

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

Date of Reserve: September 28, 2010

Date of Order: 18th November, 2010

+ Crl.A.No.697/2010

%

18.11.2010

AJAY @ LOVELY

... Petitioner

Through: Mr. Sidharth Luthra, Sr. Advocate
With Mr. Manu Beri, Advocate.

Versus

STATE

... Respondent

Through: Mr. O.P. Saxena, Addl. PP

JUSTICE SHIV NARAYAN DHINGRA

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

JUDGMENT

1. This appeal has been preferred against judgment dated 4th May, 2010 whereby the appellant was convicted under Section 376 IPC and the order on sentence dated 7th May, 2010 whereby the appellant was sentenced to RI for seven years and a fine of ₹15,000/-.
2. In brief, the prosecution's case is that the prosecutrix and her family members used to live in the tenanted premises in Dasram Niwas, Kallu Mohalla, Garhi, New Delhi. On 5th July, 2005, prosecutrix along with her younger sister had gone to the school in Sant Nagar for admission of her younger sister in 5th Standard. When she came out from the school with her younger sister between 11.30 a.m. and 12.00 noon, the accused, son of the landlord, was found standing outside the school in

a Maruti car. He asked the prosecutrix to accompany him as he would get her a job. The prosecutrix and her younger sister sat in the car. The younger sister was asked to get down near the house and the accused took prosecutrix in the car to Swarupa Mohalla near Chaupal on the pretext of introducing her to the house owner for getting a job. There she was taken to a lonely room and was raped by the accused. After rape, the prosecutrix was left and was told to go back home and not to report about the incident to anyone. The mother of the prosecutrix was not at home since she was away to Kanpur because of death of her mother [grand-mother (nani) of the prosecutrix]. The father of the prosecutrix was lying ill at home. The mother returned back from Kanpur on 10th July, 2005. The prosecutrix did not tell anybody about the rape till her mother came back. When her mother came back on 10th July, 2005, she told this incident to her mother. The first thing the family did was to leave the tenanted house on 11th July, 2005 itself. However, the father of the prosecutrix became serious and was admitted to hospital on 12th July, 2005. The incident was not reported to the police until 6th August, 2005. It was on 6th August, 2005 when the incident was reported to the police. On 9th August, 2005, the father of the prosecutrix expired in Safdarjung Hospital where he was lying admitted in a critical condition.

3. After lodging of report by the prosecutrix on 6th August, 2005, investigation was conducted into it and an NGO was also informed by Investigating Officer so that the prosecutrix may get help of an independent person.

4. During trial, the prosecutrix (PW-3) gave a detailed version as to how she was taken from the school in a car by accused and how her younger sister was dropped near the home and she was taken to a lonely room where she was raped. She also described how she resisted the attempts of the accused but was slapped and the accused forced himself upon her. In cross-examination of the prosecutrix, a bare denial of the incident was suggested. It was not suggested to prosecutrix that the accused was not present outside the school or that she was not taken into the car by the accused or that her younger sister was not dropped or that she was not taken by the accused in the car on the pretext of getting her a job and then taken to a lonely room where despite resistance of the prosecutrix, she was raped.
5. The mother of the prosecutrix appeared as PW-4 and explained as to why there was delay in lodging FIR. She stated that when she came back from Kanpur on 10th July, 2005, she found her husband was lying ill in a serious condition. Her daughter was in depression due to the incident of rape and wanted to commit suicide. Her son was also ill. She did complain to the father of the accused but could not report the matter to the police due to above circumstances. During her testimony, when she was examined in the Court, the counsel for defendant sought deferment of cross-examination on the ground of his busyness in another Court. She opposed deferment and informed the Court that she had received threats from the accused and had been threatened not to depose in the Court. However, the Trial Court despite her

opposition, deferred the cross-examination on the ground that counsel was busy in some other Court.

6. The mother of the prosecutrix was given suggestion that the accused had been falsely implicated due to money transaction and a document 'Exhibit PW-3/D1' was put to the mother as well as to the prosecutrix. The document allegedly had the signature of husband of PW-4 namely Vijay Kumar and PW-4 Maya Devi herself.
7. It is argued by the counsel for the appellant that it was a case of consensual intercourse and not a case of rape. He submitted that as per bone age determination, the age of prosecutrix was determined between 16.4 years and 19 years and the fact that the prosecutrix did not lodge a report about her rape soon after the incident reflected her consent. He submitted that subsequent lodging of report by the mother seemed to be motivated in order to extract money and there was monetary transaction between the parties.
8. In order to infer consent in a sexual act, there should be sufficient evidence suggestive of consent on record. In the present case, there is no suggestion given to the prosecutrix during cross-examination that she was a consenting party or she was in love with the accused. In fact, this suggestion could not have been given because the accused at the time of incident was a married person and he was not an unmarried young lad who had fallen in love with the prosecutrix. Rather he was son of the landlord where the prosecutrix was living with her family, perhaps in a pitiable condition. Her father was unemployed.

He used to work with caterers as and when he could get work. She and her brother both used to work in a factory about a month back. In July, 2005, when the incident took place, she was unemployed and her brother also seemed to be ill and it seems that the accused exploited the poor financial condition of the prosecutrix and assured her that he would get her a job with somebody and took her to a lonely place and then ravished her. It is thus not a case of consent. Merely because the prosecutrix accompanied the accused in the car since she was assured of being taken to an employer would not mean that she had consented for being raped or consented for sexual intercourse. I, therefore, consider that this theory of consent, now sought to be introduced at the appeal stage, does not appeal to the reasoning. Even otherwise no case has been built up during cross-examination of prosecutrix or other witnesses about consent. No suggestion had been given to the prosecutrix that she had ever been meeting the accused. Rather, the prosecutrix had stated that she was not talking with the accused. She was only a tenant in the house and it was the accused who had assured her of getting a job.

9. The other plea taken by the counsel for the appellant is of false implication of the accused because of the financial transaction. It has not been stated as to what was the financial transaction between the accused and the parents of the prosecutrix. No suggestion had been given either to the prosecutrix or to her mother about any financial transaction. Exhibit PW-3/D1 does not reflect any financial transaction. It only reflects that a sum of ₹27,000/- which was taken on loan was

returned back. Moreover, this documents is not admitted by the mother of the prosecutrix, one of the signatories. She stated that she and her husband were made to sign blank paper for tenant verification. Her's this statement was not refuted and no suggestion was given that this document was not got signed for tenant verification. Moreover, a look at the documents itself shows that the document does not seem to be genuine. The document is not in the handwriting of Vijay Kumar or Maya Devi, i.e. signatories because the handwriting of signatories and handwriting of the contents of documents are different. The document bears date of 12th July, 2005, whereas witness Maya Devi PW-4 categorically stated that they had left the house of the accused on 11th July, 2005. No suggestion was given to PW-4 that they had not left the house on 11th July, 2005. In the document dated 12th July, 2005 it is stated that they were going to vacate the house whereas the house had already been vacated on 11th July, 2005. Thus, this document could not have been prepared on 12th July, 2005. Moreover, no suggestion had been given to Maya Devi or to the prosecutrix of any loan transaction between Vijay Kumar, Maya Devi and landlord or his son. Arjun Verma, who is stated to be the executor of the document was not examined. DW-1 Manoj Kumar in his testimony stated that on 12th July, 2005, he was called by Arjun Verma at his house at the time of execution and on that day, Jai Prakash handed over ₹27,000/- to Vijay Kumar and Maya Devi. But in cross-examination, this witness stated that the receipt was prepared as Vijay Kumar had lost ₹27,000/- in gambling to Ajay Kumar. If, Vijay Kumar had lost ₹27,000/- gambling to Ajay Kumar, it was Vijay Kumar who had to pay money to Ajay

Kumar s/o Arjun Verma. Ex. PW-3/D-1 however shows that Ajay Kumar paid ₹27,000/- to Vijay Kumar. In fact, testimony of this witness fortifies the other part of complaint of Maya Devi which she made along with the report of rape of her daughter that her husband was robbed of ₹80,000/-. It seems that her husband was made to gamble by Ajay Kumar, the accused and in the gamble Vijay Kumar lost considerable money to Ajay Kumar. In any case this document is not reflective of any money transaction due to which Ajay Kumar could have been falsely implicated. Rather, this document reflects that all money matters were settled between the two. If money matters had been settled there was no question of falsely implicating the accused. I, therefore, consider this theory put forward by the appellant counsel must fail.

10. The other argument put forward by appellant counsel is about delay in lodging FIR. There is no doubt that there is about one month delay in lodging FIR. But one has to keep the circumstances in mind in which the prosecutrix was placed. The prosecutrix was living in a tenanted house with her parents and one brother and sister. Her mother was away to Kanpur and her father was lying ill in the house when this incident took place. The subsequent death of father shows that the illness of the father of the prosecutrix was not a trivial illness. She being a girl of teen age would not have gathered courage to report the incident to her ailing father immediately after the incident. The moment her mother came back on 10th July, 2005, she reported the incident to her mother. The first thing her mother did was to vacate the house as

she found her daughter in a state of shock and in a depressed condition with inclination to commit suicide. After she removed her daughter from the house of the landlord, she had to get her husband admitted in a hospital on very next day, that is, 12th July, 2005. Her husband remained admit in hospital from 12th July, 2005 till 9th August, 2005 when he died. It is obvious that she had to attend to her husband, to her ailing son and manage a house where they had shifted from the earlier tenanted premises. She had also to weigh the options whether she should report the matter against landlord as her first report made to PCR shows that the landlord family belonged to Gujjar community. I consider that the delay in lodging FIR has been sufficiently and reasonably explained in this case by the mother. There seems to be no reason even otherwise for the prosecutrix to falsely implicate the accused. No suggestion has been given of any quarrel, going on between family of the prosecutrix and the family of the accused. No dispute about the tenanted premises or any other transaction has been suggested. Rather the moment the mother came to know of the incident, the first thing she did was to leave the house. If she had to falsely implicate the accused so as to extract money from the accused, she would have adopted the course of staying in the house and lodging a report. But the very fact that she left the house of the landlord first, attended to her ailing husband, ailing son and then lodging a report shows that there was no intention on her part to falsely implicate the accused. It only seems that her circumstances were such that she was not in a position to prosecute or to lodge a report and had to weigh pros and cons of putting her teenaged daughter's honour at

stake. I, therefore, find that the delay in lodging FIR cannot be a ground for disbelieving the prosecution case.

11. In view of my above discussion I find that there was no force in the appeal. The appeal is hereby dismissed.

November 18, 2010
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SHIV NARAYAN DHINGRA, J.