

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Crl.App. 525/2007

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Date of Reserve : 06.10.2009.
Date of Decision: 21.10.2009.

MAHESH KUMAR Appellant
! Through: Mr.Bhupnesh Narula, Adv.

Versus

\$ STATE Respondent
^ Through: Mr. Navin Sharma, APP.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG,J

1. This order shall dispose of the aforesaid appeal filed by the appellant under Section 374 Cr.P.C. against the judgment dated 15.05.2007 and order of sentence dated 19.03.2007 passed by Additional Sessions Judge, New Delhi in S.C No. 54/2006 arising out of FIR No. 942/2005 under Sections 363/376 IPC at P.S. Okhla Industrial Area (OIA), whereby the Ld. ASJ held the appellant guilty for kidnapping and committing rape under sections 363 and 376 of IPC and has been imposed punishment of R.I for a period of 3 years besides payment of fine of Rs. 500/- or in default of payment of fine

to further undergo S.I. for one month for the offence under Section 363 IPC. Appellant has also been sentenced to undergo RI for 7 years with fine of Rs.1,000/- and in default to undergo SI for two months under Section 376 IPC. Benefit of Section 428 of Cr.P.C. has also been extended to the appellant.

2. The case was registered on the basis of the statement made by complainant Ajay Kumar, father of the prosecutrix, who in his complaint Ex.PW5/A disclosed that on 02.11.2005 at 6.15pm due to holiday at his office, he was present at his house. At about 5.45pm, accused Mahesh residing in his neighbourhood took his daughter "x" (assumed name) aged about 4 ½ years on the pretext for play. He was under the influence of liquor. After some time, complainant found his daughter missing. He then searched for her and came to know that the accused had taken his daughter towards liquor shop. While searching the prosecutrix there he came to know from his cousin Raj Kumar that accused Mahesh had taken his daughter towards the ridge. Thereafter, he along with his brother hurriedly rushed towards the ridge and heard the cries of the prosecutrix behind the bushes. They reached there running and saw the accused committing rape on the person of the prosecutrix. When he raised alarm, the accused fled away from there after putting on his pant. However, he with the help of his brother caught hold him at some distance. The complainant further disclosed that blood was oozing out from the private parts of

the prosecutrix. He then telephoned to the police at 100. CATS Ambulance reached at the spot and took "X" to AIIMS. On that basis, FIR was registered and the appellant was taken into custody in this case.

3. During the course of investigation prosecutrix was medically examined and her MLC Ex.PW7/A was prepared by Dr. Charu later on proved by Dr. Deepika Verma who appeared as PW7. In the alleged history, there is specific mention of sexual assault on the prosecutrix. According to her, vaginal tear bleeding was found positive. Vaginal Smear could not be taken as the prosecutrix was bleeding profusely. After the completion of investigation, the challan was filed by the Police. The Magistrate committed the same to the Court of Sessions. The learned ASJ framed the charges vide order dated 16.02.2006 against the appellant, under Sections 363/376 IPC to which the appellant pleaded not guilty and claimed trial. The prosecution in order to prove its case has examined 11 witnesses, namely, PW1 Raju, PW2 Raj Kumar, PW3 ASI Om Praksh, PW4 Ct. Sanjeev Kumar, PW5 Ajay Kumar, PW6 Dr. Shalini Girdhar, PW7 Dr. Deepika Verma, PW8 H.C Manohar, PW9 Ct. Bhikambar, PW 10 Ct. Shaukender Pal and PW12 ASI Shanti. In his statement under section 313 CrPC, the appellant denied his involvement in the commission of the offences as alleged. He raised a plea that he has been falsely implicated in the case but has not led any defence evidence.

4. The Ld. ASJ vide judgment dated 15.05.2007 convicted him under sections 363/376 IPC and has sentenced him as aforesaid. Thus, this appeal.

5. By way of this appeal, the appellant has assailed the judgment of conviction and order of sentence as bad in law on various grounds. Appellant has pleaded that it is a false case lodged under the influence of the complainant and his brother for settling the private scores between them and the appellant. It is also submitted that there were serious discrepancies in the version of prosecution witnesses. According to him as per prosecution story complainant saw the appellant committing rape on his daughter but none has deposed so. It is his case that as he was not taking a LIC policy from complainant and his brother, they both have implicated him in a false case. It is also submitted that the witnesses are interested witnesses and no independent witness has been joined. It is further submitted that no witness has supported the case of prosecution and that even the medical evidence does not expressly state that the victim was raped. It is also his case that vital fact that the victim has not been examined in this case.

6. On the other hand, Ld. APP has supported the impugned judgment and submitted that in the present case, complainant Ajay Kumar was examined as PW5 and he has fully supported the

prosecution case. It is submitted that in the absence of any material discrepancies in the testimony of the prosecution witnesses, prosecution has proved its case against the accused beyond reasonable doubt.

7. I have considered the submissions made by learned amicus curiae for the appellant and the learned APP for the State and have also scrutinized the evidence available on record. PW5 Ajay Kumar has supported the prosecution story in its entirety and proved the version given by him before the police at the first instance. He was subjected to cross examination where he deposed that the accused was known to him for the last about one year as he used to live in his neighbourhood. He also denied having any conversation regarding the LIC policy with the accused. He also denied that the statement made by him was a tutored one and therefore is wholly reliable and thus, convicted the appellant under section 363/376 IPC. In his deposition before Ld. ASJ on 10.07.2006, the complainant, who appeared as PW5, has stated that:

“On 02.11.2005 at about 5.45pm I was present in my house along with my children. At that time, many children were playing outside my house. I received information that my daughter Anjali aged about 4 ½ years was lifted by Mahesh Kumar. Immediately I along with my brother Raju searched my daughter. I received information from my cousin brother who is running a tea shop nearby that my daughter Anjali was taken by accused towards pahari Side. We rushed towards the bushes where from the crying sound was coming and found the accused was committing rape on the person of my daughter. We caught hold the accused at the spot. My daughter was bleeding profusely from her private part. I put a cloth over her private part and informed the

police. The CAT Ambulance and PCR come to the spot. I took my daughter in CAT Ambulance to hospital. I handed over the custody of accused to my brother. Police reached at hospital. Police made inquiries from me and recorded my statement which is Ex.PW-5/A. It bears my signatures at point A. The child was medically treated at hospital. She was operated twice. Still she has not recovered completely and there is possibility of another operation.

I handed over the clothes of the girl to police which the police seized vide seizure memo Ex.PW5/B which bears my signatures at point A.

8. As far as the other grounds raised by the appellant in this appeal are concerned, the Ld. ASJ has very categorically dealt with the each ground specifically in view of the evidence available before him in the following manner:

19. PW5 Ajay Kumar is the father of the prosecutrix and must be interested to bring the real culprit to book. His own daughter had been ravished. He is not imagined to let the real culprit go scot free and to falsely rope in the accused without his fault. Nothing has come on record to show if this witness had any ill-will or enmity with the accused to falsely name him in this case. No complaint was ever made by the accused against this witness showing strained relations with him. In the absence of any previous enmity, this witness inspires confidence.

20. This witness categorically proved that the accused was seen by him committing rape on the person of the prosecutrix. This witness proved the presence of the accused with the prosecutrix at the time of occurrence. The presence of this witness at the spot in his anxiety to search for his child is quite natural and probable. The prosecutrix was not expected to reach alone to that secluded place. This witness proved that the prosecutrix was bleeding profusely from her private parts. This witness being the father of the child can't be expected to make false deposition on all these facts to bring his young child to disrepute.

21. PW 1 Raju has corroborated the version given by PW5 Ajay Kumar. He also in his deposition before the court stated on oath that On 02.11.2005 at about 9.30 pm, his brother Ajay Kumar came to him and told him that his daughter "X" was not there in the house. Thereafter he alongwith his brother went to search "x". on the way at a tea shop, PW Raj Kumar met them and told them that accused Mahesh had taken "X" towards "theka" side. They immediately ran towards theka side. They searched "x" and hears her crying sounds. When they reached towards

pahari side, he found the accused putting on his pant. The accused ran away after seeing them. They chased the accused and caught hold him. His brother Ajay Kumar lifted "X". PCR van came at the spot and removed "X" to AIIMS. This witness further deposed that he had seen blood coming out from the private parts of the prosecutrix and she was raped by accused.

22. This witness also tested in the cross examination. The witness admitted in the cross examination that the accused was known to them for the last about one year as he used to reside in their neighbourhood. The witness denied the suggestion that a quarrel had taken place of the accused with his brother a few days prior to the incident. The witness fairly admitted that he did not remember the color of the pant, which the accused was wearing at the time of incident. However, the witness revealed that it was a full pant. The accused was apprehended after he ran for a distance of about 60/70 paces. Telephone call was made by his brother from his mobile. Police reached at the spot within five minutes. The witness further denied the suggestion that the quarrel had taken place of his brother with accused as the accused was working as agent in Post office to deposit monthly installment regarding RD on MIS schemes. The witness further denied the suggestion that his brother being an agent in LIC used to compel the accused to get insurance policy.

27. On scanning the testimonies of all the three witnesses referred above, it reveals that no material inconsistencies have come in their cross examination to doubt the veracity of the statements made by them. All these witnesses were closely related to the victim and had no ulterior motive to falsely implicate the accused. Accused did not bring on record any circumstance to infer enmity of these prosecution witnesses qua him prompting them to falsely implicate him in this case. The accused has given contradictory suggestions to PW1 Raju and PW5 Ajay Kumar about his strained relations with them. In the cross examination of PW5 Ajay Kumar, the accused did not put any suggestion if any quarrel had taken place with him on any occasion prior to the incident. No suggestion was put to this witness if he had ever compelled the accused to get any insurance policy through him. Only in the cross examination of PW1 Raju, learned Counsel for the accused suggested that a quarrel of his brother had taken place with the accused regarding payment of money as the accused was working as agent in Post Office to deposit monthly installments regarding RD on MIS schemes. This specific suggestion was not put to PW5 Ajay Kumar in the cross examination. Moreover, no specific date was suggested by the accused as to when any such quarrel had taken place. The accused did not examine any witness in defence to show if he was working as agent at Post office or that he used to deposit monthly installments on MIS schemes. Nothing has come on record to show if the complainant has opted for any such MIS scheme through the accused. Again suggestion was put to this witness that being an agent, the complainant used to

compel the accused to get any insurance policy. Moreover on such petty matters, the complainant is not expected to level serious allegations regarding commission of heinous offence against the accused and that to make his own daughter as scape goat. Complainant is not expected to fable the incident of rape where the child was found profusely bleeding from her private parts. Relationship of the prosecution witnesses with the prosecutrix is not a factor to discard the otherwise cogent and reliable testimonies of the prosecution witnesses.

31. No adverse inference can be drawn against the prosecution for not examining the victim. It has come on record that the victim was a child of about 4 years on the day of incident. In fact, the victim was brought for her testimony before the court. The child was unable to give rational answers. On that the child was not examined and was dropped by the learned Addl. PP for the State. Since the child was too small to give statement before the court, her non- examination is not fatal to the case of the prosecution and the accused can't encash her non-examination.

34. In view of the above discussion, I am of this view that the prosecution has proved its case against the accused beyond the shadow of reasonable doubt for commission of kidnapping and rape. Accused Mahesh is held guilty for the commission of the offence punishable under section 363/376 IPC and is convicted accordingly.

9. I have perused the record of the case. The opinion formed by learned ASJ is substantiated from the record. The statement given by PW5 coupled with the medical evidence leaves no room for doubt that the prosecutrix was raped by the appellant. The defence put forward by the appellant does not inspire any confidence. It is unbelievable that the father of a minor girl of 4 ½ years of age would use her innocence by making the allegation that she was subjected to rape. As such there is no reason to believe that it is a case of false implication inasmuch as the plea taken by the appellant, that the complainant and his brother due to enmity over professionalism implicated him in a false case. The reasoning given by the learned

ASJ that no father will use her daughter to indulge in a rape assault just to settle the previous scores is, true. Moreover, the amicus curiae has rightly not pressed the appeal on merits in view of the overwhelming evidence available on the record. Thus, taking into consideration the facts and circumstances of the case, I uphold the conviction of the appellant. Coming to the prayer made by learned amicus curiae to reduced the sentence to the period already undergone, I find no reason to interfere in the order of sentence awarded to the appellant as this is a case where the rape was committed upon a minor girl of 4 ½ years old.

10. Accordingly, the appeal is dismissed. Pending applications, if any, also stand dismissed. The fee of amicus curiae is fixed as Rs.4000/-.

11. Copy of the order sent to the appellant through Jail Superintendent and to the trial court with TCR.

MOOL CHAND GARG, J.

OCTOBER 21, 2009

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