

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ Crl.A.567/2006

GOPAL RAM Petitioner
! Through: Ms. Rakhi Dubey, Adv.

 Versus
\$ STATE Respondent

^ Through: Mr. O.P. Saxena, Addl. PP
 for the State.

* **CORAM:**
 HON'BLE MR. JUSTICE V.K. JAIN

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: V.K. JAIN, J. (ORAL)

1. This is an appeal against the Judgment dated 27th April, 2006 and Order on Sentence dated 29th April, 2006, whereby the appellant was convicted under Sections 376 IPC and was sentenced to undergo RI for 10 years and to pay a fine of Rs. 4,000/- or to undergo RI for one month in default.

2. The case of the prosecution is that on 30th September, 2005, the appellant, who was residing as a tenant in the house of the aunt of the prosecutrix, took the prosecutrix to his room on the first floor and after removing her cloths as well as his own cloths, he raped her. Thereafter, the appellant gave one

rupee to the prosecutrix and asked her not to narrate the incident to anyone. He also threatened to kill her in case she disclosed the incident to anyone. When the aunt of the prosecutrix came back from the village after a few days, she disclosed the whole incident to her. The aunt brought her to the Police Station and lodged FIR on 8th October, 2005.

3. The prosecutrix came in the witness box as PW-3, but did not support the case of the prosecution, as set out in the FIR. She stated that the accused was not known to her and she was not aware as to in which room he was residing at the time she was residing in the house of her aunt. She was cross-examined by the learned AP and during cross-examination, she said that she had pardoned the appellant and may be let off. She, however, expressed ignorance as regards the folly for which she had pardoned the appellant and felt ashamed in telling those facts. She, however, denied the suggestion that when her aunt was away, the appellant had taken her to his room and tried to have sex with her. However, she admitted that when they started from their house, it was discussed that the appellant had committed a folly and he had to be taken out of shackles.

4. PW-2 Dr. Sandhya Jain examined the prosecutrix in Guru Teg Bahadur Hospital on 8th October, 2005. She has stated that when the prosecutrix was produced before her for

medical examination, she gave history of being sexually assaulted by a man named Gopal in the afternoon of 30th September, 2005. On examination of the prosecutrix by the witness, her hymen appeared to be torn.

5. PW-1 Smt. Prakash is the aunt of the prosecutrix. She has stated that the appellant resided as a tenant in her house for about 1 ½ months. She has further stated that about 5 months before her examination in the Court, she had gone to village Tilderi where she stayed for about one week and when she came back on the 7th day of the English calendar month, the appellant touched her feet and begged for pardon. She further stated that the appellant had taken the prosecutrix to his room, bolted the door from inside, removed his cloths as well as his own cloths and had done unnatural act with her. She has further stated that she went to the officers of the appellant for taking action against him, but no action was taken by them. Thereafter, she went to the Police Station alongwith the prosecutrix and lodged a report.

6. PW-4 Vipin is the son of PW-1. He has stated that the appellant used to reside as a tenant in their house on the first floor, but he had not committed any folly. In cross-examination, he admitted that his mother had gone to her native village leaving them behind alongwith prosecutrix. He has also stated that during those days, the appellant was their tenant and when

his mother returned, the prosecutrix made a complaint to her about her sexual exploitation by the appellant. During cross-examination by learned APP, he stated that when they were studying, the prosecutrix was upstairs, whereas he was on the ground floor. He also admitted that the fact regarding sexual exploitation was not disclosed by the prosecutrix to his mother in his presence. Thus, this witness also has no personal knowledge about the complaint made by the prosecutrix to her mother regarding her alleged sexual exploitation.

7. PW-5 Deepak is other son of PW-1. He has stated that he had come to know that the appellant had behaved indecently with the prosecutrix, and therefore, was sent to jail. Thus, this witness does not support the prosecution as far as the allegation of rape is concerned.

8. In his statement under Section 313 Cr.P.C., the appellant admitted that he was a tenant in a room on the first floor of the house of PW-1 in September, 2005. He also admitted that in those days, PW-1 had gone to her native village. He has, however, denied having taken the prosecutrix to his room and having done any unnatural act with her. The stand taken by him was that he was present in his office and was on duty on the day of the alleged incident.

9. DW-1 Neelam Sarangal is an Assistant Commandant of Rapid Action Force (RAF). She has stated that on 30th

September, 2005, the appellant was on duty from 5.00 am to 9.00 pm. She has further stated that tea is served at 5.00 am, breakfast is served from 8.25 to 8.55 am, lunch is served from 11.50 to 1.00 pm, evening tea is served at 2.00 pm and dinner is served from 7.00 to 8.00 pm in the mess where the appellant was working. She has also produced a copy of the Attendance Sheet of the appellant for the month of September, 2005. In cross-examination, she admitted that general duty hours are for eight hours a day for an employee and five cooks were working in their company in September, 2005. She also admitted that there was no time recorded when someone comes inside or goes outside the camp. She also admitted that one can reach in Biharipur/Takmirpur in about 10-15 minutes from their camp.

10. DW-2 Jaivir is the brother-in-law of PW-1. He has stated that his wife and his sister-in-law had gone to village Tildairy on 20th September, 2005 and had returned on the same day after the last rites of his cousin were performed.

11. PW-3 Balwan Singh, Head Constable in RAF has stated that the appellant used to be on duty from 5.00 am to 9.00 pm and on 30th September, 2005 also, he remained on duty from 5.00 am to 9.00 pm.

12. As regards the plea taken by the appellant that he was on duty at the time of alleged incident, the law is well-settled that onus to prove *alibi* lies upon the accused and he has to prove

the plea of *alibi* with a reasonable certainty (Rajesh Kumar vs. Dharambir & Ors. AIR 1997 SC-322). PW-1, Assistant Commandant of RFA has stated in her cross-examination that normal duty hours for employee are eight hours. If it is so, there could be no reason for the appellant to be on duty from 5.00 am till 9.00 pm. Even otherwise, no employee of the Government is put on duty for 16 hours a day on a regular basis. There is no documentary evidence of the appellant being on duty from 5.00 am to 9.00 pm on 30th September, 2005. As admitted by DW-1, there was no system of obtaining any signature whenever someone left the camp in which the appellant was posted. DW-3 has admitted in his cross-examination that no system was maintained to the effect that if one goes out of the campus he has to put his signature and mention the time of leaving the gate. He has also admitted that the main gate from where one can enter or go out of the camp was not visible from his position. Therefore, in case the appellant left the camp in the afternoon of 30th September, 2005, PW-3 would not have been in a position to see him leaving the camp. Admittedly, the house in which the incident took place can be reached in 10-15 minutes from the camp in which the appellant was working. Tea is served up to 2.00 pm as stated by PW-1 and thereafter dinner is served between 7.00 pm to 8.00 pm. Therefore, it was very much possible for a cook to leave the mess in which he is

working after 2.00 pm, once the tea was served and reach the house by 3.00 pm. Therefore, it cannot be said that the appellant was not in a position to be in his house at about 3.00 pm on 30th September, 2005.

13. 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 though may precede lodging of FIR in such cases. The prosecutrix, a young girl, aged about 12-14 years, at the time of this incident, was residing in the house of her aunt when she was subjected to this humiliation. Since her aunt was out of station and there was no other adult person in the family, it was not expected of the prosecutrix to go to Police Station alone or with a child of her aunt. The natural reaction of a girl of her age whose parents had died and who was living in the house of her aunt, would, in such circumstances, be to await the return of her aunt and then decide the course of action. As soon as the aunt of the prosecutrix returned from outstation, she confided in her and

the matter was then reported to the police. Therefore, there was no abnormal or unexplained delay in lodging the FIR.

14. It is true that the prosecutrix has not supported the case of the prosecution. But, if there is evidence circumstantial or otherwise available on record, to prove the guilt attributed to the appellant, the prosecutrix having not supported the prosecution would not, by itself, entitle the appellant to acquittal even in a case of rape. A careful examination of the statement of the prosecutrix leaves no reasonable doubt that something wrong was done to her by the appellant. Had the appellant done nothing wrong with her, there would have been no occasion for her to say that she had pardoned him and to make a request that he may be let off. The admission of the prosecutrix that when they started from their house on the day she was to be examined in the Court, it was discussed that though the appellant had committed a folly, he had to be taken out of the shackles, also shows that there was some kind of a settlement between the appellant and the prosecutrix/her family members and it was pursuant to that settlement that the prosecutrix did not support the case as set out in the FIR. The statement of the prosecutrix to the effect that she felt ashamed in telling those facts is an indicator of the nature of the act that was committed by the appellant with her. The very fact that the prosecutrix did not support the prosecution leaves no doubt that

she is not interested in implicating the appellant, and therefore, it cannot be said that she had any grudge against the appellant when she sought pardon for him.

15. The conduct of the appellant in falling on the feet of the PW-1 when she returned home and begging pardon is yet another circumstantial evidence which prove that the appellant had done something wrong with the prosecutrix and that is why he had sought pardon from PW-1.

16. To ascertain what exactly was the nature of the wrong act or shameful act which the appellant had done with the prosecutrix, one has to look to the facts and circumstances of the case. When the prosecutrix met PW-1 on her return from the native place, she told her that the appellant had taken her to his room, bolted the door from inside, removed her cloths as well as his own cloths and then had some unnatural act with her. When the prosecutrix was examined by PW-2 Dr. Sandhya Jain, she gave history of being sexually assaulted by the appellant in the afternoon of 30th September, 2005. From the expression used by the prosecutrix during her cross-examination by the learned APP, it is obvious that the wrong act done with was a sex related act and that is why she felt ashamed of narrating it in the Court. Had it been some act other than a sex related act, she would have no hesitation in narrating it in the Court. It is quite understandable that when a

girl aged about 12-14 years, (the age given in the Ossification Test) is examined in the Court, she would feel embarrassed in revealing an act related to a sexual offence with her.

17. The next question which comes up for consideration is whether the sexual act done by the appellant with the prosecutrix was an act of outraging her modesty or it was an attempt to commit rape or it was an actual rape. Since the prosecutrix has not supported the prosecution, it is difficult to know the exact nature of the act that was committed by the appellant with her. The fact that her hymen appeared to be torn is suggestive of rape having been committed. But, in the FIR lodged by her, the prosecutrix specifically stated that the appellant tried to do bad act with her ("mere saath galat kaam kerne ki koshish ki"). Had the prosecutrix been raped, she would have said "mere saath galat kaam kiya" and not that "mere saath galat kaam kerne ki koshish ki". Even in the FIR, the prosecutrix did not say that she had bled when the appellant did the offensive act with her. When the prosecutrix was cross-examined by the learned APP, it was suggested to her that the accused tried to have sex with her. This suggestion indicates that the case of the prosecution itself is that the appellant had attempted to rape the prosecutrix.

18. In my view, keeping in view the fact the prosecutrix has not supported the prosecution and has not told the Court as

to what exactly was done to her, coupled with the fact that in the FIR she alleged attempt to rape, it would not be safe to conclude that the appellant had raped her, despite the fact that the hymen of the prosecutrix appeared to be torn when she was examined in the hospital. Another important aspect in this regard is that when the prosecutrix complained to her aunt on her return from the native place, she said that the appellant had done unnatural act with her. Ordinarily, sexual intercourse is not described as an unnatural act.

19. Keeping in view all the facts and circumstances, I am of the considered view that the appellant had taken the prosecutrix to his room in the absence of his aunt to commit rape. He could not succeed since the prosecutrix started weeping and raising alarm as is stated in the FIR.

20. For the reasons given in the preceding paragraphs, the conviction of the appellant is converted from Section 376 IPC to Section 376 IPC read with Section 511 thereof for attempting to commit rape. Keeping in view all the facts and circumstances of the case, including that he has been pardoned by the prosecutrix, the appellant is sentenced to undergo RI for 4 years and to pay a fine of Rs. 1,000/- or to undergo SI for one month in default.

21. One copy of this order be sent to the Trial Court and one copy be sent to the appellant through Jail Superintendent

for information and record. Ms. Rakhi Dubey, who has been appointed as Amicus Curiae in this case shall be paid fee as per the scale fixed by Delhi High Court Legal Services Committee.

(V.K.JAIN)
JUDGE

NOVEMBER 20, 2009
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