

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

RESERVED ON : MARCH 10, 2015

DECIDED ON : MARCH 24, 2015

+ **CRL.A. 586/2003**

LOVE KUMAR @ BITTOO Appellant

Through : Mr.M.L.Yadav, Advocate.

versus

STATE OF DELHI Respondent

Through : Ms.Kusum Dhalla, APP.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Aggrieved by a judgment dated 16.08.2003 of Additional Sessions Judge in Sessions Case No.618/2002 arising out of FIR 211/02 registered at Police Station Ambedkar Nagar by which the appellant Love Kumar @ Bittoo was held guilty for committing offences under Section 376/452 IPC, the instant appeal has been filed by him. By an order dated 18.08.2003, RI for three years with fine ₹500/- under Section 452 IPC and RI for seven years with fine ₹500/- under Section 376 IPC was awarded to him.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that the appellant sexually assaulted 'M' (assumed name), aged about 13 years after putting her in fear at the point of knife at the roof of her House No.1/359 Dakshinpuri, New Delhi at about 3:00 p.m. before 1.5.2002. The police machinery swung into action when the incident was reported vide daily diary (DD) No.31 B (Ex.PW-8/A) recorded at 1:22 p.m. on 1.5.2002 at Police Station Ambedkar Nagar. FIR was lodged after recording victim's statement (Ex.PW-1/A). The prosecutrix was medically examined. The accused was arrested and medically examined. Statements of witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against the appellant for the commission of aforesaid offences. To establish appellant's guilt, the prosecution examined ten witnesses in all. In 313 statement, the appellant denied his complicity in the crime and pleaded false implication. He examined DW-1 (Udai Singh) and DW-2 (Deepak) in defence. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file. The incident occurred about six months prior to the lodging of the report. Exact date when the occurrence took place has not

been established. Undisputedly, there is inordinate delay of about six months in lodging the report with the police. No cogent and plausible explanation has been offered by the prosecution witnesses for the delay. 'X' in her Court statement attempted to justify it and deposed that she suspected the appellant's hand in the disappearance of her cousin for the last five or six months and due to fear, she did not lodge the report. No such reason finds mention in her initial statement given to the police (Ex.PW-1/A). PW-2 (Vijay Kumar), 'M's cousin who was allegedly present at the time of occurrence contradicted her and in the cross-examination disclosed that he had apprised his mother about the incident same day. Her mother had scolded the accused after calling him. The prosecution did not examine prosecutrix's uncle and aunt to ascertain as to what had prevented them not to lodge the report with the police at the earliest. PW-8 (SI Kailash Chand), the Investigating Officer, revealed that he had inquired from the prosecutrix about delay in lodging the complaint and her reply was that she was under threat extended by the accused. Inconsistent version has been given by the prosecution witnesses and the delay has remained unexplained. The prosecutrix and her cousins were not expected to be under threat for long six months and not to lodge the report with the police. It is unclear if the appellant had given threat to 'M'

on any specific date. The appellant lived in their neighbourhood. Nothing has come in record if at the time of occurrence he was armed with knife; no such knife was recovered in the instant case. The prosecutrix and her family members had no real apprehension not to lodge the report with the police. It is true that delay in lodging the First Information Report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It, however, puts the court on guard to search for and consider if any explanation has been offered for the delay. In case, the prosecution fails to satisfactorily explain the inordinate delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay it is a relevant factor.

4. Findings of the trial court that the appellant established forcible physical relation with the prosecutrix against her wishes after putting her in fear cannot be accepted. The prosecutrix and the appellant were acquainted with each other before the incidence. The appellant lived in her neighbourhood. On the day of incidence 'M's aunt was sleeping in the house on the ground floor and her two cousin were with her on the roof. The appellant came on the roof through the staircase of the house. No alarm, whatsoever, was raised either by the prosecutrix or her cousins to attract the attention of her aunt or neighbours when allegedly the

appellant was armed with a knife and had confined the children in an adjacent room. Even after sexual assault when the appellant left the spot and the prosecutrix came out of the room, she did not raise hue and cry. She rather kept mum and did not inform her close family members. She remained silent for about six months. Though she felt pain due to sexual assault, yet she was not taken to any doctor for medical examination. She did not suffer any visible injury/struggle marks on her body. When she was medically examined after about six months, there was least possibility of any such injury to be noticed/detected on her body. Her hymen was found 'torn'; vagina admitted two fingers with difficulty as reflected in the MLC (Ex.PW-7/A). It seems that the prosecutrix and the appellant were in regular touch and it led to the lodging of DD No.31 B (Ex.PW-8/A) where it was disclosed that the appellant was sexually assaulting the prosecutrix for the last 5/6 months. PW-2 (Vijay Kumar) her cousin did not find any injury on her body. Blood stained clothes of the prosecutrix were not seized. In fact, the whole evidence which could have been collected to confirm sexual assault washed away due to inordinate delay in lodging the report. PW-2 too did not suffer any injury on his body. He also did not shout when allegedly pushed into a room. The other cousin Krishan KUMar did not appear for evidence. From the circumstances

referred above, it can be inferred that physical relations (if any) were the result of free consent of the prosecutrix.

5. To infer appellant's guilt, age of the prosecutrix on the day of incident is of utmost relevance. Admitted position is that the prosecutrix had studied upto Vth Standard in a school in her native place. However, no school record depicting her date of birth was produced before the Investigating Officer. The IO did not collect any birth certificate of the prosecutrix from her native village. 'M' lived in her native village before coming to reside with her uncle and aunt in Delhi after the death of her parents. She alone shifted to Delhi whereas her real sister and brother continued to stay in the village. No reasonable explanation has been offered by the Investigating Officer as to why the best piece of evidence to ascertain the age of the prosecutrix was not collected during investigation. 'M's close relatives including her uncle and aunt who could have requisite knowledge about her birth/studies were not produced for examination. The prosecutrix claimed herself of 13 years old without any proof. Ossification test was conducted to ascertain her age and as per ossification report (Ex.PW-10/A) given by Dr.Levina Varma (PW-10) her age was in between 13 to 14.9 years. No positive evidence regarding the exact date of birth of the prosecutrix surfaced. Ossification test is not a

sure test as to the age of the prosecutrix. It gives only an approximate age which may vary by two years on either side. This Court in *Akil Ahmad vs.State* 2014 (3) JCC 1543 held the prosecutrix therein to be major considering the X-ray report where her age was opined to be 14 to 17 years. It relied upon *Jayamala v.Home Secretary, Govt. of J& K* AIR 1982 SC 1297 where it was observed “*However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side*”. Reliance was also placed on *Mahabir Prasad vs.State* 1999(1) Crimes 1 where it was held “*On consideration of the entire evidence on record and the judgment cited at the bar, if there can be difference of two years, even in the ossification tests, in that event, the benefit of doubt has to go to the accused*”. In *Ram Suresh Singh vs.Prabhat Singh @ Chhotu Singh and Anr.* AIR 2009 SC 2805, similar view was taken. Under these circumstances, considering the age determined in the ossification report and the variation of two years to be given on either side, it can be inferred that the prosecutrix was above 16 years of age on the day of occurrence and was capable to give consent.

6. In the light of the above discussion, the appeal is allowed. Conviction and sentence recorded by the trial court are set aside. Copy of this order be sent to the concerned Jail Superintendent for information and

necessary action. Trial court record be sent back along with a copy of this order. Bail bond and Surety bond furnished by the appellant stand discharged.

(S.P.GARG)
JUDGE

MARCH 24, 2015

sa