

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

% Date of Decision : 16th April, 2010

+ **Crl.A.No.298/2010**

KISHAN PAL Appellant
Through: Ms.Nilofar Qureshi, Advocate

versus

STATE Respondent
Through: Mr.M.N.Dudeja, A.P.P.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

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?Yes

PRADEEP NANDRAJOG, J. (Oral)

1. Vide impugned judgment and order dated 11.05.2009 the appellant has been convicted for the offence punishable under Section 376/506 IPC. For the offence of rape appellant has been sentenced to undergo imprisonment for life and pay fine in sum of Rs.50,000/-. For the offence punishable under Section 506 IPC the appellant has been sentenced to undergo RI for three years and pay fine in sum of Rs.10,000/-.

2. In sustaining the conviction of the appellant the learned trial judge has held that the testimony of the prosecutrix, examined as PW-1, inspires confidence and has

been corroborated through the testimony of Geeta PW-2. That the prosecutrix was subjected to a sexual intercourse had been held established with reference to the MLC Ex.PW-9/A which shows that the hymen of the prosecutrix had a tear. Further corroboration has been found with reference to the report Ex.PW10/C and Ex.PW-10/D of the Senior Scientific Assistant as per which human semen was detected on the vaginal swab slide of the prosecutrix as also the salwar worn by the prosecutrix which was taken into possession by the doctor, who examined the prosecutrix the day next when, as per claim of the prosecutrix, she was subjected to sexual intercourse.

3. As deposed to by the prosecutrix her father had abandoned her mother who died thereby compelling the prosecutrix to sleep in the compound of GTB hospital where the accused, who was known to her as a rickshaw puller, met her and assured her that he would keep her like his daughter and would arrange for her marriage when she grew up. Thereby winning her confidence he took her to his house at New Seemapuri and told her to tell the people around that the appellant was the son of her paternal uncle (Tau). That in the night after removing her salwar the appellant committed rape upon her and gave his underwear to her to clean the semen

which fell on her body. As per the prosecutrix the next day morning at 5:00 AM she told as to what had happened to her, to the landlady Geeta, by which time the accused had left to ply his rickshaw. In the evening, when he returned, Geeta made the appellant take her i.e. the prosecutrix to the police station where her statement Ex.PW-1/A was recorded.

4. Geeta PW-2 the landlady referred to by the prosecutrix in her statement stated that the accused had brought a girl in his room on 17.08.2005 and told her i.e. Geeta that the girl would be staying with him and the young girl told Geeta that the accused was son of her uncle. That the accused slept with the prosecutrix in his room and next day morning when prosecutrix was playing she told another lady that the accused had subjected her to rape, the lady told her said fact. She i.e. Geeta waited for the accused to return and then took accused along with prosecutrix to the P.S.

5. ASI Pushpa PW-10 posted at PS Seelampuri deposed that Geeta accompanied by the accused and the prosecutrix came to the police station and she recorded the statement Ex.PW-1/A of the prosecutrix and making an endorsement Ex.PW-10/A beneath the same got registered the FIR and took the prosecutrix to GTB hospital, where her MLC was conducted as per which there was evidence of the prosecutrix being

raped. That after the prosecutrix was medically examined, her Salwar and Vaginal Swab Slide duly sealed by GTB hospital was handed over to her which she seized as recorded in the memo Ex.PW-3/A and she sent the same for forensic examination along with an underwear got recovered by the appellant from his house. That forensic reports Ex.PW-10/C and Ex.PW-10/D were received by her.

6. Unfortunately, Dr.Monika who had medically examined the prosecutrix at GTB hospital had left the services and therefore Dr.Jyoti who was conversant with the handwriting of Dr.Monika proved the MLC Ex.PW-9/A and clarified that if hymen tear was an old injury, it would have been so mentioned. She clarified that if it is not mentioned that the hymen tear is a scar mark, it has to be treated that the hymen tear is a fresh injury.

7. After he was apprehended the appellant was medically examined and as per MLC Ex.PW-7/A it was opined that the appellant was capable of sexual intercourse and disclosed his age to be 42 years.

8. This then is the total evidence led at the trial.

9. It is urged by learned counsel for the appellant that the testimony of Geeta pertaining to what was spoken off by

the prosecutrix is hearsay evidence for the reason Geeta claims that one Yasmin told her that the prosecutrix has told Yasmin as to what transpired last night.

10. The argument of learned counsel for the appellant is well founded and is accepted.

11. But, we have the testimony of the prosecutrix which nails the appellant.

12. Discrediting the prosecutrix, learned counsel urges that in her examination-in-chief the prosecutrix claims to have told the landlady of her ordeal in the night at 5.00 A.M. in the morning and from the testimony of Geeta PW-2 as per whom when the prosecutrix was playing outside the house she told Yasmin on Yasmin asking her, that the appellant had subjected her to rape. Learned counsel further urges that why would the appellant take the prosecutrix and Geeta to the police station if he was accused of having raped the prosecutrix.

13. We do not know why the appellant volunteered to take prosecutrix and Geeta to the hospital but the fact is that he did so. Geeta claims so. The prosecutrix claims so. ASI Poonam PW-10 claims so.

14. None of them have been cross-examined with reference to their testimony that the appellant took prosecutrix and Geeta to the police station.

15. Learned trial Judge has dealt with this issue by recording an opinion that it is possible that under fear of public beating the appellant took the prosecutrix to the police station on being compelled by Geeta to do so. Well, this can be the reason why the appellant did so.

16. The fact of the matter remains that the two FSL reports Ex.PW-10/C and Ex.PW-10/D conclusively establish that the prosecutrix was subjected to sexual intercourse which is evidenced by the fact that human semen was detected on the vaginal swab slide as also the salwar which the prosecutrix was wearing. The prosecutrix claims that the appellant took her to his house. Geeta corroborates the prosecutrix of having seen the appellant bringing the prosecutrix to his room in the night of 17.08.2005.

17. The denial by the appellant to each and every incriminating circumstance and his rendering not a word of explanation compels us to hold that the evidence on record establishes the prosecutrix being subjected to sexual intercourse on the night of 17 and 18th August, 2005. The

prosecutrix spent the night in the room of the appellant. There may be some blemishes in the testimony of the prosecutrix but they are not of such serious nature so as to discredit her. Even the MLC Ex.PW-9/A of the prosecutrix evidences her being subjected to sexual intercourse. The reports Ex.PW-10/C and Ex.PW-10/D are the final nail in the coffin.

18. But, we have a problem with the sentence imposed by the learned trial Judge.

19. It is settled law that while imposing sentence the approach should be to start from the minimum sentence whenever prescribed and if aggravating circumstances are to be found to move towards the higher sentence prescribed.

20. Pertaining to the rape of a minor, factoring in the aggravating circumstances of the victim being a minor, the legislature has provided for a minimum sentence of 10 years with a maximum of imprisonment for life. Notwithstanding a minimum sentence being prescribed, discretion has been left with a judge, to after giving the reasons, impose a lesser sentence.

21. Thus, merely because the prosecutrix was a minor would be no reason by itself to impose the sentence to undergo imprisonment for life.

22. Another facet of the sentence imposed by the learned trial Judge needs a word to be penned by us.

23. Persuaded by emotions, the learned trial Judge has directed the appellant to pay fine in sum of Rs.50,000/- for the offence of rape and Rs.10,000/- for the offence of intimidation. It has been held that on fine being realized the same would be paid over to the prosecutrix.

24. Little has the trial Judge realized that the appellant is a rickshaw puller who earns his daily bread and by next morning has not a penny in his bag even for himself.

25. What is the use of directing such compensations to be paid where the accused has no means even to feed himself?

26. All throughout the trial and even in the appeal, the appellant has been represented by a Legal Aid Counsel which shows that the appellant has no means even to defend himself. Being a rickshaw puller, the appellant would have no funds to compensate the prosecutrix or to pay such a heavy fine.

27. Learned trial Judges are expected to be humane but are not expected to be persuaded by undue emotions. Practicalities of life have always to be kept in view.

28. We dispose of the appeal maintaining the conviction of the appellant for the two offences sustained by the learned trial Judge, but reduce the sentence for the offence of rape.

29. Maintaining the sentence for the offence punishable under Section 506 IPC, we modify the sentence imposed for the offence of rape by directing that the appellant shall suffer Rigorous Imprisonment for a period of 10 years for the offence punishable under Section 376(2)(f) IPC. Needless to state both the sentences shall run concurrently. The appellant shall also be entitled to the benefit of Section 428 Cr.P.C.

30. Since the appellant is still in Jail, we direct that a copy of this decision be sent to the Superintendent, Central Jail Tihar to be supplied to the appellant.

PRADEEP NANDRAJOG, J

SURESH KAIT, J

APRIL 16, 2010
'mr/nks'