

Judgment Pronounced on: March 15, 2010

% Raju @ Ikhlq ... Appellant
Through: Mr. Rajesh Mahajan, Advocate

versus

allied offence has been also imposed. The incident is of late evening of 21st August, 2005, and the place is roof of the house of the prosecutrix (PW-5). At the time of this incident, she was sleeping there.

2. As per the version of the prosecutrix (PW-5), appellant/accused came there and had committed the offence of rape and thereafter went away. After this incident, prosecutrix (PW-5) came crying to her mother (PW-6) and had narrated this incident to her. This matter was reported to the police after two days of this incident. The reason for the delay, as given by the mother (PW-6), is that the accused had threatened to kill if this matter was reported to the police. Since the prosecutrix (PW-5) had developed some medical complications after this incident, therefore, this matter had to be reported to the police. FIR No. 548 of 2005, under Sections 376/506 of the IPC, was registered at Police Station Ashok Vihar, Delhi, regarding this incident. Apart from the medical examination of the prosecutrix (PW-5), statement of the witnesses was recorded and the spot proceedings were conducted during the investigation of this case. Statement of the prosecutrix (PW-5) under Section 164 of the Cr.P.C. was also got recorded and the investigation of this case

stood concluded with the filing of the charge-sheet against the appellant/accused. It was followed by the trial, as the appellant/accused had not pleaded guilty to the charges framed against him for the offence under Section 376/506 of the IPC. The evidence recorded not only comprises the deposition of the prosecutrix (PW-5) and of her mother (PW-6), but also of Doctor Archana Gupta (PW-8) and Investigating Officer (PW-11).

3. The stand of the appellant/accused before the trial court was of denial and of his false implication in this case. Though the plea of *alibi* was taken by him but no evidence to substantiate it was led by him before the trial court. The trial of this case ended with the conviction of the appellant/accused for the aforesaid offences, which is under challenge in this appeal.

4. Sum and substance of the submissions advanced on behalf of the appellant/accused is that there are discrepancies in the prosecution case, coupled with the delay in lodging of FIR of this case and the FSL Report does not incriminate the appellant/accused. According to the Counsel for the appellant, even if the prosecution case is taken as it is, still it does not constitute the offence of rape. At best, the offence, if any committed, is of

attempt to rape and the sentence of about three years, already undergone by the appellant/accused, would be adequate for the offence of attempt to rape. Reference has been made to the decision in *“Virender vs. The State of NCT of Delhi”* **2009 [4] JCC 2721**, to urge that the benefit of contradictions in the prosecution case accrues to the appellant/accused in a case like the present one.

5. The aforesaid submissions have been stiffly refuted by Mr. Amit Sharma, learned Additional Public Prosecutor for respondent-State, who points out that the delay occasioned stands sufficiently explained and shortcomings, if any, in the deposition of the prosecutrix (PW-5) is of no avail, as the medical evidence on record clinchingly proves that the offence committed is of rape and not of attempt to rape.

6. First of all, the delay aspect has to be dealt with. The delay aspect has to be appreciated in such like cases in the light of the pertinent observations made by the Apex Court in *‘Dildar Singh V State of Punjab’* **AIR 2006 SC 3084**, which reads as under:-

“In the normal course of human conduct an unmarried girl who is victim of sexual offence would not like to give

publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate such incident. Overpowered, as she may be, by a feeling of shame her natural inclination would be to avoid talking to anyone, lest the family name and honour is brought into controversy. Thus delay in lodging the first information report cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same on the ground of delay in lodging the first information report."

7. Prosecutrix (PW-5) has clearly stated in her evidence that she had felt pain in her private parts after appellant/accused had done 'galat kaam' with her. Cross-examination of the prosecutrix (PW-5) by the defence does not throw any light on the delay aspect because it was not for her to have reported the matter to the police ultimately. She had promptly told about happening of this incident to her mother (PW-6). She could not have done anything beyond than that. The explanation given by the mother (PW-6) for the delay is that the appellant/accused had threatened to kill her if this matter was reported to the police.

8. In the face of the evidence emerging on record, this Court finds that the delay occasioned in reporting this matter to the police is not fatal to the prosecution case. Regarding the

contradictions in the prosecution case, it is found that they are not material one. For instance, prosecutrix (PW-5) had claimed that she was sleeping on the roof of her house whereas her mother (PW-6) had stated that she was playing on the roof of the house. Most part of the deposition of the prosecutrix (PW-5) has been recorded in the question-answer form and it is found that the answers given to the questions put in the chief examination as well as in cross-examination are forthright and to the point. Simply because it has come in the cross-examination of the prosecutrix (PW-5) by the defence that her maternal grandfather had tutored her for deposing in the Court, her entire deposition does not get washed off. When the trial court had put a court question on the tutoring aspect, the prosecutrix (PW-5) had kept mum. In any case, why the prosecutrix (PW-5) would falsely implicate the appellant/ accused in this case, remains unanswered by the appellant/ accused. No suggestion to the prosecutrix (PW-5) has been given by the defence as to why she would falsely implicate the appellant/accused in this case.

9. It is worthwhile to notice that MLC (Ex. PW-8/A) of the prosecutrix (PW-5) mentions the name of the appellant/ accused as the culprit. Perhaps, it is for this very reason that Counsel for

the appellant had to take the plea of present case being of attempt to rape. Now it is to be seen as to whether the offence committed is of rape or of attempt to rape. For this, MLC (EX PW-8/A) of the prosecutrix (PW-5) is to be seen. It reveals that the hymen of the prosecutrix (PW-5) was torn and the recovered underwear of the prosecutrix (PW-5) was found to be blood stained. Simply because it was not having semen stains, it cannot be inferred that offence of rape has not been committed. This Court in "*Virender vs. The State of NCT of Delhi*" **2009 [4] JCC 2721** has reiterated the settled position that to constitute the offence of rape, even slightest penetration is sufficient and seminal emission is not necessary. Therefore, absence of semen stains on the underwear of the prosecutrix (PW-5) cannot be the basis to conclude that the offence committed is not of rape, but is of attempt to rape. Infact, not much is required to be said on this aspect for the reason that evidence of Doctor Anjali Gupta (PW-8), who has proved the MLC (EX. PW-8/A) of the prosecutrix (PW-5), remains unchallenged.

10. It is settled legal proposition in criminal matters that wherever there is material discrepancy in the prosecution case, the benefit obviously goes to the accused. This is what has been

reiterated in *Virender vs. The State of NCT of Delhi (Supra)* by this Court. There can be no dispute with this proposition. However, this Court does not find any worthwhile discrepancy in the prosecution case to reject the prosecution version, which has been found by the trial court to be consistent, trustworthy and on perusal of the same, even this Court approves the findings of the trial court and finds no hesitation in upholding the impugned judgment. Since the sentence awarded is minimum under the law for the offence in question, therefore, there is no scope for any interference by this Court in this appeal. On the quantum of sentence, no special or adequate reasons are forthcoming to award lesser sentence than the minimum sentence provided under the law. This appeal lacks substance and is accordingly rejected.

11. Appellant is in custody. He be apprised of this order through the concerned Jail Superintendent.

12. This appeal stand accordingly disposed of.

Sunil Gaur, J.

March 15, 2010

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