

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: July 20, 2010
Judgment delivered on: September 20, 2010

+ **CRIMINAL APPEAL NO.153/2008**

VISHNU

....APPELLANT

Through: Ms. Rakhi Dubey, Amicus Curiae DHCLSC

Versus

THE STATE(GOVT. OF N.C.T. OF DELHI) RESPONDENT

Through: Pawan K. Bahl, APP

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. This appeal is directed against the impugned judgment dated 09.07.2007, convicting the appellant for the offences punishable under Section 376(2)(g) IPC and Section 506 IPC as also against the consequent order on sentence dated 10.07.2007 vide which the appellant has been sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 2000/-, in default of which to undergo further RI for 6 months for the offence under Section 376 IPC and for the offence under Section 506 IPC, the appellant has been sentenced

to undergo RI for six months and pay fine of Rs. 500/-, in default to undergo RI for one month, with both the sentences to run concurrently.

2. Briefly stated, case of the prosecution is that on 26.10.2003 at 8.45 am, information was received at police station Khajoori Khas that one man had informed the PCR that on 25.10.2003 at around 10 am, two boys had committed rape on his daughter aged 17-18 years. This information was recorded as DD No. 3A (Ex.PW5/A) and was entrusted to SI Shripal (PW11), who reached at the place of occurrence, E-1/530, Sonia Vihar, 4th Pushta opposite DAPT point. There, ASI Shripal met the prosecutrix and her parents and on enquiry, he found that rape was committed upon the prosecutrix. He informed senior officials. ASI Madhavi Bisht of CAW cell reached at the spot and took over the investigation of the case.

3. ASI Madhavi Bisht (PW5) met the prosecutrix at the spot and recorded her statement Ex.PW2/A. In her statement, the prosecutrix stated that on 25.10.2003 at around 10/10.30 am, she had gone to the nearby jungle alongwith a girl Radha to ease herself when two boys aged around 25-26 years came there and started saying “ek baar, ek baar”, but she did not understand what they were saying. Thereafter, one of the boys caught hold of her and when she raised alarm, the other boy took her chunni and stuffed it in her mouth. She bit the finger of that boy, but the other accused pressed her throat and she fell down. Both the boys raped her. She further stated that while

leaving, the boys threatened her that if she told about the incident to the police, they would kill her. She returned to her home and told her parents about the incident, but they did not lodge a complaint due to fear. The prosecutrix stated that on 26.10.2003, she and her mother had again gone to the jungle to ease themselves when she saw the accused persons and they again threatened her. She pointed out the accused persons to her mother but they ran away. Thereafter, she and her mother returned to their house and told her father about the incident, who called the police. The Investigating Officer ASI Madhavi Bisht appended her endorsement on the said statement and sent it to the police station and on the basis of this rukka, formal FIR was registered.

4. The Investigating officer inspected the spot and prepared the rough site plan Ex.PW5/C. She also recorded the statements of the parents of the prosecutrix as well of her neighbor Radha under Section 161 Cr.PC and found out that the accused persons lived nearby, at 3rd Pushta, Sonia Vihar. Thereafter, she alongwith the prosecutrix, her parents and Radha went to 3rd Pushta, Sonia Vihar, from where the appellant was apprehended at the instance of the prosecutrix. The appellant was arrested and his personal search was conducted. The Investigating Officer interrogated the appellant and he made disclosure statement Ex.PW5/D. The Investigating Officer also got conducted the medical examination of the prosecutrix and the appellant and collected their MLCs Ex.PW4/A and Ex.PW5/G respectively. She seized case

property from the hospital and deposited the same in the malkhana. She also arrested the co-accused Sanjay on the next day at the instance of the appellant. The case property was sent to CFSL and report of CFSL Ex.PW6/A was obtained. On completion of investigation, challan was filed in court.

5. On completion of the formalities of investigation, the appellant as well as co-accused Sanjay were charged under Section 376(2)(g) and 506/34 IPC. The appellant pleaded innocence and claimed to be tried.

6. In order to bring home the guilt of the appellant, the prosecution examined 19 witnesses in all. However, material witnesses examined by the prosecution are the prosecutrix (PW2), PW19 Radha, PW1 Shri Ram Sagar, father of the prosecutrix, PW8 Sumitra, mother of the prosecutrix, besides Dr. Anjali (PW4). It would be appropriate to have a look upon the gist of their testimony.

7. PW1 Shri Ram Sagar, father of the prosecutrix has stated that on 25.10.2003 at about 10:00 am, the prosecutrix had gone to the jungle to ease herself. On her return, she told that in the jungle she came across five persons and two out of them had forcibly raped her and other three persons were silent spectators. On the next day i.e. 26.10.2003, he reported the matter to the police on telephone No.100. He stated that pursuant to the telephone call, the police along with one social worker came and took his daughter to GTB Hospital where she was medically examined.

8. PW8 Sumitra is the mother of the prosecutrix. She in her testimony claimed that about three years prior to her examination as a witness, the prosecutrix had gone along with Radha (PW19) to the jungle at about 10:00 am. On her return, prosecutrix told her that she was subjected to rape by two boys, namely, Vishnu and Sanjay. She claimed that on the next day, she went to the jungle along with her daughter for easing themselves, where the prosecutrix pointed towards two boys present there and told that they had subjected her to rape. She further stated that said two boys threatened the prosecutrix even on 26.10.2003. Police was informed about the incident by her husband and her daughter was taken to hospital for medical examination by the police. She claimed that police also made inquiries from PW19 Radha.

9. The prosecutrix (PW2) in her testimony reiterated the version given by her in her complaint statement Ex.PW2/A. She was cross-examined at length on behalf of the appellant but she stood her ground and denied the suggestion that she has falsely implicated the appellant.

10. Child witness Radha (PW19) has deposed that the appellant as well as the prosecutrix at the relevant time were neighbours. She stated that on the fateful day, she had accompanied the prosecutrix to the jungle where two persons came and one of them gagged the mouth of the prosecutrix and the other teased her. Thereafter, she ran away from the spot and did not disclose this fact to anyone due to fear.

She identified the appellant Vishnu as the person who had gagged the mouth of the prosecutrix. She claimed that when the police asked her about those boys, she told the Investigating Officer that those boys were living in their neighbourhood.

11. PW4 Dr. Anjali, Senior Resident Gynaecologist, Ganga Ram Hospital is an important witness. She medically examined the prosecutrix. She has proved the MLC of the prosecutrix prepared by her as Ex.PW4/A. She stated that the prosecutrix was having imperpigementa and fungal patches all around perinevus (butterfly pattern); discharge seen at intoriotus; no bleeding, abrasion small indina at posterior fourchette; old hymen tear; laxity of vagina; discharge non foul smell. She thereafter referred the patient to skin for perineal selious.

12. The appellant Vishnu in his statement under Section 313 Cr.P.C. claimed to be innocent and stated that he has been falsely implicated in this case at the instance of the father of one of his friends Deepak. Though the appellant initially expressed his desire to lead evidence in defence but he did not adduce any evidence in defence.

13. The learned Additional Sessions Judge on consideration of the evidence on record found the appellant guilty on both the counts and he convicted and sentenced him accordingly.

14. Learned Ms. Rakhi Dubey, Amicus Curiae appearing for the appellant submitted that the appellant is innocent and he has been

falsely implicated by the police at the instance of the father of the appellant's friend Deepak. She has assailed the impugned judgment firstly on the ground that if the prosecutrix is to be believed, she was raped on 25.10.2003 at around 10:00-10:30 am but the FIR in this case has been filed after a delay of almost a day on 26.10.2003, which circumstance casts a doubt against the correctness of prosecution story and raises a possibility of false implication of the appellant on an afterthought.

15. I do not find any merit in this contention for the reason that if there was an intention to falsely implicate the appellant, the prosecutrix, in her complaint statement Ex.PW2/A would have named him as one of the culprits. The fact that the prosecutrix has not named the accused persons in the FIR is an indication that there was no motive to falsely implicate the appellant or his co-accused and actually their identity came to the fore during the investigation of the case. It is pertinent to note that as per the testimony of PW2 i.e. the prosecutrix, after raping her, the appellant and his co-accused threatened to kill her in the event of her reporting the matter to the police. Therefore, a possibility cannot be ruled out that initially the prosecutrix and her parents were reluctant to report the matter to the police due to fear and also to save the honour and reputation of the prosecutrix and the family. Thus, much significance cannot be attached to the delay in filing of the FIR.

16. The next contention of learned amicus curiae is that this is a case of unfair investigation. Dilating on this argument, learned amicus curiae submitted that admittedly the appellant and his co-accused were not named in the statement of the prosecutrix Ex.PW2/A and as per the testimony of the prosecutrix (PW2) and PW19 Radha, the appellant was not arrested in their presence. If the aforesaid version is true, then the question arises as to how the police managed to identify and arrest the appellant on 26.10.2003.

17. It is true that the prosecutrix has not named the appellant or his co-accused in her statement Ex.PW2/A. However, case of the prosecution, as per the testimony of PW5 ASI Madhu Bisht, is that the appellant was arrested by her on 26.10.2003 at the instance of the prosecutrix and PW19 Radha. No doubt, the prosecutrix as well as PW19 have testified in their cross-examination that the appellant was not arrested in their presence but this, by itself, cannot be taken as a circumstance to doubt the testimony of the prosecutrix which finds corroboration from the testimony of PW19 Radha, who has identified the appellant as one of the accused persons. One cannot ignore the fact that the incident took place on 25.10.2003 and the prosecutrix i.e. PW2 was cross-examined on 24.07.2006 i.e. after a lapse of almost three years. Similarly, PW19 Radha was also examined almost three years after the incident. Therefore, the aforesaid lapse in their testimony regarding the arrest of the appellant by the police can be attributed to the lapse of memory due to efflux of time.

18. Further, it is submitted by the learned amicus curiae that the testimony of the prosecutrix is not reliable because it is not corroborated by the medical evidence. I do not find any merit in this contention. Ex.PW4/A is the MLC of the prosecutrix. On perusal of the MLC, it transpires that on medical examination the Doctor concerned found scratch marks on the nose, right cheek and the upper lip of the prosecutrix, which obviously is the sign of resistance given by the prosecutrix when she was being subjected to rape and corroborates her version. The version of the prosecutrix is also corroborated by PW19 Radha who has categorically stated that when she had accompanied the prosecutrix to jungle, they came across two persons, one of whom gagged her mouth and other teased her and on this, due to fear she ran away to her home and did not disclose this fact to anyone. Testimony of the prosecutrix is also corroborated by the ocular testimony of her parents namely Shri Ram Sagar and PW8 Sumitra who are categorical that on the fateful day when the prosecutrix returned back from jungle, she told that she was subjected to rape by two boys. In view of the aforesaid overwhelming evidence, I find no reason to suspect the version of the prosecutrix. Otherwise also, it is not the case of the prosecution that there was ill-will or enmity between the parties which could have prompted the prosecutrix to lodge a false complaint against the appellant. The defence of the appellant that he has been falsely implicated at the instance of father of his friend Deepak appears to be a make believe story. Thus, under

the circumstances, I find no infirmity in the impugned judgment returning the finding of conviction of the appellant for the offence of rape punishable under Section 376 IPC.

19. Lastly, learned amicus curiae has challenged the quantum of sentence awarded to the appellant. Learned amicus curiae submits that the appellant is a poor person. He was a young man of 19 years at the time of commission of offence and this is an isolated act of indiscretion on his part. She further submitted that as per the nominal roll, the appellant has already undergone incarceration for the period of almost seven years (actual) which punishment is more than sufficient for the offence committed by him. Thus, learned amicus curiae has prayed for reduction of sentence of the appellant to the period already undergone.

20. The appellant has been convicted for the offence of gang rape punishable under Section 376(2)(g) IPC. Ordinarily, for such offence the minimum punishment is rigorous imprisonment for a term of not less than 10 years, which may be for life and fine. However, proviso to the aforesaid Section provides that the Court may for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment upon the convict for a period less than 10 years.

21. The appellant is a poor person. He was a young man aged about 19 years at the time of commission of offence and the instant case is a solitary act of indiscretion on the part of the appellant. He has already

suffered incarceration for a period almost seven years (actual) which punishment is more than sufficient for the illegal act committed by him. Accordingly, I accept the appeal partly, only on the point of sentence. Taking into account overall facts and circumstances and the nature of offence committed by the appellant, while maintaining the conviction of the appellant and sentence of fine and sentence awarded to the appellant for the offence under Section 506 IPC, the substantive sentence under Section 376(2)(g) of IPC is reduced from RI for a period of 10 years to RI for a period of 08 years, which shall run concurrently with the sentence awarded for the offence under Section 506 IPC.

22. The appeal is disposed of accordingly.

(AJIT BHARIHOKE)
JUDGE

SEPTEMBER 20, 2010
pst