

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. A. No. 316/2009

% Judgment decided on: 7th December, 2010

ASHOK KUMAR APPELLANT
Through: Mr. S.B. Dandapani, Adv.

Versus

THE STATE (NCT OF DELHI) RESPONDENT

Through: Mr. M.P. Singh, APP

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

A.K. PATHAK, J. (Oral)

1. This Appeal is directed against the judgment of Trial Court, whereby Appellant has been convicted under Section 376 IPC; sentenced to undergo rigorous imprisonment for 7 years and pay fine of Rs.5,000/-; in default of payment of fine to undergo simple imprisonment for six months.

2. Prosecution case as unfolded is that the Appellant, neighbour of prosecutrix 'X' aged about 13 years, took her

with him in his jhuggi after enticing her while she was playing outside her jhuggi on 7th July, 2007 at about 9.30 AM, thereafter, he bolted the door from inside. He forcibly tore her salwar. He also removed his pant. Thereafter, he raped her. Prosecutrix raised alarm at which her parents along with some persons of the locality arrived there. They found prosecutrix and the Appellant inside the jhuggi. Appellant was apprehended. Later on, he was handed over to the police officials.

3. At about 3:30 PM on 7th July, 2007, Ashok Kumar, father of the prosecutrix, went to Police Station Vasant Kunj and informed that his daughter aged about 14 years had been taken by the Appellant in his jhuggi forcibly and was raped. This information was recorded as DD No. 19-A and handed over to Woman Assistant Sub Inspector Saroj (Investigating Officer) for enquiry, who recorded statement of prosecutrix (PW1), wherein incident was narrated by her in the manner it has been described in para 2 hereinabove. On the basis of her statement, FIR No. 484/2007 (Ex. PW6/B) under Sections 376/506 IPC was registered.

4. Prosecutrix was taken to Safdarjang Hospital where she was clinically examined by Dr. Smita. Before the doctor

prosecutrix stated that she had been forcibly raped by Ashok (Appellant). This fact has been recorded by the doctor in the MLC. Doctor found marks of injuries on her face near left eye. Hymen was also found torn. No bleeding or other marks of injuries were noticed. Cervical swab, vaginal swab and salwar of the prosecutrix were sealed by the doctor separately and handed over to the Investigating Officer.

5. Appellant was arrested. He was medically examined at Safdarjang Hospital on 7th July, 2007 itself. Doctor opined that there was nothing to suggest that the appellant was incapable of performing sexual intercourse. Baniyan and underwear of the Appellant were sealed by the doctor and handed over to the Investigating Officer. Age of the prosecutrix through radiological examination was got determined at Safadarjang Hospital on 23rd July, 2007. After conducting radiological examination and going through x-ray reports of shoulder joint, wrist joint, elbow joint and pelvis with hip joint of the prosecutrix, doctor opined the age of prosecutrix between 14 to 16 years.

6. Statement of the prosecutrix under Section 164 Cr.P.C. was recorded by the Metropolitan Magistrate on 10th July, 2007, wherein she had narrated the incident in the same

manner in which it had been described by her in the FIR except that she added that Appellant had inserted his male organ inside her against her wishes and when she cried he scratched her face and threatened to kill her.

7. Cervical swab, vaginal swab, pubic hair and salwar of the prosecutrix as well as underwear, baniyan and blood sample of Appellant were sent to Central Forensic Science Laboratory (CFSL) Kolkata and its report was obtained. No semen was detected on the cervical swab, vaginal swab and salwar of the prosecutrix as well as on her pubic hair. However, semen was detected on the underwear of Appellant.

8. Appellant was sent up to face trial for having committed offences under Sections 376/506 IPC by filing a charge-sheet in the court of Metropolitan Magistrate, who took cognizance of the offence and committed the case to Sessions Court, since offence under Section 376 IPC is exclusively triable by the Sessions Court.

9. Charges under Sections 376/506 IPC were framed against the appellant on 16th November, 2007 by Trial Court to which he pleaded not guilty and claimed trial.

10. Prosecution examined 14 witnesses in support of its story. Prosecutrix was examined as PW1; her parents Ashok Kumar and Shanta were examined as PW2 and PW3 respectively. These are the material witnesses to prove the incident of rape. Dr. Smita, who had clinically examined the prosecutrix, had been examined as PW4. Shri Vikas Dhull, Metropolitan Magistrate, who had recorded the statement of prosecutrix under Section 164 Cr.P.C., had been examined as PW7, ASI Saroj, Investigating Officer, had been examined as PW12. Doctor Yogesh tyagi, who had medically examined the Appellant, has been examined as PW 11. He has deposed that on medical examination of Appellant he did not find anything to suggest that Appellant was incapable of performing sexual intercourse. All other witnesses are formal in nature, having been joined with the investigation at one or the other stage.

11. After the prosecution closed its evidence, statement under Section 313 Cr.P.C. of the Appellant was recorded, wherein entire incriminating material, which had come on record, was put to him. Appellant denied having taken the prosecutrix with him in his jhuggi and committing rape upon her. However, he admitted that he was neighbour of

prosecutrix. He claimed himself to be innocent. He stated that parents of prosecutrix had demanded money from him on 5th July, 2007 which he had promised to pay. However, unfortunately his uncle died on 5th July, 2007, therefore, he had to go to his village. He returned on 6th July, 2007. For that reason he could not arrange money. In the evening when parents of the prosecutrix demanded money from him, he told them that he was not able to arrange money. At this, they quarreled with him in the morning of 7th July, 2007. Thereafter, father of the prosecutrix, along with 4/5 persons, gave beatings to him. He ran away from there and reached at a dhaba on the main road where he was again caught hold by some boys and given beatings. He fell unconscious and was saved by two police officials. Thereafter he was taken to the police station and later on implicated in this case, since he refused to pay Rs.50,000/- to ASI Saroj. The fact remains that the appellant has not led any evidence in his defense, in absence whereof, defense taken by him has remained unsubstantiated. Even otherwise, it is highly improbable that parents of the prosecutrix had implicated the appellant on the false charges of rape of their daughter, which had brought

them to disrepute, inasmuch as jeopardized her marriage prospects.

12. Learned counsel for the Appellant has vehemently contended that prosecutrix is not a trustworthy and reliable witness. She had taken shifting stand at different stages. In the FIR, she had stated that Appellant took her with him to his jhuggi after enticing her, after tearing her salwar he did “galat kam” with her. As against this, in her statement recorded under Section 164 Cr.P.C. she has stated that Appellant inserted his male organ inside her against her wishes and when she raised alarm he scratched her face and threatened that he would kill her. It is contended that in the FIR she had not stated that Appellant had penetrated his male organ inside her nor had she stated that when she raised alarm, he scratched her face and threatened her with dire consequences. It is further contended that while deposing in court prosecutrix had stated that Appellant had taken her with him in his jhuggi on the pretext of giving toffee to her, whereas in her cross-examination, she had stated that accused had pulled her hand. She had not stated that Appellant scratched her face and threatened that he would kill her. Thus, her testimony has to be rejected. I do not find

much force in the above contentions of learned counsel for the Appellant. The discrepancies, as pointed out, are minor in nature and would not make much difference as regard to the main incident of rape. These minor discrepancies are not sufficient enough to discredit the statement of prosecutrix as a whole which otherwise is consistent on material points. A witness is not supposed to give a parrot-like version every time when he/she is asked to narrate an incident. Minor variations, are bound to arise and in fact, such variations make a witness natural and trustworthy and rule out tutoring. In the FIR, prosecutrix had stated that Appellant did “galat kam” with her. Investigating Officer has recorded the word “rape” next to the word “galat kam”. This shows that even at that initial stage prosecutrix had made it clear to the Investigating Officer that Appellant had raped her and for this reason the word “galat kam” was clarified. Before the Metropolitan Magistrate, prosecutrix had categorically stated that Appellant had inserted his male organ inside her. While deposing in the court she has repeated the same thing. The import of her statements given at three different stages is the same that the Appellant had forcibly taken her inside his jhuggi, tore her salwar, inserted his penis in her vagina.

13. Learned counsel for the appellant has next contended that no semen was found on the Salwar, cervical swab, vaginal swab and pubic hair of the prosecutrix, which fact, belies the allegations of rape. This contention of learned counsel needs to be rejected straightway. Ejaculation is not necessary for constituting an offence of rape. Penetration is sufficient to constitute offence of rape within the meaning of Section 375 IPC. Bare perusal of explanation to Section 375 IPC makes it clear that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

14. Counsel for the Appellant has next contended that there is material discrepancy with regard to the apprehension of the Appellant after the incident. PW1, though in her examination-in-chief, had deposed that on hearing her cries people of neighbourhood and her father reached there and saved her and apprehended the appellant. However, in her cross-examination she stated that Appellant had run away when her parents and neighbours came there. Later on, Appellant was caught while he was sitting in a hotel and was given beatings by her parents and neighbours. Police officials, who were present in the hotel, caught hold of Appellant in the morning and thereafter they went to the

police station. Against this, parents of the prosecutrix, PW2 and PW3, had stated that that on hearing cries of their daughter they went to the jhuggi of Leelu Ram, where Appellant was present along with their daughter. Their daughter was crying and was having some scratches on her face. Her salwar was torn. Their daughter informed that Appellant had committed rape upon her. Appellant was apprehended by them and taken to the police station. It is contended that this statement is suspicious in view of the answer elicited from PW1, in her cross-examination that after the incident appellant had run away and later on he was found sitting in a hotel in the morning and was apprehended from there. According to the learned counsel for the Appellant, inconsistent stand taken by the witnesses in this regard makes whole story of the prosecution doubtful. I do not find any force in this contention of learned counsel either. PW1, PW2 and PW3 are consistent in saying that PW2 and PW3 had reached the spot immediately after the incident on hearing cries of prosecutrix and apprehended the appellant. It may be possible that Appellant may have tried to run away and had been chased and apprehended and thereafter handed over to the police. Admittedly, statement of the

prosecutrix in court was recorded after about seven months and for this reason also there is possibility of her faltering in giving exact miniscule details post incident, more so, when she might have been traumatized by the incident of rape. Be that as it may, some variations regarding post incident events with regard to the apprehension of the appellant by itself would not be sufficient to discredit the unblemished testimony of PW1, to the effect that Appellant had taken her to his jhuggi after enticing her and had committed rape upon her. Arguments of learned counsel on this point, thus, are rejected.

15. From perusal of statement of PW 1 it is clear that the appellant had taken the prosecutrix with him in his jhuggi forcibly, tore her salwar and raped her; when she raised alarm, he scratched her face and threatened that he would kill her. In her medical examination bruises were noticed on her face. This medical evidence corroborates her statement that when she raised alarm appellant had scratched her face. In fact, prosecutrix did raise alarm upon which her parents PW 2 and PW 3 reached there and found appellant and the prosecutrix in the jhuggi. PW 2 and PW 3 have corroborated this fact. From the testimony of prosecutrix PW 1 it has been

conclusively proved that appellant had committed rape upon her.

16. Learned counsel has next contended that prosecutrix was habitual of sexual intercourse. She has, in her cross-examination, had admitted that prior to the incident also she had sexual intercourse with one Mahesh, who was her brother's brother-in-law. She did not inform about this to her parents. Thus, it is contended that prosecutrix cannot be believed being habitual of having sexual intercourse with strangers. Hymen tear was old. In the absence of corroboration from medical evidence, no credence can be placed on the sole testimony of prosecutrix. I do not find any force in these contentions of the learned counsel. Merely because prosecutrix had admitted having been violated once by one Mahesh, prior to the incident, would not imply that she was habitual of having coitus with strangers. There is no law that the statement of a victim of rape needs corroboration from medical, scientific or any other independent evidence. In fact, if the statement of victim of rape is trustworthy and reliable, same alone can be made the basis of conviction. Court is not to look for corroboration in rape cases if the prosecutrix is found trustworthy and reliable

witness. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the court should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found reliable. In this case I find statement of PW 1 to be trustworthy and reliable and sufficient enough to conclude beyond shadow of reasonable doubt that it is the appellant who had committed rape upon her.

17. No other argument has been advanced nor any other point pressed.

18. For the foregoing reasons, conviction of the Appellant under Section 376 IPC is maintained.

19. Learned counsel has next contended that Appellant is a poor person; he is young man of 22 years of age; he was not involved in any other offence; he is in incarceration for about 3 years, therefore, he may be handed down sentence already undergone by him. Section 376 IPC envisages that an accused of rape shall be punished with imprisonment, which shall not be less than seven years.

However, proviso to this section empowers a court to reduce the sentence less than minimum prescribed for adequate and special reasons to be mentioned in the judgment. In this case, learned counsel has failed to disclose any special reason for reducing the sentence less than the minimum prescribed under the statute. In a case of rape, a woman not only suffers physical assault but the scars of incident remain imprinted on her mind for a long time. Accordingly, I am not inclined to order for release of appellant on the sentence already undergone by him.

20. Appeal is dismissed.

21. A copy of the order be sent to Superintendent Jail for serving it on the appellant.

A.K. PATHAK, J.

DECEMBER 07, 2010

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