

High Court of Delhi At New Delhi

Crl. Appeal No. 8/2009

Date of Decision: April 19th , 2010

Avadh Bihari

... Appellant

Through: Mr. Ajay Verma, Adv.

Versus

The State (NCT of Delhi)

... Respondent

Through: Mr. Navin Sharma, Adv.

Coram:

HON'BLE MR. JUSTICE S.L. BHAYANA

1. Whether reporters of local paper may be allowed to see the judgment? Yes
2. To be Referred to the reporter or not? Yes
3. Whether the judgment should be referred in the Digest? Yes

S.L. BHAYANA, J. (Oral)

This appeal has been filed by the appellant against the judgment passed by learned Additional Sessions Judge (ASJ) dated 7.11.2007 wherein the learned trial Court has convicted and sentenced the appellant u/s 376 IPC to undergo R.I. for 7 years and to pay a fine of Rs. 1000/- and in default of payment of fine to further undergo R.I. for 1 month. The appellant has also been convicted and sentenced u/s 506 IPC to undergo R.I. for 3 years and to pay a fine of Rs. 1000/- and in default of payment of fine to further undergo R.I. for 1 month. The trial Court further ordered that both the sentences shall run concurrently.

2. Brief facts of the prosecution case are that prosecutrix came to Delhi along with her husband on 15.9.2006 and they started staying at the house of her husband's brother-in-law. It is further alleged that the appellant Avadh Bihari and the husband of the prosecutrix namely Dinesh were working together in the canteen of Haryana

Roadways Depot at village Dhaka. This canteen was being run by the brother-in-law of Dinesh. On 3.10.2006 Avadh Bihari and Dinesh left the job of the said canteen and were looking for some other house for the stay. Dinesh received information from his village that his mother is unwell, therefore, he had to leave for his village. Avadh Bihari, appellant, took Dinesh and his wife to the house of his relative near Chetan Behari Mandir, Kamal Pur, Burari, Delhi. The prosecutrix started living at the said house along with her husband. Avadh Bihari was also staying in the same house. Her husband Dinesh left for his native village to see his ailing mother leaving behind the prosecutrix. It is further alleged that on 4.10.2006 at about 11.30 p.m. when prosecutrix was sleeping in her room, the appellant who was also staying in the room on the 2nd floor in the same house entered the room of the prosecutrix and committed rape with her. When she raised alarm he gagged her mouth and committed rape against her will. On 6.10.2006 Dinesh husband of the prosecutrix came back and she narrated the whole story to her husband who then reported the matter to the police and lodged the complaint against the appellant. The appellant was arrested by the police in this case. Statement of the prosecutrix was also recorded u/s 164 Cr.P.C. by learned Metropolitan Magistrate.

3. Charge for the offence punishable u/s 376/506 (ii) IPC was framed against the accused to which accused pleaded not guilty and claimed for trial.

4. During the course of trial, prosecution in support of its case has examined 10 prosecution witnesses. PW-7, the prosecutrix is the Star Witness. She has deposed before the Court that she came to Delhi from her native village with her husband Dinesh on 15.9.2006. She stayed at the house of her sister-in-law (Nanand) namely Smt. Mithlesh, w/o Om Vir, at village Dhaka Gaon, Delhi and stayed there till 2.10.2006. Her Nandoi was running a canteen in Haryana Roadways Depot. Accused Avadh Bihari and her husband were working in the said canteen. A telephonic call from her native village was received by Omvir about the illness of her mother-in-law on 2.10.2006. Accused Avadh Bihari arranged a room for them in a colony at Chetan

Bihari Mandir, Kamalpur, Delhi. Her husband took her in the room which was on the first floor as arranged by accused Avadh Bihari. The owner of the house was Mahavir who was brother-in-law of Avadh Bihari. Her husband left her in the said room and went to his native village on 3.10.2006. She remained in the aforesaid room from 3.10.2006 to 7.10.2007. House owner Mahavir and his family was residing at the ground floor. On 3.10.2006, when she was sleeping in her room at first floor, accused Avadh Bihari came inside her room and he laid upon her and when she raised alarm he gagged her mouth and took off his pant and underwear and committed rape upon her without her will and consent and thereafter accused Avadh Bihari ran away from there. Accused Avadh Bihari threatened her not to disclose anyone about the said incident. Her husband came on 7.10.2006 and she narrated the entire incident to him. She along with her husband went to P.S. Burari where her statement was recorded by the police at about 8.a.m. which is Ex. PW.7/A. Her statement was recorded by learned Metropolitan Magistrate u/s 164 Cr.P.C., which is Ex. PW.7/B. She was medically examined by the Doctor at the hospital. Her red colour paticcoat was taken into possession by the Doctor which is marked as Ex.P-1. PW-1, Dr. S. Lal, has examined the accused Avadh Bihari. PW-2, Dr. Anubha has examined accused Avadh Bihari and she prepared MLC of the accused Avadh Bihari. On the same day, she also examined the prosecutrix, aged about 20 years with the alleged history of rape as told by the patient on 6.10.2006 and 7.10.2006 at Kamal Vihar, Delhi. Her MLC was prepared. The statement of PW-3, HC Khem Singh was also recorded. PW-5, Mahavir has deposed before the Court that Dinesh and his wife requested him to give one room on rent. On 4.10.2006 Dinesh went to his native village on account of the illness of his mother and the prosecutrix remained alone in the house for two days. She remained in the house for 5/6 days. Accused Avadh Bihari also remained in his house and used to sleep in one room on the roof of the house. He was declared hostile by learned APP as he did not support the case of the prosecution. PW-8, Pale Ram, Medical Record Clerk, brought the record of MLC of

the prosecutrix. PW-9 W/ASI Mithlesh is the I.O of this case. PW-10, Ms. Nirja Bhatia, is the learned MM, Delhi who has recorded the statement of the prosecutrix u/s 164 Cr.P.C. After recording the statement of ten witnesses the prosecution evidence was closed. Thereafter, statement u/s 313 Cr.P.C. of the accused Avadh Bihari was recorded. The allegations of the prosecution were put to the accused which were denied by the accused Avadh Bihari and he claimed to be innocent.

5. I have heard learned counsel for the parties and perused the record.

6. Learned counsel for the appellant submitted that in the statement recorded u/s 164 Cr.P.C. before learned Metropolitan Magistrate the prosecutrix has deposed that her husband left Delhi and went to his village on 4.10.2006 leaving her alone in the rented accommodation whereas in her statement made before the Court she has deposed that her husband left for village on 3.10.2006 and he remained in the village up to 7.10.2006. She has deposed before learned trial Court that on 3.10.2006 accused Avadh Bihari committed rape with her at about 11.30 p.m. when she was alone in the house. Whereas in the statement made before learned Metropolitan Magistrate u/s 164 Cr.P.C she has stated that the accused Avadh Bihari came to her room on 4.10.2006 and committed rape with her. Whereas in the MLC Ex. PW/2B and Ex. PW-8/A she has told to the Doctor that accused Avadh Bihari committed rape with her on 6.10.2006 and 7.10.2006. This fact has been confirmed by PW-2, Dr. Anubha, Medical Officer, who has deposed before the Court that the prosecutrix had given alleged history of rape on 6.10.2006 and 7.10.2006 at Kamal Vihar, Delhi which is mentioned in the MLC by her. Learned counsel for the appellant submitted that there are three versions of rape given by the prosecutrix. One version is that rape was committed on 3.10.2006. Second version is that rape was committed on 4.10.2006 and the third version is that rape was committed by the accused Avadh Bihari on 6.10.2006 and 7.10.2006. Learned counsel for the appellant states that on 7.10.2006 the husband of the prosecutrix Dinesh returned to Delhi and the question of committing rape by the accused Avadh Bihari on 7.10.2006 does not arise.

Whereas the prosecutrix has told to the Doctor that accused Avadh Bihari committed rape with her on 6.10.2006 and 7.10.2006. These contradictions appearing in the statement of the prosecutrix go to the root of the case and the accused is liable to be acquitted. She has implicated the accused at the instance of her husband in this case falsely. Learned counsel for the appellant further submitted that PW-2, Dr. Anubha, who had examined the prosecutrix has stated before the Court and has also mentioned in the MLC that there was no external injury found on the breast, thigh, perineum and vulva which further confirms that no rape was committed by the appellant with the prosecutrix. The prosecutrix in her statement submitted that when accused Avadh Bihari was trying to commit rape upon her she raised an alarm and also resisted. Thereafter accused gagged her mouth. Had the prosecutrix resisted at the time of rape there must have been external injuries found on her breast, thigh, perineum and vulva and other parts of the body but in this case, PW-2, Dr. Anubha, has confirmed that no fresh injury was found on the body of the victim. So it is a false case and the appellant has been falsely implicated in this case. Learned counsel for the appellant has further drawn my attention to the joint photograph of the accused Avadh Bihari and the prosecutrix which are marked as DX and DY and in these photographs the prosecutrix has been shown in the arms of the accused Avadh Bihari in Mark-DX whereas in Mark- DY the appellant is sitting and the prosecutrix is keeping her hand affectionately on the shoulder and the back of the accused Avadh Bihari which further shows that the prosecutrix was having a love affair with the appellant and when her husband came to know about this love affair she has falsely implicated the accused in this case. Learned counsel for the appellant has further submitted that PW-7, prosecutrix has further deposed before the Court that there was no door in the room whereas PW-5, Mahavir, who is the owner of the house, has deposed before the Court that the room in which Dinesh's wife was staying as tenant was well furnished and having door and windows. So the statement of the prosecutrix that there was no door in the room stands falsified by

the statement of owner of the house PW-5, Mahavir. Learned counsel for the appellant further submitted that in the statement made before learned Metropolitan Magistrate u/s 164 Cr.P.C., Ex- PW-7B, the prosecutrix has stated that her husband came to Delhi on 6.10.2006 and she narrated the whole incident to her husband. He telephoned at 100 number immediately and police came and recorded her statement. Whereas PW-7, prosecutrix in her examination-in-chief has stated before the trial Court that her husband came to Delhi on 7.10.2006 and she narrated entire incident to him. Thereafter she along with her husband went to P.P. Burari and narrated the incident before the police where her statement was recorded by one lady police official, which is Ex-7/A. Whereas PW-9, W/ASI Mithlesh, has stated before the Court that on 8.10.2006 at about 8 a.m., prosecutrix along with her husband Dinesh came to the police station. She recorded the statement of the prosecutrix, which is Ex. PW-7/A. So there is contradiction in all the three statements regarding the dates of arrival of the husband of the prosecutrix. In her statement u/s 164 Cr.P.C. she stated that on 6.10.2006 they telephoned the police, police came and recorded her statement; whereas in her examination-in-chief she stated that her husband reached Delhi on 7.10.2006 but she does not mention about calling police at 100 number and she only stated she went along with her husband to the police station on 7.10.2006 and made statement whereas the I.O says the prosecutrix and her husband came to the P.P. Burari only on 8.10.2006. So these contradictions in the statement of the prosecutrix are very serious in nature and the accused is liable to be acquitted. She has further deposed before Metropolitan Magistrate that on 6.10.2006 when her husband came they telephoned police. Police came and arrested accused Avadh Bihari. Whereas PW-9, W/ASI Mithlesh has stated before the Court that after recording statement of the prosecutrix on 8.10.2006 only she arrested accused Avadh Bihari. This contradiction is of serious nature and goes to the root of the case.

7. I have heard learned counsel for the appellant as well as learned APP for the State and also perused the record. I have also gone through the statement of the prosecutrix who has deposed before the Court that the accused Avadh Bihari has committed rape with her on 3.10.2006. I have also gone through the statement of the prosecutrix recorded u/s 164 Cr.P.C in which she has deposed that the accused has committed rape with her on 4.10.2006 whereas PW-2, Dr. Anubha, Medical Officer, has deposed before the Court that the prosecutrix had herself told her that the accused had committed rape with her on 6.10.2006 and 7.10.2006. The prosecutrix has given three versions with regard to the committal of rape with her by the accused. This contradiction which has appeared in the statement of the prosecutrix is very serious in nature and cannot be ignored. In her statement made before the Police she has stated that her husband came back from the village on 6.10.2006 whereas she has stated before the Doctor that accused has committed rape upon her on 6.10.2006 and 7.10.2006. This is not only improbable but it is impossible because the prosecutrix was staying with her husband in the same room whereas in the statement made before the Court she has stated that her husband came back on 7.10.2006 and she narrated the aforesaid incident to her husband. She went to P.P, Burari where her statement was recorded by a lady police official whereas in the statement made before learned Metropolitan Magistrate under section 164 Cr.P.C. she has stated that the accused has committed rape upon her on 4.10.2006 and she then told the entire incident to her husband who came from the village on 6.10.2006 and immediately her husband gave a telephone call at 100 number and the police came and recorded her statement. The statement of the prosecutrix is contradicted by I.O Mithlesh, PW-9, who has deposed before the Court that on 8.10.2006 she recorded the statement of the prosecutrix at about 8 p.m., which is Ex. PW-7/A. According to the prosecutrix her husband has come to Delhi on 6.10.2006 whereas the report was made to the police on 8.10.2006. There is delay of two days in making the report to the police. Although the prosecutrix has narrated the entire

incident to her husband and her husband called police at 100 number and her statement was recorded by the police then and there but the stand is contradicted by the I.O who has deposed that prosecutrix Sonu and her husband Dinesh came to the police station, Burari on 8.10.2006 at about 8 p.m. when her statement was recorded by her. Since the statements of the prosecutrix are full of contradictions and discrepancies I have come to the conclusion that the statement of the prosecutrix is neither trustworthy nor reliable. Moreover, there is delay of two days in informing the police about this incident by the prosecutrix. I have seen the joint photograph of the accused Avadh Bihari and the prosecutrix which are marked as DX and DY and in these photographs the prosecutrix has been shown in the arms of the accused Avadh Bihari in Mark-DX whereas in Mark- DY the appellant is sitting and the prosecutrix is keeping her hand affectionately on the shoulder and the back of the accused Avadh Bihari which further shows that the prosecutrix was having a love affair with the appellant and when her husband came to know about this love affair she has falsely implicated the accused in this case.

8. Keeping in view the discussion made above, I have no hesitation in holding that the prosecutrix was having love affair with the appellant and she had sex with the accused with her own consent and free will. The prosecution has failed to prove its case beyond reasonable doubt that accused has committed rape with the prosecutrix. The accused is therefore given benefit of doubt and therefore ordered to be acquitted.

Let a copy of this judgment be sent to the Jail Superintendent immediately.

April 19, 2010
Kb

S.L. BHAYANA, J.