

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Criminal Appeal No.10/2008

Reserved on : 16.12.2009
Date of decision : 21.12.2009

KANNU @TILAK Appellant
Through: Mr. Rajesh Mahajan, Advocate/
Amicus Curiae

Versus

STATE Respondent
Through: Mr. Manoj Ohri, APP.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1. DD No.15 A was recorded at P.S. Ambedkar Nagar on 23.01.2004 at 8.05 P.M. This document is Ex.PW-2/A. It revealed that Trivender Kumar PW 2 the uncle of Rita PW-1 had lodged a complaint that Rita who had gone to attend her school had not returned back and a missing report be lodged.

2. Ex.PW-2/A was marked to S.I. Jeet Singh PW-8 for enquiry; he searched for Rita but she could not be traced. On 24.01.2004

PW-2 handed over a written complaint Ex.PW-2/DB at the Police Station, wherein it had been alleged that some unknown persons had kidnapped Rita and she be traced; on Ex. PW-2/DB endorsement Ex. PW-8/A was made and present FIR was registered u/s 363 of the IPC. Investigation of the case was then transferred to ASI Bala Mohan, PW-11.

3. On 25.1.2004, PW-2 produced PW-1 in the Police Station and her recovery was evidenced by Memo Ex.PW-2/DC. She was medically examined at AIIMS vide MLC Ex.PW-6/A which is in the handwriting of Dr.Asima proved through the version of Dr.Savitri Sowmaya. The MLC has recorded the age of PW1 as 14 years; her hymen was torn posteriorly; no injury, cut mark or bleeding were however noted.

4. Statement of PW-1 was first recorded under Section 161 of Cr.P.C.; thereafter Sh.Deepak Garg, the MM had recorded her statement u/s 164 Cr.P.C. vide proceedings Ex. PW-7/A dated 10.01.2004.

5. Accused was arrested on 10.02.2004 vide arrest memo Ex.PW-11/A. He was medically examined by Dr.Parthasarthi Parmanik PW-3 vide MLC Ex.PW-3/A; there was nothing to suggest that the person examined was not capable to performing sexual inter course.

6. Appellant along with three other co-accused had been charged for offences under Sections 363,366 & 376 of the IPC. Vide impugned judgment dated 30.11.2007 all other accused persons except the appellant stood acquitted. Appellant had been convicted under Sections 363 & 376 of the IPC.

7. Vide order of sentence dated 06.12.2007, he had been sentenced to undergo R.I. for 10 years & to pay a fine of Rs.2,000/- and in default of payment of fine to undergo S.I. for three months for the offence punishable under Section 376 IPC; for the offence punishable under Section 363 of the IPC he had been sentenced to undergo R.I. for 3 years and to pay a fine of Rs.1,000/- and in default of payment of fine to undergo S.I. for one month. Both the sentences were to run concurrently; benefit of Section 428 of the Cr.P.C. had been given to the appellant.

8. It is this judgment, which is the subject matter of the present appeal.

9. On behalf of the appellant it is submitted that:-

(i) there are inherent contradictions in the various versions of the prosecutrix i.e. her three statements; the first recorded under Section 161 of the Cr.P.C., the second recorded under Section 164 of the Cr.P.C. and her third version recorded on oath in the Court. It is pointed out that all these three versions are contrary to one and

other and these being material contradictions, go to the root of the matter; benefit of doubt had been given to the co-accused and applying the same analogy the appellant is also entitled to an acquittal. Attention has been drawn to the version of the prosecutrix recorded under Section 161 of the Cr.P.C. where the role attributed to the appellant was that he had at point of knife threatened her; he had forcibly entered her room and at night committed rape upon her and beaten her; his father Sujan Singh and his son and a police official had take her to Delhi in their vehicle. Attention has been drawn to the second version of the prosecutrix recorded u/s 164 of the Cr.P.C., it is pointed out that in this version PW-1 had stated that Kannu, Prithvi and father of Kannu had came and told Kannu to do whatever he wanted whereupon he had at the point of knife committed rape upon her. Attention has also been drawn to the version of the prosecutrix recorded in Court. It is submitted that in this version PW-1 had stated that Kannu had come in the evening while she was sleeping, he pushed her and committed rape upon her; at 2.30 A.M. at night Prithvi, Sujan Singh father of the accused and Nannu i.e. brother of the accused brought her to Delhi and on the way Prithvi has asked her, if she would like to smoke Bidi; it is pointed out that all these three versions are contradictory to one another and no reliance can be placed upon

such a confused witness.

(ii) Prosecutrix was admittedly known to the appellant; appellant was tenant of PW-2 and this is the admitted case of prosecution; this has also been elicited in the version of PW-12 Seema who is the sister-in-law of PW-2, she has also deposed that Kannu was their tenant; this is a case of consent by the prosecutrix, she being almost of the age of discretion; accused has been falsely implicated.

10. Case of the prosecution is hinged largely on the testimony of the PW-1 who is the star witness of the prosecution. The contradictions pointed out by learned defence counsel are not material; they are at best an elaboration of her earlier versions.

11. Version of PW-1 on oath is that the appellant and his mother had come to her school; she had been informed that her mother i.e. mother of PW-1 had died. PW-1 came out of the school; Kannu gave her a handkerchief to wipe her tears; this handkerchief was laced with a drug which when she put on her eyes it made her giddy and she became unconscious; when she regain consciousness she found herself in a remote village at Rajasthan; Kannu committed rape upon her against her wishes; this was in the evening when she was sleeping. At 2.30 a.m. she had been brought back to Delhi in a car accompanied by Prithvi Singh, Shamsheer Singh, the father and the

brother of Kannu.

12. PW-1 had been subjected to a lengthy cross-examination running into almost 12 pages but her version has not been shaken or distorted; she had stuck to her stand; she had all along deposed that it was Kannu who had committed rape upon her at the village in Rajasthan where she had been taken after having been enticed by both Kannu and his mother.

13. In law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, i.e. in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. This has been re-iterated by the Courts in a plethora of judgments. Corroboration of the testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but is a guidance of prudence under the given facts and circumstances. Minor contradictions and discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

14. Prosecutrix was recovered two days later i.e. on 25.01.2004; she had surfaced after she had been brought to Delhi by Kannu and his relatives. Her medical examination was done vide MLC Ex. PW-6/A, vide which her hymen was found to be torn. The history of the patient as given by the victim and as depicted in the MLC also fully

supports the case of the prosecution that she had been abducted from her school and after sedation raped in the night.

15. In the statement of the accused recorded under Section 313 of the Cr.P.C. the appellant had stated that he has been falsely implicated in the present case; he is innocent; on the said date i.e. on 23.01.2004 he was on duty at gate no.10 at the Airport. Six witnesses have been examined in defence, but none of them have deposed to this version as has been sought to be set up by the appellant. The witnesses of the prosecution have also not been cross-examined on this score; no suggestion has been given to any of the said witnesses that the appellant was on duty at gate no.10 at Airport on the relevant date. In fact a suggestion to the contrary has been given to PW-11 wherein learned defence Counsel has suggested that the prosecutrix had in fact run away/eloped with the son of one Pandit; this defence did not find mention in the cross-examination of the earlier witnesses; these contrary stands taken by the appellant itself reflects upon the falsities of the case sought to be set up by him.

16. Inspector Bala Mohan PW-11 was the Investigating Officer. In the course of his inquiry, it was revealed that on the date of incident, PW-1 was absent from her school. Inquiry had also revealed that the appellant who used to work with his father at

Palam Airport had not visited his place of work for the last 5 to 6 days from the date of the incident.

17. Age of the prosecutrix was opined to be less than 14 years as on the date of the offence. This has been reflected in the version of Smt.Raj Tuteja. PW-4 the vice principal of the Government Girls Secondary School, Ambedkar Nagar. PW-4 had produced the admission record including the date of birth of PW-1 evidencing her date of birth as 27.12.1992; said certificate is Ex.PW-4/B; on the date of offence that is on 23.01.2004, the prosecutrix would be a less than 14 years of age; admittedly a minor; consent in such an eventuality is immaterial.

18. The offence of kidnapping, the penalty of which is contained in Section 363 of the IPC entails a kidnapping of any person from India or from lawful guardianship. Ingredients of the said offence have been met. Rape has been defined under Section 375 of the IPC; ocular testimony of PW 1 coupled with the medical evidence Ex.PW-3/A has established the offence of rape as well. The conviction of the appellant calls for no interference. The shifting stands taken by the accused have also taken him nowhere.

19. On the quantum of sentence the learned counsel for the appellant has placed reliance upon Iqbal Vs. State of Kerala, JT 2007 (12) SC 311 and State of Punjab vs. Rakesh Kumar, JT 2008 (9) SC

424, to substantiate his argument that where the victim even though a minor had admitted that she had gone with the accused on her own and had sexual intercourse with him of her own free will and consent, it was a fit case for reducing the imprisonment from the minimum of 7 years to a period of 3 years. It is submitted that ratio of the said judgments permits the Court to reduce the sentence from the statutory minimum in deserving cases as is the present one; appellant already having suffered incarceration of almost about more than 5 years he be sentenced to the period already undergone.

20. Nominal roll of the appellant has shown that as on 29.07.2008 i.e. the date when he was granted bail he had suffered incarceration of about 4 years and 9 months. The judgments relied upon by learned Counsel for the petitioner were cases in which the sentences were reduced to a sentence for the period already undergone where admittedly the prosecutrix had gone of her own volition and voluntarily and although she was a minor yet the attendant circumstances had been taken into account. Said judgments would have no applications of the facts of the instant case.

21. In this case the version of PW-1 is that it was by a force and against her consent that the act of rape had been committed upon

her person. While imposing the sentence upon appellant the trial court had keep in mind that the appellant is a young man and not a previous convict. Parties were also known to each other; appellant was of an immature age and young; evidence indicated that no marks of violence were found on the body of the prosecutrix; offence relates to year 2004; by the passage of time parties would have buried their hatchet on account of this circumstance.

22. Ends of justice would be well met if the sentence of R.I. ten years be reduced to R.I. seven years. No modification is made in the other sentences imposed. Bail bond and surety bond of the appellant stands cancelled. He be taken into judicial custody; appeal is partly allowed and disposed of in the above terms.

INDERMEET KAUR, J.

December 21 , 2009
HL