.M. (BAIL) 1434/2019**

MANOJ Appellant

versus

STATE Respondent

Advocates who appeared in this case:

For the Appellant : Ms Aishwarya Rao, Advocate (DHCLSC).
For the Respondent: Ms Kusum Dhalla, APP for State.
ASI Suresh Kumar, PS New Usman Pur.

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HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning a judgment dated 28.11.2016, whereby he was convicted of the offences punishable under Sections 366/376(2)(i) and Section 506 of the Indian Penal Code, 1860 (IPC).

2. The appellant also impugns an order dated 29.11.2016 whereby he was sentenced to (a) serve rigorous imprisonment for a period of seven years and to pay a fine of ₹2,000/- for the offence punishable under Section 366 of the IPC and in default of payment of fine, to undergo simple imprisonment for a further period of one month; (b) rigorous imprisonment for a period of ten years and a fine of ₹3,000/-

for the offence punishable under Section 376(2)(i) of the IPC and in default of payment of fine, to undergo simple imprisonment for a further period of one month; and (c) to serve rigorous imprisonment for a period of one year for offence punishable under Section 506 of the IPC. The appellant was granted the benefit of Section 428 of the Cr.P.C. and all sentences awarded to him were directed to run concurrently.

3. The appellant was prosecuted pursuant to FIR bearing no. 143/2013, registered under Sections 366/34, 376(2)(g) of the IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). The said FIR was registered on 04.05.2013 at the instance of a minor (hereafter referred to as “P”), who at the relevant time was aged about sixteen years. On that date, an information had been received from the GTB Hospital regarding the admission of “P” in the hospital on account of her being pregnant with a term of about thirty-two weeks. P’s statement was recorded and she reported an alleged incident that had occurred at about 02:30 p.m., in the year 2012 about one to two weeks prior to Durga Puja. She alleged that when she was returning to her house from her friend’s house located at first Pushta Usman Pur, she was accosted by two boys aged about twenty years. They had caught hold of her and had forcibly pulled her towards Gautam Puri *Nala* (drain). She alleged that one of the boys had caught hold of her and the second one had forcibly raped her. She stated that at the material time, she was living with her father. Her sister, brother-in-law (sister’s husband) and their three children were also residing in the same house. She stated that her mother used to stay in Kolkata. She

stated that she did not inform anybody about the incident. However, subsequently, when she noticed symptoms of being pregnant then she informed her father and her sister regarding the said incident. She stated that they took her to the Nursing Home in Yamuna Vihar. However, she was not treated there and thereafter, her father took her to GTB Hospital where the doctor informed her that she was thirty-two weeks pregnant. She stated that she could identify the boys who had committed the offence.

4. Her statement under Section 164 of the Cr.P.C. was recorded. In her statement, she stated that she had been accosted by two boys while returning from her friend's house. She did not know the said boys and had seen them for the first time on that date. She stated that both the boys had caught hold of her and they had tied a cloth around her face (*Unhone mere mooh par kapda bandh dia*) and had picked her up and taken her towards the *nala* (drain). She stated that one of them had raped her and thereafter, both of them had left. She stated that she reached home but at that time, she was alone as her father had gone to the village for Durga Puja. She stated that she became aware that she was pregnant on 02.05.2013 in view of her ultrasound.

5. P was examined as PW1. She deposed that about two weeks prior to Durga Pooja in the year 2012, she was returning back from the house of her friend, Tanu, after giving her a notebook. She stated that about 02:00 to 02:30 p.m. while she was passing in front of Government Girls Secondary School, Gautam Puri, Ganda Nala, New Usman Pur, two boys met her and they took her to the side of the *nala*. She stated that

she knew one of the boys, named Manoj, the appellant herein. She stated that he accompanied the boyfriend of one of her friends and, therefore, she knew him. She also admitted that she had developed friendship with Manoj (the appellant herein). Manoj had taken her to the side of the *nala* and the other boy who had accompanied Manoj had left thereafter. She stated that thereafter, Manoj had sexual intercourse with her against her will and without her consent. She stated that thereafter, he left the spot and she had come back home.

6. It is material to note that P had not disclosed the name of the appellant either in her initial statement or her statement recorded under Section 164 of the Cr.P.C. On the contrary, she had stated unequivocally that she did not know either of the boys that had caught hold of her on the date of the incident.

7. She deposed that after two or three days of the alleged incident, Manoj had called her on telephone and asked her to come to a park in the area of Zero Pushta, Usman Pur. He also threatened her that if she did not come, he would disclose the incident to her sister and father. She stated that when she went to the spot, Manoj was already present. He thereafter took her to a place in an autorickshaw. However, she did not know the name of the place. Thereafter, he had taken her to a lonely spot where there was a hut and he again had sexual intercourse with her against her will and without her consent. She claims that thereafter, she had told him she would not come to him irrespective of his threats. She stated that Manoj had thereafter brought her to fourth Pushta in an autorickshaw and had dropped her over there. Thereafter, she had come

back home. She also stated that two or three days thereafter, Manoj had called her again and also sent her a message (SMS) asking her to come to him. He had threatened “*tum aa rahi ho ya mein tumhare papa ko sab bata dun*”. But she did not go to meet him and had never met him thereafter.

8. She further testified that on 02.03.2013, one of her aunts residing in the neighbourhood had noticed that her abdomen was increasing and had enquired the reason for the same from her father. Her father had also enquired from her and thereafter, she had disclosed the entire facts but had not disclosed the name of Manoj because she was apprehensive that if she disclosed his name, he would spread the information about the incident.

9. She stated that her father had taken her to a nursing home in Yamuna Vihar, where she was medically examined and was also advised to get her Ultrasound. The doctor had informed her that she was pregnant and had also informed her father that this was a police case and police intervention was required. He also advised her father to go to GTB Hospital.

10. She testified that on the next day, her father and her brother-in-law (*jija*) had taken her to GTB Hospital where she was admitted. She remained there for eighteen days. She confirmed that her statement was recorded by the police at the hospital (Ex.PW1/A). After she was discharged, she was taken to the Court by SI and produced before a Lady Judge who recorded her statement. She stated that she did not

disclose the name of Manoj even before the said Judge who had recorded her statement. In view of her testimony, the Court had questioned her to the reason why she had not disclosed the name of the accused and she responded by stating that she had not done so for the same reason that she had not disclosed the name of Manoj to her father or to the police. She also deposed that in fact, Manoj had threatened her that he would get her sister's children lifted.

11. It is apparent from the above that P had consciously withheld disclosing the name of the appellant either to her father or the police. The explanation that she had not done so because the accused would tell everybody about the incident is difficult to believe. It is possible that she would have concealed the incident for fear of ignominy but after she discovered that she was pregnant and an FIR had been registered with the police, there would be little reason to withhold the name of the accused.

12. The petitioner had stated that she disclosed the name of the accused to her father after she came back home from the Court where her statement (under Section 164 of the Cr.P.C) had been recorded. Thus, according to P, her father knew that the accused committed the offence on 15.05.2013 (after recording of her statement under Section 164 Cr.P.C.). However, P's father also did not disclose the name of the accused to the police at that stage. In fact, there is no evidence on record that the name of the accused had been informed to the police prior to his arrest on 16.06.2013.

13. Although in her initial complaint, P had stated that she had been accosted by two boys who had picked her up after covering her face and taken her to the side of the *nala*, she now admitted in her testimony that she had gone with the two boys to the side of the *nala* and the other boy had left.

14. It is not her testimony that she had been physically restrained at the spot by the accused or had been taken to the spot forcibly. Although she has alleged that the accused had raped her, she provided no details of the incident. There is also no evidence on record that she had suffered any physical injury during the incident or any of her clothes had been torn. In fact, apart from stating that “*the accused had committed sexual intercourse with me against my will and without my consent*”, P had not supplied any other details. As noticed above, the description of the incident which had been reported earlier was false. This does raise questions as to how the offence was committed.

15. Although P had testified that the accused had taken her to the some place in an autorickshaw after few days, she has been unable to provide any details as to where she was taken. According to her testimony, he had taken her to a lonely place where there was a hut and the accused had again had sexual intercourse with her against her will and without her consent. Since P was taken in an autorickshaw, therefore, she would be fully aware of the route taken by the said autorickshaw.

16. P did not disclose the said incident to any person, including her sister. If she was a victim of an assault, it would have been in the natural course of events for her to do so, if she had been physically assaulted.

17. P's father deposed as PW2. He testified that in his absence, P had informed the doctor that one Manoj had sexual intercourse with her repeatedly. He stated that the doctor had apprised him about the said incident and had advised him to report the matter to the police. He stated that thereafter, the police was informed. They had come to the hospital and recorded P's statement. He, subsequently, stated that his elder daughter had informed him that it was Manoj who had raped P. In his cross-examination, he testified that prior to Manoj's arrest, he had a telephonic conversation with the accused (Manoj) and he assured him that he would marry P when he returned to Delhi. He stated that the accused had also asked him not to report the matter to the police. In addition, he stated that other family members of the accused had also met him for compromising the matter. Thus, even though PW2 knew that the accused had sexual intercourse with his daughter, he did not disclose his name to the police.

18. PW2 stated that the accused was apprehended when he visited his house in June after P had identified him as a person who had raped her. In his examination-in-chief recorded on 04.07.2014, PW2 did not testify that the accused had issued any threats to him or his family when the accused had visited his house in June 2013. However, in his examination-in-chief, which was recorded subsequently, he alleged that the accused had called P and had issued threats to kill her and family if

they made any complaint against him. However, in his cross-examination, he denied that the accused had either threatened him or any of his family members.

19. The appellant was arrested on 16.06.2013. ASI Jagbir Singh (PW10) had deposed that he had received information from the control room at 06:23 p.m. on 16.06.2013 that one person named Manoj was threatening to kill at the given address. He deposed that he recorded the said information and handed it over to ASI Santosh. ASI Santosh had, thereafter, proceeded along with Ct. Shish Pal (PW11) to the respondent's house where the appellant was produced by P's father and his neighbours.

20. The evidence obtaining in this case, raises doubts as to whether the accused had forcibly raped P. She was less than candid with the police and the investigating agency. She initially complained that she was accosted by two boys on the date of the incident. She had also stated in her statement, under Section 164 of the Cr.P.C., that she was picked by two boys who had covered her face on the date of the incident. However, she later revealed that the appellant had not taken her forcibly to the *nala*; the other boy had no role to play; and P had developed friendship with the appellant. The explanation that she had withheld the name of the accused because he would spread the information about the incident, is hard to believe. In a question put by the Court, she for the first time, gave a new explanation – that accused had threatened her that he would pick up the children of her sister. No such allegation has been made by her earlier. As noticed above, P's testimony is also bereft of

any details. Although she had stated that she was taken to a lonely hut in an autorickshaw, she did not give any clue as to the whereabouts of the said place. Although P is a minor, she was old enough to understand the place where she had been taken in an autorickshaw. She would have surely heard the directions being given to the autorickshaw driver. However, she did not disclose any such incident in her complaint or in her statement under Section 164 of the Cr.P.C. Thus, it is doubtful whether the police had any opportunity to investigate the same. The allegation about her being taken to a lonely place was made for the first time in her testimony before the Court.

21. Coupled with the above, it is also material to note that the appellant's name had been concealed, both by P as well as her father and the same was not informed to the police. P's father had admitted that there were some conversations regarding compromising the matter and he had been assured that the appellant would marry his daughter (P).

22. Considering the evidence obtaining in this case, this Court is of the view that there is room to doubt whether the appellant had forcibly raped P as her testimony inspires little confidence.

23. Having stated the above, there is no doubt that P was a minor at the material time and that the appellant had sexual intercourse with her resulting in her getting pregnant. Forensic evidence has clearly established that the appellant was the father of the infant delivered by

P. In view of the above, it is established that the appellant is guilty of committing an offence punishable under Section 376 of the IPC.

24. However, this Court is unable to accept that the prosecution has established that the appellant is guilty of an offence under Section 366 of the IPC. There is little evidence that P had been abducted or kidnapped P. The appellant is, accordingly, acquitted of the offence punishable under Section 366 of the IPC.

25. The nominal roll of the appellant dated 09.07.2019 reflects that the appellant's age is 23 years. Thus, the appellant would be barely seventeen years old on the date of the incident. However, the appellant did not plead that he was a minor before the Trial Court nor was it urged before this Court. However, the learned counsel for the appellant had earnestly contended that the appellant was very young at the time of the incident and this should be considered as one of the mitigating factors in awarding the sentence.

26. This Court finds the aforesaid contention merited.

27. Although there is little doubt that the appellant is guilty of committing rape as defined under Section 376 of the IPC as P was below the age of 18 at the material time, there is some doubt whether the appellant had forcibly sexual intercourse with P.

28. Considering the above and the age of the appellant as well as the fact that he has no prior criminal antecedents, this Court considers it apposite that he should be awarded the minimum sentence. At the

material time, the minimum sentence for rape under Section 376 of the IPC was prescribed as seven years. The minimum punishment for penetrative sexual assault under Section 4 of the POCSO Act was also stipulated as seven years.

29. In view of the above, this Court modifies the sentence awarded to the appellant for committing an offence under Section 376 of the IPC and Section 4 of the POCSO Act to seven years of rigorous imprisonment instead of ten years as awarded by the learned Trial Court.

30. The appeal is, accordingly, dismissed in the aforesaid terms. The pending application is also disposed of.

FEBRUARY 03, 2020
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VIBHU BAKHRU, J

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