

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

Judgment reserved on : February 02, 2010
Judgment pronounced on : February 08, 2010

+ **Crl. A. No. 20/2004**

% Sanjay Kumar
S/o Ram Phal ... Appellant
Through: Mr. R.D. Sharma, Mr. Ajay
Sharma and Mr. Gaurav Kaushik,
Advocates

versus

State (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?
- No.

SUNIL GAUR, J.

1. The subject matter of this appeal is '*incestuous rape*'. Prosecutrix (PW-2) and appellant/accused are real cousins, i.e., she is niece of her maternal uncle, who is father of appellant/accused. Prosecutrix (PW-2) purportedly was of

minor age and appellant/accused was of major age, when this incident had taken place.

2. Impugned judgment records the conviction of the Appellant for the offences under Section 376 and 506 (I) of Indian Penal Code and sentences appellant/accused to rigorous imprisonment for eight years with fine for the offence of rape and lesser sentence is awarded by the trial court for the allied offence.

3. In the morning of 1st October, 1998, prosecutrix (PW-2) aged between 15 and 16 years, had gone to nearby jungle to ease herself and she was caught by the appellant/accused, who is said to have raped her on the point of knife. Prosecutrix (PW-2) claims that she did not disclose about this incident to her parents as she was under threat of her elimination and of her parents at the hands of the appellant/accused, if she disclosed about it. However, on the next day of the incident, this matter was reported to the police, resulting in registration of the FIR No. 712/98 under Section 376/506 of Indian Penal Code at Police Station Sultanpuri, Delhi.

4. Prosecutrix (PW-2) herself is the first informant of the FIR in question. During investigation, she was medically

examined and was subjected to bone age examination. On the third day of this incident, appellant/accused accused was arrested and was subjected to medical examination. Statement of the prosecutrix (PW-2) under Section 164 of Cr. P.C. was got recorded, although there was no need of it, as the FIR of this case is on her statement. The cryptic statement of the prosecutrix (PW-2) under Section 164 of Cr. P.C. simply states that appellant/accused has not done anything wrong with her and she has not been subjected to rape and she knows appellant/accused who is her neighbor. Upon investigation of this case being concluded, charge sheet was filed and the trial of this case had commenced as appellant/accused chose to contest the charge of rape, etc., framed against him by the trial court.

5. The recorded evidence mainly comprises of testimony of prosecutrix (PW-2) and that of her parents (PW-3) and (PW-4), followed by the medical evidence and of the Magistrate (PW-9), who had recorded the statement of the prosecutrix (PW-2). Sub-Inspector C.M. Meena is the Investigating Officer of this case. The plea of the appellant/accused was of course of denial and he preferred not to lead any evidence in his defence and what he had to state, deserves attention and is as under:-

“Rakhi is daughter of my maternal uncle. A quarrel took place between brother of my maternal uncle and me. He falsely implicated me in this case. I am innocent.”

6. Trial of this case stood concluded with the conviction of the appellant/accused, which is under challenge herein.

7. Submissions advanced have been pondered over. Evidence recorded has been meticulously scrutinized. Since prosecutrix (PW-2) claims that she was a minor on the day of this incident, therefore, this aspect needs to be adverted to, first.

8. MLC (Ex.PW-6/A) of the prosecutrix (PW-2) indicates that she had disclosed her age as fifteen years then. At the time of recording of the FIR of this case, the prosecutrix (PW-2) had also given her age as fifteen years. Bone age report (Ex. PW-5/A) also discloses that prosecutrix (PW-2) had given her age at that time also, as fifteen years. It is worthwhile to note that the age of the prosecutrix (PW-2) is conspicuously absent in her statement - Ex. PW-2/DA, recorded under Section 164 of Cr. P.C.

9. In his deposition, father (PW-3) of the prosecutrix (PW-2) gives her age as fifteen years on the day of this

incident. Prosecutrix (PW-2) and her mother (PW-4) are illiterate. During the course of the arguments, nothing worthwhile has been brought out by the defence from the depositions of the prosecutrix (PW-2) and her parents to show that she was aged sixteen years on the day of this incident.

10. Bone age report (Ex. PW-5/A) gives the age of the prosecutrix (PW-2) as between fifteen to sixteen years. Appellant/accused claims margin of error of two years on either side and it is asserted on his behalf that once this benefit is given, then the age of the prosecutrix (PW-2) would be above eighteen years. It is difficult to accept this submission for the reason that until and unless, expert witness is confronted with it, no benefit of the same can be extended to the appellant/accused. Dr. G.K. Sharma (PW-5) proves the Bone age report (Ex. PW-5/A) and his deposition remains unchallenged by the appellant/accused. In this situation, trial court has rightly held that the prosecutrix (PW-2) was sixteen years of age on the day of this incident.

11. The deposition of the prosecutrix (PW-2) needs to be appreciated in the light of the apt observations made by the Apex Court in *Dildar Singh vs. State of Punjab*, **AIR**

2006 SC 3084, which are as under:-

“In the normal course of human conduct an unmarried girl who is victim of sexual offence would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate such incident. Overpowered, as she may be, by a feeling of shame her natural inclination would be to avoid talking to anyone, lest the family name and honour is brought into controversy. Thus delay in lodging the first information report cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same on the ground of delay in lodging the first information report.”

12. Upon doing so, this Court finds that the prosecutrix (PW-2) has deposed in a straight forward manner and has explained the reason for deposing differently before the Magistrate, when her statement under Section 164 of Cr. P.C. was recorded. She has candidly stated in her cross-examination that regarding this incident, a Panchayat was held and the notarized statement marked-‘DA’ purportedly bears her thumb impression, which might be hers but she has not identified it. However, she has qualified the aforesaid statement by categorically asserting that she had not attended that Panchayat meeting.

13. There is no whisper about the Panchayat proceedings

or about alleged statement – marked ‘DA’, either in the statement of appellant/accused under Section 313 of Cr. P.C. nor any evidence in support of unproved document – Marked ‘DA’ was led by him. In any case, this document loses its significance, as prosecutrix (PW-2) in her evidence had volunteered that she was not present at the time of the alleged panchayat meeting and under threat by the appellant/accused, this document was manufactured.

14. The testimony of the prosecutrix (PW-2) is sought to be demolished by learned counsel for the Appellant by contending that she had made material improvement in her evidence as she had omitted to state in her evidence that she had gone to jungle or that any knife was shown to her by the appellant/accused or that she had become unconscious. The contradiction pointed out in her evidence is that prosecutrix (PW-2) has stated in her evidence that she had disclosed about this incident to her father on the same day, whereas, in the FIR, it is stated that she had disclosed about it to her mother on the next day of this incident.

15. It is elementary that to derive any advantage out of the so-called aforesaid contradictions, the witness has to

be confronted with it. Scrutiny of the evidence of the prosecutrix (PW-2) reveals that this has not been done. Prosecutrix (PW-2) gives plausible reason for changing her version at the time of recording of the statement under Section 164 of Cr. P.C., as she was under threat from the accused of her younger sister meeting the same fate, if she does not disown the contents of the FIR in question. Therefore, precedence cannot be given to her statement under Section 164 of Cr. P.C., especially when, the manner of its recording, leaves much to be desired. It appears to have been mechanically recorded. It is so said, because it does not take note of the fact that the FIR of this case was recorded on the statement of the prosecutrix (PW-2) herself and in such a situation, the concerned Magistrate ought not to have recorded her statement under Section 164 of Cr. P.C., especially when, the time gap between the registration of the FIR of this case and recording of this statement was of more than two months. In view of the deposition of the prosecutrix (PW-2) before the Court, this statement under Section 164 of Cr. P.C. – Ex. PW-2/DA, has been rightly excluded from consideration by the trial court. The alleged history given by the prosecutrix (PW-2) as reflected in her MLC (Ex.PW-6/A) clearly states that she

was raped by the appellant/accused whose name's appears in the alleged history given.

16. Delay of a day or two, in cases of '*incestuous rape*' is hardly of any significance. It is beyond comprehension that an unmarried teenager would stake her honour to falsely implicate her real cousin because of some quarrel between her brother and her cousin, especially when the cause of the quarrel is not forthcoming. Therefore, version of the prosecutrix (PW-2) cannot be discredited on the basis of the aforesaid so-called discrepancies, which according to me, do not go to the root of the matter and are totally insufficient to dislodge her otherwise reliable version.

17. Consequentially, on merits, this appeal deserves to be rejected. The impugned judgment does not suffer from any illegality or infirmity and is hereby upheld. The minimum sentence for the offence of rape of this kind is seven years. There are no special or adequate reasons for awarding less than the minimum sentence prescribed for this kind of offence.

18. Considering the facts and circumstances of this case, the substantive sentence for the offence of rape is

reduced from eight years to seven years rigorous imprisonment. Except for this modification, there is no scope for any interference by this Court. This appeal is partly allowed to the aforesaid limited extent. Bail bonds of the Appellant are forfeited. He be taken into custody by the trial court to serve out the partially modified sentence as indicated above.

19. This appeal as well as pending application, if any, are accordingly disposed of.

Sunil Gaur, J.

February 08, 2010

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