

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

Judgment reserved on : February 09, 2009
Judgment delivered on : February 27, 2009

+ **(1) Crl. Appeal No. 847/2006**

% Mohd. Nasir @ Gulfam ... Appellant
Through: Mr. Rashid Hashmi, Advocate.
versus
State ... Respondent
Through: Mr. Amit Sharma, Additional Public
Prosecutor for State.

+ **(2) Crl. A. No. 1004/2006**
&
Crl. M. B. No. 729/2008

% Javed ... Appellant
Through: Mr. S.A. Rajput and Mr. R.K. Uppal,
Advocates.
versus
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 two Appellants, *Mohd. Nasir @ Gulfam s/o Mohd. Rafiq* and *Zaved s/o Akhlakh* in the above titled two appeals assail their conviction for the offences punishable under Section 376(2g)/506/34 of Indian Penal Code, recorded by the learned Additional Sessions Judge, Delhi in the impugned judgment of 13th July, 2006, and vide order on sentence of 17th July, 2006, both Appellants have been sentenced to undergo rigorous imprisonment for a period of ten years each and to

pay fine of Rs.2,000/- each and in default of payment of fine, to further undergo rigorous imprisonment for six months each.

2. Since these two appeals arise out of common impugned judgment, therefore, they have been heard together and are being decided by this common judgment.

3. The prosecution version, in brief, as appearing from the record of this case, is that on receipt of DD No.32A on 18.7.2005, SI Abha alongwith SI Ramnath and Constable Satish reached in H.R. Hospital and collected the MLC of one Yashmin w/o Rafique (hereinafter referred to as prosecutrix) and recorded her statement, Ex.PW-8/A, in which she had alleged that on 18.7.2005 at about 3 a.m., when she got up for spreading the wet clothes of her daughter, for drying, as she had urinated, her *Jeth* - Javed suddenly caught hold her from behind and her brother-in-law/Behnoi put the cloth in her mouth and both of them took her to latrine and thereafter, they both committed rape upon her turn by turn. They told her that if she will make any noise, they will kill her husband by administering poison. On the basis of her statement, the present case was registered and, thereafter, investigation was conducted and appellants/accused were arrested. After completion of investigation, appellants/accused were charge-sheeted for the offence under Sections 328/506/376(2g)/34 of Indian Penal Code.

4. On 20th October, 2005, trial in this case commenced

because accused/appellants did not plead guilty to the charges framed against them under the aforesaid provisions of law.

5. During trial, the prosecution had got examined fifteen witnesses in all. The crucial witnesses are the prosecutrix (PW-8), her husband (PW-10) and her sister (PW-9). Dr. Sweta Mishra (PW-5) has proved the MLC Ex. PW-2/A of the prosecutrix (PW-8) and the MLCs of the appellants are proved on record as EX. PW-14/A and EX. PW-14/C. ASI Abha is the Investigating Officer of this case.

6. These two appellants in their statements under Section 313 Cr.P.C before the trial court had pleaded their innocence and stated that they have been falsely implicated in this case. They got examined two witnesses in their defence, i.e., G.Nawab Ahmed (DW-1) and Mohd. Aklaq (DW-2). Infact, Nawab Ahmed (DW-1) did not deposed anything about this case and deposed about some old quarrel and Mohd. Akhlaq (DW-2) is the father of accused appellant/accused –Javed.

7. After the trial, these two appellants stood convicted and sentenced for the offence punishable under Section 376(2g)/506/34 of the Indian Penal, as indicated above.

8. Submissions have been advanced by both the sides, who have assisted this court, in perusing the evidence on record.

9. The testimony of the prosecutrix (PW-8) has been assailed by the learned Counsels for both the appellants by

contending that they have been falsely implicated in this case due to property dispute with the husband of the prosecutrix and also due to the ill-will and bad relations of the prosecutrix with the family members. The effort on behalf of the appellants was to highlight from the evidence of the prosecutrix (PW-8) that the incident, as narrated by her, was not at all possible because the latrine where she was allegedly raped by the appellants, was just 36"X32" and the prosecutrix has asserted in her evidence that she was raped by the appellants, one by one, while she remained in the latrine in standing position.

10. According to learned counsels for these two appellants, it is just not possible to rape the prosecutrix, as alleged by her. It is also pointed out that there was no injury on the person of the prosecutrix, although she has alleged that after she was raped, she had fallen down in the latrine. It is further pointed out by learned Counsels for the appellants that the cloth, which was allegedly put in the mouth of the prosecutrix, was not produced and the prosecutrix in her evidence has stated that this incident lasted for about half an hour and at the time of this incident, her hands were down, which indicated that she had not resisted the alleged forcible sexual intercourse with her. Attention of this court has been drawn to the cross examination of the prosecutrix by the defence to show that she did not raise any objection at the time of commission of the offence by appellant/accused-Javed.

11. Attention of this court has been also drawn to the cross

examination of the prosecutrix by the defence to show that she has admitted in her evidence that sometimes, quarrel took place, between her husband and her *jeth* and *jethani* and that she has also admitted that she had gone to her parental house due to quarrel between her and her husband and that there was lot of quarrel on several occasions on the property.

12. The medical evidence indicates the presence of human semen on the salwar of the prosecutrix and on the payjama of appellant/accused-Javed, as per FSL Report EX. PW-15/B & C may not be conclusive evidence by itself. But it is certainly incriminates the appellants/accused as prosecutrix (PLW-8) has categorically stated in her evidence in clear terms that she did not have sexual intercourse with her husband of late i.e. prior to this incident. In the case of *Prithi Chand V. State of Himachal Pradesh* **AIR 1989 SC 702** it has been said that *mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case.*

13. After having carefully scrutinized the evidence of the prosecutrix (PW-8), of her husband (PW-10) and of her sister (PW-9), I find that the aforesaid contentions raised on behalf of the appellant to assail the testimony of the prosecutrix (PW-8) are not of much consequence, for the reason that the defence had given suggestion to the prosecutrix (PW-8), which reads as under:-

“ It is further wrong to suggest that even on the date of the incident, accused- Javed committed sexual intercourse with my

consent along with accused Mohd. Nasir @ Gulfam."

14. The suggestion given to Mohd. Rafique (PW-10), husband of the prosecutrix by the defence was that appellant/accused-Javed was having illicit relations with the prosecutrix (PW-8), i.e. the wife of this witness and it has come in the evidence of this witness (PW-10) that appellant/ accused- Javed is his step-brother.

15. Although the suggestion given to the prosecutrix (PW-8) by the defence was of false implication on account of property dispute with her husband (PW-10) but no such suggestion has been given to the husband of the prosecutrix (PW-8). All that has been suggested to the husband of the prosecutrix is that due to previous enmity, he has falsely implicated the appellants, in connivance with his wife. Nature of previous enmity has not been brought out by the defence.

16. The happening of this incident, as narrated above, stands conclusively proved on record, not only from the evidence of the prosecutrix (PW-8) but also from the evidence of Smt. Naima (PW-9), sister of the prosecutrix, to whom, the prosecutrix had told about this incident in the first instance. The testimony of the prosecutrix (PW-8) receives sufficient corroboration from the evidence of her husband (PW-10).

17. In case of *Om Prakash V State of Uttar Pradesh*, **AIR 2006 SC 2214**, the pertinent observations made by the Apex Court are as follows :-

“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”.

18. In the instant case, it is beyond comprehension that a married lady, i.e. the prosecutrix (PW-8) would be a consenting party to the sexual intercourse with the two appellants who are her brothers-in-law and that too, not once but twice, on the day of the incident. The nature of the dispute regarding the property has not been brought out in the cross examination by the defence, therefore, appellants can have no advantage out of it.

19. Generally speaking, the evidence of the prosecutrix ought to be relied upon, if, it inspires confidence and it is not required to be corroborated. In the present case, I have found the evidence of the prosecutrix (PW-8) to be worthy of utmost reliance and I find that the plea of consent raised by the appellants is not at all plausible and their false implication by the prosecutrix (PW-8) is ruled out.

20. When the prosecutrix (PW-8) asserts that she was raped by appellant- Mohd. Nasir @ Gulfam also and not once, but twice, there is no reason to disbelieve her. During the course of the arguments, much emphasis was laid on the fact that it is

not at all possible to rape a woman in a standing position. This contention stands repelled by the fact that appellants themselves have given a suggestion to the prosecutrix (PW-8) that she was a consenting party to the sexual intercourse with them. Furthermore, recently in **Crl. Appeal No. 224 of 2009**, titled as *Arjun Singh v. State of Himachal Pradesh*, decided on 6th February, 2009, by the Apex Court, it has been reiterated that *even the slightest degree of penetration is sufficient to prove sexual intercourse. By the very nature of offence, it is an obnoxious act of the highest order.*

21. It is more so in the instant case as the present case is of a gang rape by the brothers-in-law of the prosecutrix (PW-8). I am of the considered view that the conviction of these two appellants for the offence of gang rape by the trial court is very well justified from the evidence on record. The substantive sentence imposed upon the appellants is the minimum, as provided under the law.

22. There is no scope for any interference with the impugned judgment/ order on merits as well as on the quantum of sentence. These two appeals are bereft of merit and are hereby, dismissed.

23. These two appeals and pending application, stands accordingly disposed of.

Sunil Gaur, J.

February 27, 2009

Pkb/rs

