

*** HIGH COURT OF DELHI : NEW DELHI**

Judgment reserved on: May 06, 2009

Judgment pronounced on: May 25, 2009

+ Criminal Appeal No. 795 of 2006

% Bhure Khan @ Jakka ... Appellant
Through: Ms. Anu Narula, Advocate

versus

State (Govt. of NCT of Delhi) ... Respondent
Through: Mr. Amit Sharma, Additional
Public Prosecutor for the State

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

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

SUNIL GAUR, J.

1. In the afternoon of 11th day of April, 1996, prosecutrix (PW-7) a housewife and a neighbor of Appellant is said to have been sexually assaulted by the Appellant in the jhuggi of the prosecutrix (PW-7). Appellant-Bhure Khan was tried for the commission of the aforesaid offence by the trial court and he stands convicted vide impugned judgment for raping the prosecutrix (PW-7).

2. As per the version of the prosecutrix (PW-7), on the day of the incident, i.e., on 11th April, 1996 at about noon time, prosecutrix (PW-7) was relaxing with her seven months old baby, after finishing her household chores and appellant/accused came inside her jhuggi and offered tea to her but she refused and Appellant went back. Again at about 2 PM, on that day, appellant/accused came inside her jhuggi and offered to bring medicine for her as she was not well but the prosecutrix (PW-7) again refused. There and then, appellant/accused is said to have caught hold of right hand of the prosecutrix (PW-7) who tried to raise alarm but her mouth was gagged by the appellant/accused with his hand. Prosecutrix (PW-7) claims that appellant/accused had pressed both her hands with his knees and had broke open the string of her salwar and had raped her. Prosecutrix (PW-7) had also claimed that thereafter, she had given a push to the Appellant with her left feet and he fell aside and then, he ran away. According to the prosecutrix (PW-7), after this incident, she went to the shop of her husband and narrated this incident to him and police was called and the statement of the prosecutrix (Ex.PW-7/A) was recorded, which led to registration of FIR No. 170/96 under section 376 of the

Indian Penal Code, registered at Police Station Timarpur, Delhi.

3. During the investigation of this case, spot proceedings were conducted and the bed sheet from the jhuggi of the prosecutrix was seized, prosecutrix (PW-7) was got medically examined. Arrest of the appellant/accused was effected in this case and the investigation stood completed by filing of charge sheet against the appellant/accused for the offence of rape.

4. Trial in this case took place, as the charge of rape was contested by the appellant/accused. Prosecution had relied upon the evidence of fourteen witnesses to prove its case against the appellant/accused before the trial court. However, prosecution case rests upon the deposition of the prosecutrix (PW-7), her husband (PW-6), the medical evidence, i.e., MLC (Ex. PW-11/A) of the prosecutrix and the MLC (Ex. PW-9/A) of the appellant/accused. The initial investigation of this case was conducted by Sub-Inspector Dharam Pal (PW-14).

5. Appellant/accused had denied the prosecution case and had claimed before the trial court that he has been falsely implicated in this case at the instance of Pradhan of

the Jhuggies, who had an ill will against him. The two witnesses, who had deposed in favour of the appellant/accused, before the trial court are his neighbours, i.e., Sunita (DW-1) and Duley Jaan (DW-2) and their version was that in the morning, on the day of this incident, appellant/accused was demanding Rs. 10,000/- from husband (PW-6) of the prosecutrix (PW-7), who was refusing to pay the same and a quarrel took place between them and husband of the prosecutrix had threatened to falsely implicate the Appellant and in the evening they came to know that Appellant has been falsely implicated in this case.

6. Trial concluded with the conviction of the appellant/accused for the offence of rape and vide impugned order of 24th July, 2006, Appellant stood sentenced to undergo rigorous imprisonment for a period of seven years with fine of Rs.5,000/- for committing the offence of rape. In default of payment of fine, trial court has directed the appellant/accused to undergo rigorous imprisonment for one year.

7. Aforesaid conviction and sentence is assailed by the appellant/accused in this appeal.

8. Ms. Anu Narula, learned counsel for the Appellant as well as Mr. Amit Sharma, learned Additional Public Prosecutor for the Respondent-State, have addressed their respective arguments in this appeal and have ably assisted this court in appreciating the evidence on record.

9. The basic contention put forth on behalf of the appellant/accused is that it is not just possible to commit the offence as has been alleged by the prosecutrix (PW-7) in this case. It has been pointed out by learned counsel for the Appellant that the prosecutrix (PW-7) has admitted in her evidence that on earlier occasions, there used to be quarrel between the family member of the accused and her family. Thus, it has been contended on behalf of the Appellant that in such a situation, it is highly improbable that the appellant/accused would come on the day of the incident in the morning to offer tea to the prosecutrix (PW-7) and would again come in the afternoon, to offer to bring medicine for the prosecutrix (PW-7).

10. Learned counsel for the Appellant has vehemently argued that the MLC (Ex. PW-11/A) of the prosecutrix (PW-7) is not admissible in evidence as the same has been proved by the record clerk and not by the doctor concerned. Much emphasis was laid by Appellant's

counsel on the submission that the medical evidence does not corroborate the prosecution story. It has been pointed out by learned counsel for the Appellant that the prosecutrix (PW-7) had claimed that prior to this, she had called Noorjahan Didi but she had not come to her help. Thus, it is stated that non-examination of Noorjahan goes against the prosecution. In the end, much stress has been laid by counsel for the Appellant on the fact that the defence witnesses are to be treated at par with the prosecution witnesses and the evidence of the defence witnesses has been illegally brushed aside by the trial court. According to learned counsel for the Appellant, false implication of the appellant/accused is on account of money dispute and because of the quarrel of the appellant/accused with the Pradhan of the area, who had got him falsely implicated in this case through the prosecutrix (PW-7). It is emphatically asserted by learned counsel for the Appellant that the prosecution story is improbable and the defence version is plausible, which entitles the appellant/accused to acquittal, which has been illegally denied to the Appellant by the trial court. Nothing else is urged on behalf of the Appellant.

11. The stand of the Respondent-State projected by Mr.

Amit Sharma, Additional Public Prosecutor for the State is that prosecution version is consistent and reliable, whereas defence story is not at all plausible and that the impugned judgment does not suffer from any illegality and this appeal is bereft of merit.

12. Before proceeding to appreciate the evidence of the star witness, i.e., prosecutrix (PW-7), I am reminded of the pertinent observations made by the Apex Court in the case of “*Om Prakash V State of Uttar Pradesh*”, **AIR 2006 SC 2214**, which are as under:-

“The Indian women has tendency to conceal such offence (of rape) because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after staking her own prestige and honour”

13. In the above background, the testimony of the prosecutrix (PW-7) has to be considered. There is a serious challenge to the prosecution case regarding the happening of the actual incident. Defence claims that this

incident could not have taken place in the manner narrated by the prosecutrix (PW-7) in her evidence. To make such a tall claim, the cross-examination of the prosecutrix by the defence has to be pointed one and not blunt, as is found to be in the instant case. For instance, it has not been brought out in the cross-examination of the prosecutrix (PW-7) by the defence that in what position, the prosecutrix (PW-7) was lying when the appellant/accused allegedly pressed both her hands with his knee and as to whether they were pressed with one knee or with both knees. Prosecutrix (PW-7) has not been questioned by the defence in her cross-examination as to whether gagging of her mouth was with right hand or left hand. It cannot be presumed that all throughout this incident, appellant/accused had kept on holding the right hand of the prosecutrix (PW-7). When the prosecutrix (PW-7) had categorically claimed in her deposition that the appellant/accused had broke open the string of her salwar, then, it was not put to the prosecutrix (PW-7) by the defence as to how and with which hand the appellant had broke open the string of the salwar. In any case, there is no cross-examination of the prosecutrix (PW-7) by the defence regarding the crucial part of this incident, i.e., of

appellant inserting his male organ into her private part.

14. After commission of this offence, prosecutrix (PW-7) had pushed away the appellant/accused with her left feet and thereupon appellant is said to have fallen aside. It is so claimed by the prosecutrix (PW-7) in her evidence. If the defence found anything unusual about it, then there should have been specific cross-examination on this aspect, which is not there. In any case, there is nothing unusual about the aforesaid post incident conduct of the prosecutrix (PW-7). It is purely conjectural that the prosecutrix (PW-7) could not have done it because she was not well on the day of the incident. The act of prosecutrix (PW-7) pushing the appellant/accused with her leg after the sexual assault by the Appellant upon her, is an expression of her resistance or in any case, of her disgust. Simply because there used to be quarrel between the family members of the prosecutrix (PW-7) and the family members of the appellant/accused, it would not be a ground for false implication of the appellant/accused by the prosecutrix (PW-7) because it has not been brought out in the cross-examination of the prosecutrix as to what was the nature of the said quarrels. From the evidence of the prosecutrix (PW-7), it emerges that both the families

i.e. of the prosecutrix (PW-7) and that of appellant/accused were not on visiting terms and on the day of the incident, wife of the appellant/accused was not present at the house of the appellant/accused. Even if it is taken that there used to be quarrel between the two families on petty matters, still a married housewife would be the last person to stake her honour and of her family, to falsely implicate the appellant/accused.

15. In my considered view, the happening of this incident, as narrated by the prosecutrix (PW-7), does not sound to be improbable. However, prosecutrix's version is required to be tested, viz-a-viz the defence version. The two defence witnesses, who are the neighbours of the appellant/accused, have deposed that appellant/accused was demanding Rupees ten thousand from the husband of the prosecutrix (PW-7) and what is alleged by these two defence witnesses, is that husband of the prosecutrix had declared in the morning on the day of the incident that he would not return the demanded money and would falsely implicate the appellant/accused in a false case. According to these two defence witnesses, this matter was pacified with their intervention. All that has come in the evidence of the prosecutrix (PW-7) is that when she had reported

this matter to her husband, he took her with him to the *Pradhan* of the area where Dule (DW-2) was also present and thereafter, this matter was reported to the police. The suggestion given by the defence to the prosecutrix (PW-7) regarding the aforesaid defence plea deserves to be noted and it reads as under:-

“It is incorrect to suggest that as we had borrowed money from accused and that there was quarrel on return of money”.

16. Nothing more has been suggested to the prosecutrix (PW-7) in respect to the aforesaid defence version. In my considered view, the above referred defence version is neither probable nor plausible.

17. It is going too far, to claim that Noorjahan should have been got examined because the prosecutrix (PW-7) has stated in her evidence that she had called out for Noorjahan. It is nobody's case that Noorjahan had come to the spot. In fact, prosecutrix (PW-7) has clearly stated that Noorjahan had not come to her help. No doubt, prosecutrix (PW-7) had promptly narrated this incident to her neighbor Noorjahan, but non-examination of the neighbor would not go against the prosecution because corroboration in such like cases, is not generally insisted upon. In any case, there is no inconsistency or improbability in the version of

the prosecutrix (PW-7) requiring corroboration.

18. The medical evidence, i.e. MLC (EX. PW-11/A) of the prosecutrix (PW-7) may not have been formally proved in evidence but it would not make much difference for the reason that what is incriminating, is not the MLC (EX. PW-11/A) of the prosecutrix but is the FSL Report (EX. PX) which indicates that the vaginal slides of the prosecutrix (PW-7) and the bed sheet recovered from the spot, were having human semen. To get over the FSL Report (EX. PX), a half hearted suggestion given by the defence to the prosecutrix (PW-7) was that her husband had come back to his house at 1:30 p.m. This suggestion was denied by the prosecutrix (PW-7). In any case, absence of injuries on the person of the prosecutrix (PW-7) or lack of medical evidence to corroborate the version of the prosecutrix (PW-7) are really not of much consequence because the absence of injuries on the private parts of a victim, especially a married lady, cannot *ipso facto* lead to an inference that no rape has been committed. It has been so reiterated by the Apex Court in the case of "*Santosh Kumar vs. State of M.P.*" **AIR 2006 SC 3098**.

19. Upon over all analysis of the evidence on record, I hold that the conviction and the sentence imposed upon

the appellant/accused, does not suffer from any illegality or infirmity. As a necessary corollary thereof, this appeal is dismissed being devoid of merit. Appellant is in custody. He be apprised of the fate of his appeal through the concerned Jail Superintendent and its compliance be reported to this court, within two weeks.

20. This appeal stands disposed of, with aforesaid directions.

Sunil Gaur, J.

May 25, 2009
pkb/rs