

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

+ CRL.A. 498/2006

Reserved on: October 12, 2009

Pronounced on: October 23, 2009

RAM LAL BHARGAV @ VASUDEV @ GUPTA
..... Appellant

! Through: Mr. R.D. Chauhan and Mr. Arun
K. Chauhan, Advocates.

Versus

\$ STATE Respondent

^ Through: Mr. Amit Sharma, Ld. APP for the
State.

CORAM:

HON'BLE MR. JUSTICE V.K. JAIN

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

V.K.Jain, J.

This is an appeal against the Judgment dated 17.4.2006 and Order on Sentence dated 19.4.2006, whereby the appellant was convicted under Section 376/506 of I.P.C. and was sentenced to undergo rigorous imprisonment for ten years and pay a fine of

Rs.10,000/- or to undergo simple imprisonment for six months in default under Section 376 IPC and was further sentenced to undergo rigorous imprisonment for six months under Section 506 IPC without imposing any fine under that section.

2. In nutshell, the case of the prosecution is that the husband of the prosecutrix was a tenant under the appellant and was residing on the upper floor of his house whereas the appellant himself was residing on the ground floor. On 6.7.2005, at about 2:30 p.m., when the husband of the prosecutrix was out of town and only her two young children were present in her room, the appellant came there along with some milk in his hand and requested her to prepare tea for him and bring it to his portion on the ground floor. When the prosecutrix went to the ground floor portion of the premises, along with tea for the appellant, he bolted the main gate of the house, caught hold of her from the back, forcibly laid her down on the bed and raped her after extending threats to kill her in the event of her making any noise. After the occurrence, the prosecutrix started weeping and went to her room on the upper floor of the house. At about 7:00 p.m, when the brother of the prosecutrix came to her house, on enquiry, she narrated the incidence to her brother who thereupon informed to the Police.

3. During trial, the prosecutrix came in the witness box as PW-2 and stated that on 6.7.2005, at about 2:30 p.m., when her husband was out of the house for his duty, she was present in her room along with her two children, the appellant came there with milk in his hand and asked her to prepare tea for him as well as for herself and bring the tea in his room on the lower floor. She accordingly prepared tea, though only for the appellant, and went to his room. As soon as she kept tea on the table, the appellant, after bolting the main gate of the house, caught hold of her from back side, threatened to kill by strangulating her in case she raise noise, forcibly laid her on the bed and committed sexual intercourse with her, after removing her lower clothes. She started weeping and went to her room on the upper floor. The appellant thereafter went out of the house. In the evening, when her brother Sharwan Kumar Jha came to her house, she communicated the incident to him. Sharwan Kumar Jha then telephonically informed the police, which came to her house and recorded her statement Ex. PW2/A. She was taken to G.T. B. hospital and was medically examined. The appellant was not traceable for many days despite search for him. Ultimately, on 29.7.05, he was arrested at the instance of her husband. The appellant got recovered the bed sheet which was lying on the cot kept in his room.

4. PW-3 Sharwan Kumar Jha is the brother of prosecutrix and has corroborated her testimony. According to him when he reached the house of the prosecutrix at about 7 pm on 6th July, she told him that appellant had raped her at about 3 pm. He, thereafter, informed the Police Control Room, the police came there and registered the case.

5. PW-1 Dr. Richa Aggarwal examined the prosecutrix in hospital at about 3.15 am on 7th July. The prosecutrix gave history to her, which she recorded on the MLC Ex. PW1/A.

6. PW-4 Brahmanand is the husband of the prosecutrix. He has stated that on 6th July, he had gone for duty at about 8 am and returned only in the morning on 7th July, 2005. When he came home, he found his wife and brother in law Sharwan Kumar Jha weeping. On inquiry they narrated the incident to him. He further stated that the appellant had absconded from his house after this incident and was arrested from RTV Bus Stand, at his instance, on 29th July.

7. PW-5, Woman SI Kanchan has stated that on 29th July, the husband of the prosecutrix informed her that he had seen the appellant at TRV Bus Stand. She along with her staff and husband of the prosecutrix went there and arrested the appellant. PW-9 Ct

Sompal and PW-11 Ct. Khem Chand have corroborated the testimony of PW-4 and PW-5 regarding the arrest of the appellant on 29th July, 2005.

8. In his statement under Section 313 of Cr. P.C., the appellant denied all the allegations against him and stated that no such crime was ever committed by him and he has been framed in this case as the prosecutrix did not pay any rent to him since inception of tenancy. According to him when he went to demand the rent on 6th July, 2005, the prosecutrix asked him to wait for some more days. He then went to Shahadra and was later on implicated in this case.

9. It has been contended by the learned counsel for the appellant that it was a case of intercourse by consent of the prosecutrix and therefore no rape was committed by the appellant. In support of his contention, he pointed out that no mark of injury was found on the body of the prosecutrix and the matter was not reported by her to the police immediately after the incident. In cross examination of the prosecutrix also it was suggested to her that she did not sustain injury because she was a consenting party to the sexual activities. It was further suggested to her that she did not try to free herself from the clutches of the appellant at all but with her own consent she had acceded to the request of the

appellant to have sex with him. Thus, the defence taken by the appellant is that though he had sexual intercourse with the prosecutrix, it was a consensual act.

10. In my view, the facts and circumstances of the case do not indicate any consent on the part of the prosecutrix to have sex with the appellant. In fact, in his statement under Section 313 Cr. P.C., the appellant did not, at all, claim that he had sex with the prosecutrix with her consent. The plea taken by him was that rent had not been paid to him since inception of the tenancy and when he demanded the same, he was implicated in this case. Therefore, the plea taken in the statement under Section 313 of Cr. P.C. is absolutely contrary to the suggestions given to PW-2 in her cross examination and the submissions made by learned counsel for the appellant during argument. In fact, the case set up in cross examination of the prosecutrix and the case set up in the statement of the appellant under Section 313 of Cr. P.C. are mutually destructive.

11. Had the prosecutrix consented to have sexual intercourse with the appellant, there could have been no reason for her to make a complaint against him to her brother and then lodge FIR with the police. This is not the case of the appellant that some family members of the prosecutrix or some outsider had seen the

prosecutrix having sex with him and therefore she had to level false accusation of rape against him, in order to save her own skin. The testimony of the prosecutrix shows that the incident of rape took place in the room of the appellant on the ground floor, whereas her children, who were the only persons present in the house at that time, and were aged only about 5-6 years, were on the upper floor. In any case, this is not the case of the appellant that either of the children of the prosecutrix had seen her in his company. Therefore, circumstances of the case do not indicate consent on the part of the prosecutrix to have sexual intercourse with the appellant.

12. As regards absence of injury on the person of the prosecutrix, she has clearly stated in her cross examination that she could not raise noise on account of the threat given to her the appellant and on account of her being fully overpowered by him. It is to be kept in mind that the prosecutrix was all alone in the room of the appellant when this incident took place. The main door of the house had been locked by the appellant before he raped the prosecutrix. The children of the prosecutrix were so small that they could not have saved her from the clutches of the appellant. Moreover, the appellant had threatened to strangle her, before he raped her. The appellant being physically much

more strong than that prosecutrix, it is quite understandable that the prosecutrix could not have given a strong physical resistance to his advances. A lady who was alone in the room was not expected to put up a tough resistance when she was already under threat and she knew that only other persons present in the house were her two small children, who could have been of no help to her and who in any case were in another room on the upper floor.

13. If a woman yields to violence and threat on the part of the accused and therefore, being under fear of death or injury does not physically resist him, she cannot be said to be a consenting party to the act of the accused. In fact, Section 375 (thirdly) of the Indian Penal Code specifically provides that a man is said to have committed rape without consent of a woman if her consent has been obtained by putting her or any person in whose she is interested, in fear of death or hurt. A mere act of helpless resignation to an inevitable compulsion, offering no resistance or passive giving in, when volitional faculty is either choked by fear or is vitiated by duress cannot be said to be consent as understood in law. Consent on the part of a woman as a defence in a prosecution for rape requires voluntary participation, after having freely exercised a choice between resistance and assent. Submissions of her body under the influence of fear or terror

cannot amount to consent. A woman can be said to have consented only when she voluntarily agrees to submit herself, while in a free and unconstrained possession of her physical and moral power, to act in such a manner as she wants; it is always a voluntary conscious acceptance of what is proposed to be done by the man concerned. If the woman has been overpowered or threatened and therefore unable to resist, inference of consent cannot be drawn from absence of injuries on her body.

14. Ordinarily, no woman of honour will accuse some one of rape since by reporting such an incident she will sacrifice what is most dear to her. As observed by Hon'ble Supreme Court in *Bhogin Bhai Hirji Bhai v. State of Gujarat*, AIR 1983 SC 753, a girl or a woman in the tradition bound society of India would be extremely reluctant to even admit that an incident, which is likely to reflect on her chastity, had ever occurred. She would be conscious of danger of being looked down not only by relatives, friends and neighbours, but, also by her own family members. The Hon'ble Supreme Court gave the following reasons for accepting the testimony of a prosecutrix without corroboration:

1. *A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred.*

2. *She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends and neighbours.*
3. *She would have to brave the whole world.*
4. *She would face the risk of losing the love and respect of her own husband and near relatives, and her matrimonial home and happiness being shattered.*
5. *If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family.*
6. *It would almost inevitably and almost invariably result in mental torture and suffering to herself.*
7. *The fear of being taunted by others will always haunt her.*
8. *She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo.*
9. *The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy.*
10. *The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more than not, want to avoid*

publicity on account of the fear of society stigma on the family name and family honour.

11. The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless on her innocence.

12. The reluctance to face interrogation by the investigating agency, to face the court, to face the cross-examination by the counsel for the culprit and the risk of being disbelieved, act as a deterrent.

15. In *State Vs. Gurmeet Singh*; 1996 (2) SCC 387, the Hon'ble Supreme Court again stated that while evaluating the evidence, a court should remain alert of the fact that in case of rape, no self respective woman could come forward to a court just to make a humiliating statement against her honour as such is involved in the commission of rape on her.

16. The prosecutrix in this case is a married lady. She disclosed this incident not only to her brother but also to her husband. No woman is likely to report such an incident to her own brother unless it is absolutely true. In fact she would be quite embarrassed while narrating such an incident to her brother, overpowered, as she would be by a feeling of shame and humiliation. In our tradition bound society there is always a fear of a social stigma being attached to the prosecutrix and a genuine

fear in her mind as well as in the mind of her family member that some people in the society may consider her to be at least partly responsible for the incident, though, in fact she may be absolutely innocent. Therefore, she is not likely to make a false accusation of rape and thereby invite interrogation not only by police but also during cross examination in the court. The risk of being disbelieved would always act as a deterrent in her mind.

17. Keeping in view of the facts and circumstances of the case, I find no good ground to disbelieve the version given by the prosecutrix. It is, by now, well settled by a catena of decisions of the Hon'ble Supreme Court including *Rafiq v. State of Uttar Pradesh*, 1980 Crl. J. 1344 and in the case of *Bhogin Bhai Hirji Bhai v. State of Gujarat*, (Supra) that there is no rule of law or practice that the evidence of the prosecutrix cannot be relied upon without corroboration. If the testimony of the victim does not suffer from any basic infirmity and is not inherently improbable, there can be no justification for discarding the same. Having regard to the increase in the number of sex violence cases in the recent past, it would be adding insult to injury to tell a woman that her story cannot be believed unless it is corroborated in material particulars as in the case of an accomplice of a crime. The standard of proof to be accepted by a court in such cases must

take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than prosecutrix can be available.

18. Even if I proceed on the basis that the court must look for corroboration of the deposition of the prosecutrix, I find corroboration in the form of the complaint made by the prosecutrix to her own brother PW-3 Sharwan Kumar Jha soon after this incident and PW-1 Dr. Richa Aggarwal, who examined her in the night intervening 6/7th July, 2005. These previous statements of the prosecutrix are admissible in evidence under Section 157 of Evidence Act. In *Madan Lal v. State of Jammu and Kashmir*, AIR 1998 SC 386 the statement made by the prosecutrix to her mother immediately after the incident was accepted to be a corroborative piece of evidence. Therefore, the statement made by PW-2 to her brother and to the Doctor who examined her in the hospital are definite corroboration of her deposition in the court.

19. As regards delay in reporting the matter to the police, as noted by Hon'ble Supreme Court in the decision reported in *Ravinder Kumar v. State of Punjab*, 2001 (VII) AD (SC) 209, the law has not fixed any time limit for lodging FIR and delayed FIR is not illegal. If there is delay, the court has to look for the reasons

which could be many. But the FIR is not vitiated on account of delay alone. As regards delay in lodging of FIR in rape cases one cannot be oblivious to the fact that such cases involve honour of family and therefore a cool thought may precede lodging of FIR in such cases. In the present case, the prosecutrix was almost alone in her house, the only other persons present being her very small children and her husband was out of the house for duty. As explained by the husband of the prosecutrix, he did not even have a landline telephone at the Dhaba where he was working. The prosecutrix is an illiterate lady. Keeping in view the social and economic background of the prosecutrix, it was not expected of her to go all alone to the Police Station, unaccompanied by a male member of the family, and lodge report an incident of this nature and that too not by a stranger, but by her own landlord. Obviously, she would like to take her family members into confidence before taking such a step. As soon as her brother came to her house, she reported the matter to him. The matter was, thereafter, reported to the Police Control Room, as is also evident from DD Ex. PW6/C which shows that the incident of rape was reported to Police Control Room at around 7.30 pm on 6th July, 2005.

20. Another corroborative evidence in this case is that the appellant was found absconding from his house after this incident. The testimony of the prosecutrix, her husband as well as Police officials shows that the appellant had locked the house and gone away on 6th July, 2005. He was arrested only on 29th July, 2005. In his statement under Section 313 Cr. P.C., the appellant has stated that after demanding rent from the prosecutrix on 6th July, 2005, he had gone to Shahadra. Thus, the appellant admits that he had left his house in Mahavir Gali, Sonia Vihar on 6th July, 2005. He has not given any explanation as to why he had left his house for almost three weeks. This is not the case of the appellant that he was arrested prior to 27th July, 2005. Therefore, there is practically no explanation for the absence of the appellant from his house for three weeks. If a person is found absconding from his house and does not give any valid explanation for his absence from the house, such a conduct would be relevant in view of the provisions of Section 8 of Evidence Act. The court would therefore be justified in drawing an inference that since he had raped the prosecutrix, he was absconding, in order to evade his arrest.

21. For the reasons given in the preceding paragraphs, I find no ground to interfere with the conviction of the appellant under Section 506 and 376 of IPC and the same are hereby maintained.

The sentence awarded to the appellant under Section 506 of IPC does not call for any interference. However, keeping in view the social background of the appellant and the period already spent by him in custody, I reduce his sentence under Section 376 of IPC to rigorous Imprisonment for Seven years and a fine of Rs. 10,000/- or Simple Imprisonment for three months in default. The sentence shall run concurrently. The Appeal stands disposed of. One copy of this order be sent to Trial Court whereas the other copy be sent to the concerned Jail Superintendent for record and for information of the appellant.

(V.K. JAIN)
JUDGE

October 23, 2009/acm