



\$~15

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

Date of decision: 28th January, 2025

+ **CRL.L.P. 197/2022**

STATE OF NCT OF DELHI

.....Petitioner

Through: Mr. Ritesh Kumar Bahri, APP for
State with Mr. Lalit Luthra, Adv. with
SI Sangeeta PS S.B. Dairy.

versus

SUBHAN ALI @ GANGI & ANR.

.....Respondents

Through: Ms. Sairica Raju, Adv. (Amicus) on
behalf of both the Respondents with
Mr. Aditya Goswami, Adv. (Assisting
Amicus) (M:9205105221)

CORAM:

**JUSTICE PRATHIBA M. SINGH
JUSTICE DHARMESH SHARMA**

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present leave petition has been filed on behalf of the Petitioner-State of NCT of Delhi assailing the impugned judgment of conviction and order on sentence dated 11th December, 2019 and 13th December, 2019 respectively, passed by Sh, Umesh Grewal, Id. ASJ, Special FTC (North), Rohini Courts, Delhi, whereby the Accused/Respondent has been convicted in *SC No. 58548/16*, in FIR No. 543/15 registered in PS. Shahbad Dairy under Sections 376D/451/506/34 IPC.
3. Vide the impugned order on sentence, the Accused/Respondent herein has been convicted under Sections 452/354 IPC. The relevant portion of the



order on sentence dated 13th December, 2019 is extracted hereinunder:

“3. Taking into account mitigating and militating circumstances, convict Subhan Ali @ Gangi is directed to undergo rigorous imprisonment of three years and pay fine of Rs. 3,000/- for offence punishable u/s. 452 IPC. In default of payment of fine, he shall undergo simple imprisonment for two months.

The convict is further directed to undergo rigorous imprisonment of three years and to pay fine of Rs. 2,000/- for offence punishable u/s. 354 IPC. In default of payment of fine, he shall further undergo simple imprisonment for two months.

4. Fine of Rs. 5,000/- paid by the convict.

5. Both sentences shall shall concurrently. However, benefit section 428 Cr.P.C. be given to him.”

4. The background of the present case as stated in the petition is that an incident was reported by the complainant/survivor, stating that, on 26th April, 2015 at about 3:00 PM she was sexually assaulted by the Accused/Respondent herein. Thereafter, a PCR call was made at about 3.45 PM and in the said call it was recorded that the complainant had alleged that the Accused/Respondent had done ‘chedhchad’ with her. It was further alleged that two children were present at the time when the Accused had misbehaved with her.

5. The statement of the survivor under Section 164 Cr.P.C. was recorded before the Id. Magistrate being Ex.PW1/A. The survivor had stated as under:



1. अमान अमान सोनी 410 अमान R10C-2/1856, Sec 27, Rohini
 2. Delhi, Age-23 Mobile No. 9873402911
 Permanent Address:- Jhuggi No. B-635, J J Camp, Suraj Park
 Badli Village, Delhi

अमान किता कि में पता उपरोक्त घर किता के मकान में अपन पति व
 दो बच्चों के साथ रहती हैं 1 से 10 वी कम्प्लेक्स में पढ़ी है और कूलिंग
 मशील है। आज रात करीब 3 बजे दिन में अपन घर पर अकामि थी
 तो मेरे पति से रहे वरना मरना Subhan Ali @ Changee S/o

3. अमान किता कि में पता उपरोक्त घर किता के मकान में अपन पति व
 दो बच्चों के साथ रहती हैं 1 से 10 वी कम्प्लेक्स में पढ़ी है और कूलिंग
 मशील है। आज रात करीब 3 बजे दिन में अपन घर पर अकामि थी
 तो मेरे पति से रहे वरना मरना Subhan Ali @ Changee S/o

4. अमान किता कि में पता उपरोक्त घर किता के मकान में अपन पति व
 दो बच्चों के साथ रहती हैं 1 से 10 वी कम्प्लेक्स में पढ़ी है और कूलिंग
 मशील है। आज रात करीब 3 बजे दिन में अपन घर पर अकामि थी
 तो मेरे पति से रहे वरना मरना Subhan Ali @ Changee S/o

5. अमान किता कि में पता उपरोक्त घर किता के मकान में अपन पति व
 दो बच्चों के साथ रहती हैं 1 से 10 वी कम्प्लेक्स में पढ़ी है और कूलिंग
 मशील है। आज रात करीब 3 बजे दिन में अपन घर पर अकामि थी
 तो मेरे पति से रहे वरना मरना Subhan Ali @ Changee S/o

6. अमान किता कि में पता उपरोक्त घर किता के मकान में अपन पति व
 दो बच्चों के साथ रहती हैं 1 से 10 वी कम्प्लेक्स में पढ़ी है और कूलिंग
 मशील है। आज रात करीब 3 बजे दिन में अपन घर पर अकामि थी
 तो मेरे पति से रहे वरना मरना Subhan Ali @ Changee S/o

7. अमान किता कि में पता उपरोक्त घर किता के मकान में अपन पति व
 दो बच्चों के साथ रहती हैं 1 से 10 वी कम्प्लेक्स में पढ़ी है और कूलिंग
 मशील है। आज रात करीब 3 बजे दिन में अपन घर पर अकामि थी
 तो मेरे पति से रहे वरना मरना Subhan Ali @ Changee S/o

8. अमान किता कि में पता उपरोक्त घर किता के मकान में अपन पति व
 दो बच्चों के साथ रहती हैं 1 से 10 वी कम्प्लेक्स में पढ़ी है और कूलिंग
 मशील है। आज रात करीब 3 बजे दिन में अपन घर पर अकामि थी
 तो मेरे पति से रहे वरना मरना Subhan Ali @ Changee S/o

9. अमान किता कि में पता उपरोक्त घर किता के मकान में अपन पति व
 दो बच्चों के साथ रहती हैं 1 से 10 वी कम्प्लेक्स में पढ़ी है और कूलिंग
 मशील है। आज रात करीब 3 बजे दिन में अपन घर पर अकामि थी
 तो मेरे पति से रहे वरना मरना Subhan Ali @ Changee S/o

10. अमान किता कि में पता उपरोक्त घर किता के मकान में अपन पति व
 दो बच्चों के साथ रहती हैं 1 से 10 वी कम्प्लेक्स में पढ़ी है और कूलिंग
 मशील है। आज रात करीब 3 बजे दिन में अपन घर पर अकामि थी
 तो मेरे पति से रहे वरना मरना Subhan Ali @ Changee S/o

6. On perusal of the above, it is seen that the survivor has stated that the Accused/Respondent had entered her room forcibly and after she had gone to the washroom, the Accused/Respondent had pushed her on the bed and had tried to molest/rape her. In the said statement there is no allegation of sexual intercourse.

7. In terms of these facts, the trial was conducted and the survivor had testified before the Court. In the testimony she stated that the Accused/Respondent had inserted his finger in her private parts. The Trial Court, however, disbelieved the same and convicted the Accused/Respondent only under Section 354/452 of IPC. Under Section 376 of IPC the Accused/Respondent was acquitted. The reasoning given by the Trial Court is as under:

“22. PCR forms shows that at the very outset, the victim told PCR van official at 3.47 pm that her neighbour, who was



drunk, had done 'chedchad' with her. She was medically examined on the same day at 7.35 pm and she told the treating doctor that her neighbour Gangi had tried to harass and assault her sexually. Statement of the victim to the PCR official that the accused was drunk, is corroborated by MLC Ex.PW8/A of Subhan Ali, prepared just after nine hours of the incident, in which it is mentioned that BAC was 18 mg. So, as per MLC also, accused Subhan Ali @ Gangi was drunk. 23. Hence, there is no dispute about the complicity of accused Subhan Ali @ Gangi in the offence. The moot question is about exact offence done by him."

8. The submission of Mr. Bahri, Id. APP for State is that the testimony of PW-1 is clear to the effect that there was sexual assault committed by the Accused/Respondent and that he had inserted his finger into her private parts. Hence, it is a clear case of rape under Section 376 of IPC. Mr. Bahri, Id. APP further submits that the previous statements made on behalf of the survivor have not been confronted to the witness, hence the same cannot be considered as an improvement to acquit the Accused under Section 376 IPC.

9. On the other hand, Ms. Raju, Id. Counsel for the Accused/Respondent submits that this testimony of the survivor is not to be believed.

10. The Court has heard the matter. On a perusal of the initial complaint as also the statement of the survivor under Section 164 Cr.P.C., the Trial Court observes that there is absence of the following facts:

- (i) Mr. Nand Kishore, the co-accused with whom the husband of the survivor had a dispute, was standing outside the door of the room where the alleged incident occurred;
- (ii) There is no allegation that the Accused/Respondent had inserted his finger in the private parts of the survivor.

In view of these two facts, the testimony given before the Court, was not

