

Judgment Reserved on: March 3, 2010

Judgment Pronounced on: March 12, 2010

% Raj Kumar @ Petal ... Appellant
Through: Mr. Baldev raj & Ms. Swati Shukla,
Advocates

The State (Govt. of NCT of Delhi) ... Respondent
Through: Mr. Amit Sharma, Additional Public
Prosecutor for State.

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

1. To repel the charge of rape of a married woman, the plea of consent is being put forth on behalf of the appellant/accused in

this appeal. The incident is of night intervening 17th and 18th March, 2004.

2. The version of the prosecutrix (PW-1), aged about twenty two years, is that her husband was not present in the house at the time of this incident and appellant/accused along with co-accused came there and enquired about the owner of the house and had told the prosecutrix (PW-1) to call the owner of the said house, who was said to be residing in a nearby area. The prosecutrix (PW-1) innocently did so and thereafter, appellant expressed desire to have some food and his co-accused went away to fetch the food and during the intervening period, appellant/accused had misbehaved with the prosecutrix (PW-1) and when she resisted, he had torn her clothes and had forcibly raped her. Attempt by the prosecutrix (PW-1) to raise voice was stalled by the appellant/accused by closing her mouth. On the pretext of urinating, prosecutrix (PW-1) had managed to escape from the spot while locking the appellant/accused in the house and she had informed the neighbours and this matter was reported to the police, which led to registration of FIR No. 221 of

2004, under Section 376/34 of the IPC, at Police Station Nangloi, Delhi.

3. The law was set into motion on the statement of the prosecutrix (PW-1). During the investigation, medical examination of the prosecutrix (PW-1) was got done. Since the arrest of the appellant/accused was from the spot, his medical examination was also got done and he was arrested in this case. The exhibits of this case were sent for analysis. Investigation in this case came to a close with the filing of the charge-sheet against the appellant/ accused and his co-accused for the offence under Section 376 (g)/34 of the IPC. The trial had commenced, as the appellant/accused and his co-accused chose to contest the charges framed against them in this case. Out of the deposition of thirteen witnesses, the deposition of the prosecutrix (PW-1) was the one which was referred to, during the hearing of this appeal.

4. The plea taken by the appellant/accused before the trial court was of false implication because of a loan dispute. The evidence led by the appellant/accused and his co-accused before the trial court was of three witnesses. The first defence witness

had deposed regarding the plea of *alibi* taken by the co-accused Deepak and the second witness was a jail official who had said before the trial court that the prosecutrix (PW-1) had come to meet the co-accused and the third witness was a neighbour who had purportedly informed the police about this incident. The trial of this case ended with the conviction of the appellant/accused for the offence of rape simplicitor and impugned order on sentence of 5th February, 2008, orders for imprisonment of the appellant/accused to rigorous imprisonment for seven years with fine.

5. Arguments advanced by both sides have been duly considered and with the active assistance of the Counsel for the parties, the evidence on record has been looked into.

6. To probablise the plea of consent, the contention advanced on behalf of the appellant/accused was that the prosecutrix (PW-1) did not raise any alarm and she had not suffered any injury on her person nor purportedly torn clothes were seized and ultimately, the FSL Report on record does not connect the appellant with the offence in question. According to learned Counsel for the appellant, prosecutrix (PW-1) has deposed

against the appellant/accused in order to save herself and aforesaid circumstances clearly show that the prosecutrix (PW-1) was a consenting party and therefore, the conviction of the appellant is bad in law. Attention of this Court has been drawn to the decisions reported in *"Dilip vs. State of M.P. (SC)" 2001 (4) RCR (Criminal) 383*; *"State of Rajasthan vs. Kishanlal" 2002 (2) RCR (Criminal) 853*; *"Pardeep Kumar vs. Union Administration, Chandigarh" 2006 (4) RCR 35*; *"Kuldeep K. Mahato vs. State of Bihar" 1998 (3) RCR (Criminal) 799* and *"Bal Kishan v. State of H.P." 2008 (4) JCC 2887* to support the aforesaid plea of consent.

7. Mr. Amit Sharma, learned Additional Public Prosecutor for respondent-State, with his usual vehemence not only defends the impugned judgment but asserts that the plea of consent is not at all evident from the evidence appearing on record of this case. According to the learned Additional Public Prosecutor for State, decisions cited are clearly distinguishable on facts and the plea of consent remains unsubstantiated and the impugned judgment is well reasoned and deserves to be upheld.

8. The Apex Court in the case of *Om Prakash V State of Uttar Pradesh*, **AIR 2006 SC 2214**, has pertinently observed as under:-

“The Indian women has tendency to conceal such offence (of rape) because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after staking her own prestige and honour”.

9. The fate of this case depends upon the testimony of the prosecutrix (PW-1), which is to be appreciated in the light of the plea of consent taken by the appellant/accused in this case. Before doing so, it is noticed that the plea which was put-forth before the trial court was of false implication due to some loan transaction and there was no whisper about the plea of consent. It is not the case of the appellant's Counsel that the plea of consent was taken before the trial court. Be that as it may. The evidence of the prosecutrix (PW-1) has to be independently and

objectively appraised by this Court and upon doing so, this Court finds that except in the suggestion to the prosecutrix (PW-1) of being a consenting party, the tenor of the cross-examination of the prosecutrix (PW-1) does not substantiate the plea of consent. For instance, the seized torn clothes of the prosecutrix (PW-1) have been duly identified by her at the time of her deposition and there is no cross-examination regarding the said clothes being not torn. Infact, they were torn, as per the deposition of Dr. Chetna (PW-2), which remains unchallenged by the defence. Therefore, it cannot be said that there was no resistance from the prosecutrix (PW-1). It has come in the evidence of the prosecutrix (PW-1) that she had not raised alarm after the incident to seek help of neighbours because none was available and as she was not on talking terms with anyone in the neighbourhood.

10. The categoric stand of the appellant/accused is of his having sexual intercourse with the prosecutrix (PW-1), therefore, the limited question is as to whether it was with consent or without consent of the prosecutrix (PW-1). Probability factor militates against the plea of consent for the reason that it is highly unlikely that the prosecutrix (PW-1) would consent to have

a sexual intercourse with anyone, in the presence of a third person.

11. There can be no precedent in criminal cases, as the facts of one case are different from the facts of another case. The decisions cited have been perused and it is found that the plea of consent in these decisions have been accepted by the Court in the facts of those cases. Absence of injury on the person of the prosecutrix (PW-1) is one of the circumstance but cannot be the sole circumstance to infer the plea of consent.

12. In the face of the evidence of the prosecutrix (PW-1) on record, it cannot be reasonably inferred that the prosecutrix (PW-1) was a consenting party. Consequentially, this Court finds that the conviction of the appellant for the offence of rape is well borne out from the evidence on record and merits no interference by this Court in this appeal. The sentence imposed upon the appellant/accused is minimum, as provided under the law. No adequate or special reason has been shown to reduce the sentence to a period less than the minimum provided for the offence in question.

13. Resultantly, the impugned judgment and order of the trial court are upheld and this appeal is dismissed. Appellant is in custody. He be apprised of this order through the concerned Jail Superintendent.

14. This appeal and pending application, if any, is accordingly disposed of.

Sunil Gaur, J.

March 12, 2010
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