

Moh. Mian Vs. State

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SooperKanoon Citation : sooperkanoon.com/683946

Court : Delhi

Decided On : Dec-08-1988

Reported in : 1989(1)Crimes453; 37(1989)DLT35

Judge : P.K. Bahri, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 376

Appeal No. : Criminal Appeal No. 58 of 1987

Appellant : Moh. Mian

Respondent : State

Advocate for Pet/Ap. : Ujjal Singh and; M.S. Siddique, Advs

Judgement :

P.K. Bahri, J.

(1) This appeal has been brought against the order dated February 5, 1987 of ShriS.N. Kapur. Additional Sessions Judge by which he convicted the appellant of an offence under Section 376, I P.C. and sentenced him to undergo 10 years rigorous imprisonment and a fine of Rs. 2 000.00 and in case of default of payment of fine to further undergo rigorous imprisonment for one year. The story of the prosecution in brief is that on March 31, 1985, at about 3 P.M. Public Witness -3 and P W-4 i.e. Tanglu Ram and his wife Nita Devi were watching the

T.V. programme at the house of their neighbour in Basti Bara Hindu Rao. They are residents of 7815/21 of that area. Their young daughter aged about 2 years was stated to be playing in the lane at that time. The parents came out to find their daughter and she was not found in the lane and hearing her cries from the room of the first floor of House No. 7815/26. they are stated to have witnessed the appellant committing rape on their young daughter. The accused was apprehended by the parents and neighbours and they went to the police station and lodged the report. The daughter and the accused were got examined medically and the accused was challaned for the offence punishable under Section 376, LP.C.

(2) Unfortunately, for the prosecution both the parents of the said young girl had turned hostile and did not support the prosecution case on the point of appellant having committed rape on the person of their daughter. They came out with the new story that when they came out for searching their daughter, they found the daughter bleeding from her private parts and the appellant was seen by them standing on the upstairs. However, the learned Additional Sessions Judge took into consideration the medical report of the young girl and the circumstance of semen being found on the underwear of the said girl and the underwear of the appellant came to the conclusion that the appellant had committed rape on the said young girl. The crucial question which has been raised by the learned counsel for the appellant is that the medical examination of the accused belies the story of rape because no injury of whatsoever nature was found on the person of the appellant particularly on his penis. The medical examination of the girl showed that the child was apparently found to be in no disconformity and was found intelligent with no mark of injury on her body but a fresh tear of the hymen, slight bleeding from the edge, Cm. fix degree in the for chetta from which also there is animal bleeding were noticed. The mere fact that the hymen of the girl stood torn by itself is not in my opinion a sufficient and conclusive circumstance . to show that the appellant had committed sexual intercourse with the girl. The learned counsel for the appellant had made reference the observations of the learned author Modi in his book 'Medical Jurisprudence' to the following effect : 'In mobile virgins there may be one or more radiate tears and the edges of vagina must be read swollen and painful and they must bleed on mere touching. Forchetta may be born as a

result of violence and the thigh may not be separated without the application of Cockain solution or any other aneesthesia. There should be congestion in the vagina and if the intromission is done by a healthy man and with a brute force, it must always be accompanied by severe tearing of the genital organs.' He has also quoted certain observations from the Book 'Principles and practice' by Taylor which are to the following effect: 'It is impossible to conceive the forcible intercourse should take place in childhood without brushing, effusion of blood or a laceration of private parts. The size of an adult male organ must necessarily cause some local injury in the attempt to enter the vagina of a child'. Keeping in view these opinion it is obvious that the appellant had not caused tear in the hymen of that child with his penis. So charge of rape could not have been brought against the appellant. There was sufficient evidence to show that the appellant was found playing with that child and was noticed by PW-7, namely, Ram Lakhi and the fact that semen was detected on the cloth of the accused as well as the girl and on the bed sheet recovered from the room of the appellant which would unmistakably show that the appellant had outraged the modesty of the girl by playing with her in the sexual manner. The counsel for the appellant as well as the counsel for the State also agreed that charge under Section 354, Indian Penal Code . should be considered made out against the appellant. I thus allow the appeal partially and modify the conviction from under Section 376 Indian Penal Code . to under Section 354 Indian Penal Code . The appellant had already undergone imprisonment from the date of the occurrence till date and thus I make the sentence of period already undergone. The appellant be released immediately from jail if not required in any other case .