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

Date of Decision: June 07, 2017

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CRL.A. 1147/2014

ALBAKSH

..... Appellant

Through: Mr. Amar Nath, Amicus Curiae
with Mr. Azhar Qayum, DHCLSC
Panel Advocate

versus

STATE

..... Respondent

Through: Ms. Neelam Sharma, Addl. Public
Prosecutor

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT

(ORAL)

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In this appeal, the challenge is to the impugned conviction and sentence for the offence of rape. The alleged incident is of 8th April, 2010. FIR of this Case has been registered on the statement of Patrolling Officer, who was at DND Flyway. Vide impugned order of 14th December, 2013, appellant has been sentenced to rigorous imprisonment for ten years with fine of ₹50,000/- with default clause for raping a subnormal minor girl. The crux of prosecution case, as noted by the trial court in the impugned judgment, is as under:-

"...In her statement before the court prosecutrix deposed that she along with her father had come from their native

village to Delhi. Her father used to go out for work and she used to remain in the room. One day the door of the room remained open and the accused took her from the room by catching hold of her hand. The accused slapped on her face and head. Accused rubbed her body and got her laid on the ground."

Apart from the evidence of prosecutrix (PW-18), there is evidence of Patrolling Officer (PW-1), Guards (PW-8 & PW-9) on the DND Flyway, Dr. Manju Mehta (PW-5), Dr. Sujata (PW-16), Dr. Pankaj Kumar (PW-17), who had proved the MLC of prosecutrix and the two Investigating Officers (PW-19 & PW-20). The stand of appellant is of being falsely implicated in this case due to a quarrel with the traffic police at their booth, on taking of water from the booth. However, appellant has not led any evidence before the trial court. While discarding the defence plea and on relying on the prosecution evidence, trial court has convicted and sentenced appellant, as noted herein above.

Pursuant to issuance of production warrants, appellant-accused has been produced in custody.

To assail the impugned judgment and order on sentence, learned counsel appearing for appellant submits that prosecutrix cannot be labelled to be a mentally retarded girl as she has a low IQ only. It is submitted on behalf of appellant that statement of prosecutrix under Section 161 of Cr.P.C. or under Section 164 of Cr.P.C. has not been recorded. Attention of this Court is drawn by counsel appearing on behalf of appellant to deposition of PW-5 to point out that IQ of prosecutrix was found to be at the level of mild mental subnormality and since prosecutrix

was not speaking, so her formal assessment could not be done. It is next submitted on behalf of appellant that the assessment of mental condition of prosecutrix is incomplete and so, the case of appellant does not come within the ambit of Clause (1) of Sub-Section 2 of Section 376 of IPC.

It is also submitted on behalf of appellant that trial court has already held that the age of prosecutrix is not proved and so, conviction of appellant under Sub-Section 2 of Section 376 of IPC is uncalled for. It is further submitted on behalf of appellant that as per Nominal Roll of appellant, he has already undergone sentence of more than seven years and the trial court has convicted the appellant under Section 376 of IPC simpliciter and so, the sentence awarded to appellant deserves to be reduced to the period already undergone by him.

On the contrary is the submission of learned Additional Public Prosecutor for respondent-State, who submits that the prosecutrix is mentally retarded and it is so evident from her evidence and the medical evidence on record. It is submitted that evidence of Patrolling Officer, guards and the medical evidence sufficiently corroborates the prosecution version. It is submitted that appellant has committed a heinous offence of raping a minor girl who is also mentally retarded and so, the sentence awarded to appellant is just and proper and thus, this appeal deserves to be dismissed.

Upon hearing and on perusal of impugned judgment, order on sentence, Nominal Roll of appellant and the record of this case, I find that in the face of evidence of prosecutrix coupled with the medical evidence,

the offence of rape is proved. It is to be now seen as to whether the appellant is liable to be punished for the aggravated offence of rape or for rape simpliciter. It is pertinent to note that when this offence was committed, Clause (1) of Sub-Section (2) of Section 376 of IPC was not in statute book. Undisputedly, the substantive offence cannot be made to operate retrospectively and so appellant cannot be convicted for committing offence punishable under Clause (1) of Sub-Section 2 of Section 376 of IPC. Even trial court has convicted appellant for the offence of rape simpliciter which provides for minimum sentence of seven years. Otherwise also, it has come on record that prosecutrix was not mentally abnormal but subnormal girl. Trial court has already held that the prosecution has failed to prove that the prosecutrix was a minor. This finding has not been challenged by respondent-State.

During the course of hearing it was submitted on behalf of the appellant that he is a poor person and has a family to support and that it is his first offence. It was pointed out by appellant's counsel that the conduct of appellant in jail has been satisfactory.

Taking note of the fact that appellant has not been involved in any other criminal case and his conduct in jail is satisfactory and that he has a family to support, the sentence awarded to appellant is reduced from 10 years to 08 years as no minimum sentence is prescribed for the offence of rape simpliciter. Correspondingly, the sentence of fine is also reduced from ₹50,000/- to ₹15,000/- and period in default of payment of fine is also reduced from simple imprisonment for 06 months to simple

imprisonment for 03 months. While maintaining the conviction of the appellant, the sentence awarded to appellant is modified as indicated hereinabove.

This appeal is partly allowed in the aforesaid terms and is disposed of as such.

**(SUNIL GAUR)
JUDGE**

JUNE 07, 2017
r/skb

