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HIGH COURT OF DELHI : NEW DELHI

Judgment reserved on : March 13, 2009

Judgment delivered on : March 26, 2009

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Crl. Appeal No. 817/2006

% Balraj @ Mallahu ... Appellant
Through: Mr. B.S. Rana and Mr. Rai Singh,
Advocates

versus

The State (NCT of Delhi) ... Respondent
Through: Mr. Amit Sharma, Additional Public
Prosecutor for 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. The Appellant- Balraj @ Mallahu, has preferred this appeal against the judgment of 4th August, 2006, and order on sentence of 10th August, 2006, delivered by the trial court, whereby the appellant- Balraj @ Mallahu, has been found guilty for the offences under Section 363/376/34 of the IPC. Appellant- Balraj @ Mallahu has been sentenced to undergo RI for two years and to fine of Rs.1,000/-, and in default thereof, to undergo SI for one month for the offence under Section 363 of the IPC and is further sentenced

to undergo RI for seven years with fine of Rs.2,000/-, and in default of payment of fine, to undergo SI for two months for the offence punishable under Section 376 of the IPC and in default thereof, to undergo SI for three months. These two sentences would run concurrently.

2. The brief facts, as emerging from the record of this case, are as follows:-

“On 28th December, 2004, at Police Station Najafgarh, the prosecutrix lodged a complaint that while on 27th December, 2004, at about 8:00 PM, she along with her younger brother, was going to the fields for toilet, two boys came on a scooter and stopped near her and she was forcibly made to sit on that scooter, which was driven by accused-Manoj @ Tinda while accused/appellant- Balraj, was the pillion rider. While pushing her brother aside, both the boys forcibly took her to kothri, at the tube well and accused- Manoj raped her, after forcibly breaking the nada of her salwar, while accused- Balraj, remained outside to guard. Thereafter, accused-Balraj also committed raped her and co-accused Manoj was guarding. After committing the rape, both the accused persons fled away from the spot, on the scooter.”

3. After lodging of the complaint by the prosecutrix, police reached at the spot and started investigation of the case. Pointing Out Memo was prepared and various articles were seized, including *salwar* of the prosecutrix. She was got medically

examined and her statement under Section 164 of the Cr.P.C, was got recorded. During the course of the investigation, both the accused persons were arrested and their disclosure statements were got recorded. At the instance of accused persons, Pointing Out Memo of the spot was prepared and police also recovered the scooter, pant of accused- Balraj, track suit of co-accused- Manoj, which was seized. The police sent the recovered articles to FSL for analysis and, thereafter, filed charge-sheet against both the accused persons, for commission of offences under Section 363/376/34 of the IPC, in the concerned court of Metropolitan Magistrate, Delhi.

4. While the case of co-accused-Manoj was transferred to the Juvenile Court, the concerned Metropolitan Magistrate, after complying with the provisions of Sections 207/208 of the Cr.P.C., committed the case of accused-Balraj, to the court of Sessions. The Additional Session Judge, to whom this case was assigned, framed charges under Sections 363/366/376 (2) of the IPC, as accused-Balraj did not plead guilty and the trial commenced.

5. Prosecution, in order to prove its case, got examined fourteen witnesses in all, at trial. Material witnesses are Manjeet Kaur (PW-1), Prosecutrix (PW-2), Sahil Devi (PW-4) mother of the prosecutrix, Doctor Mahesh (PW-5) and Doctor Aparna (PW-6), Dr. S. Dass (PW-7) and Sh. Mukesh Vats, Metropolitan Magistrate (PW-11). SI Nirmal Sharma (PW-12) and Constable Mukesh

Kumar (PW-8) conducted the investigation of this case.

6. After recording of prosecution evidence, statement of accused/appellant- Balraj @ Mallahu, under Section 313 of the Cr.P.C. was recorded by the trial court. Though, the accused/appellant did not led any evidence in his defence, yet he pleaded not guilty to the aforesaid offences and stated that he was innocent and was falsely implicated in the case.

7. Trial concluded with verdict of guilt against appellant/accused for the offence of rape and he was convicted and sentenced in the manner, as indicated in the opening paragraph of this judgment.

8. Oral submissions have been advanced by both the sides in this appeal and they have adverted to the evidence on record.

9. Learned Counsel for the appellant/accused contends that the prosecutrix (PW-2) and her mother (PW-4) in their cross-examination have admitted that they did not know the names of the culprits and the prosecutrix in her cross examination has stated that the names of the appellants and his co-accused, were told to her by the Investigating Officer and this is unlikely, as the family of the prosecutrix (PW-2) and the family of the appellant/accused resided in the same village. It is pointed out that Vijay (brother of the prosecutrix) was accompanying her at the time of this incident and he has not been got examined by the prosecution. Learned

Counsel for the appellant/accused points out that Bhagwan Singh (DW-1) was present near the spot and he has certified that no such incident, as alleged by the prosecutrix, had taken place and the appellant/accused has been falsely implicated in this case.

10. The basic contention advanced on behalf of the appellant/accused is that from the evidence on record, the offence of rape does not stand proved as the prosecution fails to establish that the appellant/accused had sexual intercourse with the prosecutrix (PW2). It is pointed out that as per the medical examination of the prosecutrix, (PW-2) there were no bleeding from her private parts and the hymen was intact and the vagina admitted one finger only. It is also pointed out that as per the FSL Report (Ex. PX) semen was not detected on the clothes of the prosecutrix, nor on the vaginal swab of the prosecutrix and this rules out the prosecution version of the appellant/accused committing rape upon the prosecutrix and at best offence, if any, made out is the one under Section 354 of the Indian Penal Code. In support of the above submissions, reliance has been placed upon the decision of the Apex Court reported in **2008 (4) Crimes (SC) 126** and upon the decision reported in **2003 (2) JCC 984**. Lastly, it is submitted that in view of the aforesaid infirmities, the conviction of the appellant/accused for the offence of rape, is unsustainable and is liable to be set aside.

11. Learned Additional Public Prosecutor for the State contends

that in the face of the evidence of the prosecutrix, which is consistent and reliable, it cannot be said that the offence committed by the appellant/accused would fall under Section 354 of the IPC. It is pointed out that there is no ambiguity regarding the identity of the appellant/accused as the prosecution case, right from the beginning, is that the prosecutrix and her mother knew the appellant by face. It is further pointed out that ground realities have to be kept in mind and it cannot be forgotten that this incident is of a village, where the local police knows the residents of the village quite well and it will not be out of place to mention that if the prosecutrix had told the police that the two boys had come on a scooter, then it is quite probable that the local police knew their names and in that context, the Investigating Officer of this case may have told the names of the Appellant and his co-accused to the prosecutrix. It is submitted that there is nothing unusual about it and the present case cannot be of a mistaken identity, because the prosecutrix has identified the Appellant/accused as one of the culprits and she would be the last person to falsely implicate the Appellant/accused and to spare the real culprit. Lastly, it is submitted that the decisions relied upon on behalf of the Appellant/accused have no application to the facts of this case and the conviction of the Appellant/accused is well borne out from the evidence on record and therefore, this appeal deserves dismissal.

12. Nothing else has been urged by either side.

13. The evidence on record has been analyzed in the light of the submissions advanced by both the sides and in the light of decision of the Apex Court in the case of “*State of Punjab v. Gurmeet Singh & Ors.*” **AIR 1996 SC 1393**, wherein the courts have been cautioned to appreciate the evidence of the prosecutrix with a greater degree of sensitivity by observing as under :-

“A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations“

14. It is true that prosecutrix (PW-2) has named both the accused in the FIR and she claims in her evidence also that she

knew them but she does not specifically state in her evidence that she knew them by name. However, she has stated in her cross examination by the defence that the names of the accused were disclosed to her by the police and prior to this incident, she did not know the names of the accused. She has stated in her evidence that the names of the accused were told to her by police official Anand Prakash (PW-14). It is evident from her MLC that she had not given the names of the accused to the doctor and she had simply stated that she was sexually assaulted by two boys.

15. Mother (PW-4) of the prosecutrix has stated in her evidence that she did not know the accused prior to this incident but she had seen them coming and going, meaning thereby, she knew the Appellant and his co-accused by face.

16. Prosecution case has to be tested on the touch stone of '*probability factor*'. It is quite probable that in a village or rural area, upon disclosure by the prosecutrix that the culprits had come on a scooter, local police could have given out their names to the prosecutrix and that is how, the names of the Appellant and his co-accused figure in the FIR in question. There is nothing improbable in not disclosing the names of the assailants by the prosecutrix in the alleged history given to the doctor at the time of medical examination. In any case, no mileage can be drawn by the defence on this account because the prosecutrix (PW-2) has not been questioned on this aspect by the defence. She ought to have been

asked as to why she did not give the names of the culprits to the doctor. Had it been so done, then she would have given some plausible answer to it. For the sake of argument, even if it is taken that the FIR of this case has been '*ante-timed*', still no benefit accrues to the Appellant/accused, for the reason that the prosecutrix (PW-2) would be the last person who would spare the real culprit and would falsely implicate the Appellant/accused for the offence like present one.

17. Even if case of the defence is taken as its best, still all that could said is that FIR of this case naming the Appellant and his co-accused, was recorded after the arrest of Appellant/accused which as per Investigating Officer (PW-14) took place on the day succeeding the night of this incident, i.e., at 6.30 a.m., in the morning. The so-called lapse of ante-timing of the FIR on the part of Investigating Officer (PW-14) would not and cannot demolish otherwise consistent and reliable testimony of prosecutrix (PW-2) which is sufficient to sustain the conviction of the Appellant/accused.

18. Cases involving sexual molestation and assault require a different approach – a sensitive approach and not an approach which a court may adopt in dealing with a normal offence under the penal laws. It has been so said by the Apex Court, in the case of "*State of Rajasthan v. Om Prakash*", **AIR 2002 SC 2235**. It has been reiterated by the Apex Court, in its decision in the case of

“Laxmi & Others v. State of U.P.” (2002) 7 SCC 198, that every faulty investigation or padding in evidence cannot by itself lead to a total demolition of the prosecution case, if it can otherwise stand ignoring these fallacies. In the case of *“Dharmendra Sinh @ Man Sinh Rattan Sinh v. State of Gujarat” (2002) 4 SCC 679*. Apex Court has gone to the extent of holding that though, there was a contradiction regarding lodging of FIR, but that did not discredit the main prosecution case, which was otherwise found to be reliable and trustworthy. Thus, it is fairly well settled that faulty investigation can hardly be a ground for rejection of the testimony of a material witness, if it has got a ring of truth in it.

19. Apex Court has declared in its famous verdict in the case of *“Zahira Habibulla H. Sheikh and another v. State of Gujarat and others” AIR 2004 SC 3114*, that defective investigation cannot be a ground to acquit an accused and the pertinent observations made on this aspect are as under:-

“In the case of a defective investigation the Court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found by having recourse to Section 311 or at a later stage also resorting to Section 391 instead of throwing hands in the air in despair. It would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective.”

20. The Investigating Officer (PW-14) has not been questioned by the defence as to why Vijay, brother of the prosecutrix (PW-2) has not been cited as a witness and therefore, Appellant cannot be heard to complain about it. There is no defence plea and therefore, the evidence of Bhagwan Singh (DW-1) certifying that no such incident took place, is neither here nor there. No plea of *alibi* has been taken by the Appellant/accused in this case. Simply because that no semen was detected in the vaginal swab of the prosecutrix (PW-2) or on her clothes, it cannot be said that no offence of rape has been committed. MLC, Ex.PW-5/A of the prosecutrix reveals that there was some staining on the private parts of the prosecutrix and there was secretion around her private parts and there was supra pubic swelling.

21. In the face of the aforesaid medical evidence, it cannot be said that the medical evidence negates the commission of offence of rape. Even partial penetration is sufficient to constitute the offence of rape and the present case cannot be said to be of mere outraging of modesty of the prosecutrix (PW-2). No plausible reason is forthcoming as to why the prosecutrix would falsely implicate the Appellant/accused. In the decision reported in **2008 (4) Crimes SC 126**, relied upon by the Appellant, there was an unexplained delay in the lodging of the FIR, whereas, in the present case, there is no delay.

22. Decision reported in **2003 (2) JCC 984**, relied upon by the

Appellant, wherein the sentence for the offence of rape was reduced from seven years to one year, i.e., the period already undergone, can be no precedent as it was done on the concession extended by learned counsel for the State.

23. I am of the considered view that there are no adequate or special reasons for awarding the sentence for a period less than the minimum prescribed for the offence of rape. In fact, the present case falls in the category of gang rape, which is punishable with a minimum term of ten years under Section 376 (2)(g) of the Indian Penal Code. Since there is no appeal by the State, for alteration of the conviction of the Appellant from section 376 Indian Penal Code to section 376 (2)(g) of the Indian Penal Code, therefore, such a course for enhancement of sentence is not being adopted.

24. There is no merit in this appeal. The conviction and sentence imposed upon the Appellant are accordingly affirmed.

25. This appeal is accordingly disposed of.

Sunil Gaur, J.

March 26, 2009

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