

HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL No. 573/2009

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Decided on 4th February, 2010

NAND KISHORE MEHTO Appellant

Through: Mr. Deepak Vohra, Adv.

Versus

STATE Respondent

Through: Mr. Manoj Ohri, APP for
State.

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? | Not necessary |
| 2. To be referred to Reporter or not? | Not necessary |
| 3. Whether the judgment should be reported in the Digest? | Not necessary |

A.K. PATHAK, J. (Oral)

1. Appellant has been convicted under Section 376 of the Indian Penal Code (IPC) by the learned trial court and sentenced to undergo rigorous imprisonment for seven years with fine of Rs. 10,000/- and in default of payment of fine, to undergo simple imprisonment for three months.

2. Appellant is brother-in-law (*sala*) of brother of prosecutrix. Appellant was living in a *jhuggi*, which was

adjoining to the house of prosecutrix. Appellant had come to Delhi from his village few months prior to the incident in search of a job. In fact, he had paid a sum of Rs. 35,000/- either to brother or father of the prosecutrix for arranging a job for him. However, appellant could not get any employment. On 25th September, 2006 prosecutrix was taken to All India Institute of Medical Sciences (AIIMS) at about 11:02 pm with the history of bleeding per vagina. On reaching hospital, mother of prosecutrix told the doctor that prosecutrix had gone out and when she returned, she was having massive bleeding per vagina. Accordingly, this fact was recorded in the MLC. Prosecutrix was referred to Senior Resident, Gynaecology. In the later part of the MLC it was recorded that the patient was sexually assaulted at 7 pm on 25th September, 2006. Doctor found hymen ruptured and first degree perennial tear with bleeding.

3. Duty constable, Vinay Kumar, who was posted at AIIMS, forwarded information to Police Station Hajrat Nizamuddin pursuant whereof D.D. No. 27A was recorded and handed over to ASI Jit Singh for enquiry, who reached AIIMS and obtained MLC of prosecutrix. However, prosecutrix was not found in the hospital. Thereafter, he went to the house of

prosecutrix but the same was found locked. On enquiring, neighbours informed that prosecutrix with her family members had gone out of Delhi. ASI Jit Singh again visited house of prosecutrix but neither the prosecutrix nor her family members made any statement before him on the pretext that prosecutrix was not well.

4. Later investigation was handed over to SI Saroj Bala, who on 20th October, 2006, visited the house of prosecutrix along with Ms. Garima, who working with a NGO Prayatn, and recorded statement of prosecutrix wherein she stated that in the evening of 25th September, 2006 she had gone to bathroom for urinating and when she was returning, appellant came there and pulled her inside a room, situated behind her house and made her to lay down in a bed; removed her *salwar*, when she tried to raise alarm he gagged her mouth from one hand, and did *galat kaam* with her. In the meanwhile, her mother came there and on seeing her, appellant got up and ran away.

5. On the basis of this statement of prosecutrix, FIR No. 709/2006 under Section 376 IPC was registered at Police Station Hazrat Nizamuddin. On 7th December, 2006. Appellant was arrested and was medically examined. Doctor

opined that there was nothing to suggest that appellant was incapable of performing sexual intercourse in normal circumstances. Blood sample of appellant was taken, sealed. Later on this was deposited in the Malkhana. Vaginal smear in sealed condition with seal of CMO AIIMS, which was earlier handed over to him in the hospital by the doctor, was deposited by him in the Malkhana. Subsequently, Vaginal smear of prosecutrix as well as blood sample of appellant was sent to FSL, Delhi and its report was obtained. As per FSL report, no semen was detected in the Vaginal smear and blood on the gauze cloth piece of the appellant was opined that of human.

6. After completion of investigation appellant was sent up to face trial for having committed the offence under Section 376 IPC, by filing a charge-sheet in the court of learned Metropolitan Magistrate who committed the case to Sessions Court for trial.

7. Charge under Section 376 IPC was framed against the appellant by the learned Additional Sessions on 28th February, 2007 to which appellant pleaded not guilty and claimed trial.

8. Prosecution examined ten witnesses to prove its story.

After prosecution closed evidence, statement of appellant

under Section 313 Cr.P.C. was recorded on 13th January, 2009 wherein entire incriminating material, which had come on record, was put to him. Appellant denied the same to be incorrect. He claimed himself to be innocent. He took a plea that he was falsely implicated by the parents of the prosecutrix in collusion with the prosecutrix in order to grab his money. Appellant examined his sister in his defence as DW1.

9. Learned trial Judge found testimony of prosecutrix PW2 trustworthy and reliable for concluding that appellant had committed rape upon her on 25th September, 2006 at about 7:00 pm. Testimony of PW3 Nanki Devi was also accepted as reliable and corroborative. As per the trial court, testimony of prosecutrix and her mother was supported by medical evidence. Consequently, appellant was convicted under Section 376 IPC.

10. I have heard learned amicus curiae, learned counsel for the State and perused the trial court record carefully. Learned counsel for the appellant has vehemently contended that there is an inordinate delay in lodging the FIR which is fatal in the facts of this case more so, when it remained unexplained. He further contended that immediately after the

incident PW8 ASI Jit Singh had reached the hospital but did not find prosecutrix or her family members present there. He even went to house of prosecutrix but no statement was made before him either by the prosecutrix or her mother that appellant had committed rape. PW5 Ms. Garima has also deposed that despite her repeated advice, neither prosecutrix nor her mother came forward to make a statement against the appellant. As per PW3 herself, she did not make any statement before the Police almost for a month. Even if it is presumed that prosecutrix was under shock or was unwell, even then it was always open for PW3 to make a statement before the Police but she did not do so. Not only this, conduct of the father of the prosecutrix PW1 Bhuneshwar Mehto, is also suspicious. He had admitted, in his cross-examination, that he was informed on phone regarding the incident by his wife while he was in Bihar, in spite of this, he did not make any effort to return to Delhi nor any steps were taken by him to lodge the FIR immediately on his return from the village. According to learned counsel, this unusual delay in lodging the FIR had remained unexplained and the appellant was, thus, entitled to benefit of doubt as false implication of appellant cannot be ruled out in view of certain admitted facts. Admittedly, appellant had paid a sum of Rs. 35,000/- to

the close relatives of the prosecutrix for getting a job for himself. However, neither the job was arranged nor money was returned. Not only this, PW2 categorically admitted, in her cross-examination, that her father had asked appellant either to marry her or to pay Rs. 1 lakh so as to marry the prosecutrix with someone else. It has been further contended that Vaginal smear of the prosecutrix was taken immediately after the incident but no semen was detected as per FSL report, which also rule out the rape.

11. As against this, learned counsel for the State vehemently contended that there is no reason to disbelieve the prosecutrix and her mother, who had categorically deposed that it is the appellant, who had raped the prosecutrix on the fateful day. He further contends that in cases of sexual offences there is initial hesitation on part of the victim to inform the Police, as the reputation of family remains at stake, inasmuch as, marriage prospects of the victim also gets in jeopardy. Delay in such cases of rape has to be ignored. Father of the prosecutrix was not in Delhi which also resulted in delay. Appellant was brother-in-law (*sala*) of prosecutrix's brother, for this reason also family of the prosecutrix initially might be hesitant to lodge FIR against him. Appellant was

asked to marry the prosecutrix or to pay Rs. 1 lakh so that she could get married elsewhere only after the rape, therefore, it cannot be said that he was falsely implicated in this case on his refusal to marry the prosecutrix or that he was blackmailed in any manner, whosoever.

12. I have considered the rival contentions of both the parties in the light of ocular as well as documentary evidence available on record. It is well settled that in a case of rape, mere delay in lodging the FIR, by itself would not be fatal to the prosecution case. However, the fact that report was lodged belatedly is a relevant fact of which, the court is under obligation to take note of this fact and the same has to be considered in the light of other facts and circumstances of the case. In a given case, court may be satisfied that the delay in lodging the report has been sufficiently explained, In the light of the totality of the evidence, the court, as a matter of fact, has to consider whether the delay in lodging report adversely affects the case of the prosecution. That is a matter of appreciation of evidence.

13. In this case, delay in lodging the FIR, coupled with other adverting circumstances, create suspicion about the veracity of prosecution story and makes the appellant entitled to

benefit of doubt. None of the witnesses had disposed that statement was not made by the prosecutrix or her mother, immediately after the incident, due to shame or with the fear of inviting disrepute or stigma on the prosecutrix for rest of her life or due to fear of ostracization in the society. The only plea taken was that the prosecutrix was not keeping well. This plea taken by the victim's family does not, inspire confidence and does not appear to be convincing. As per PW3, i.e. prosecutrix's mother, she had herself witnessed the incident. In such an eventuality, even if prosecutrix had not been keeping well, PW3 could have come forward to make a statement before the Police. MLC also does not indicates that prosecutrix was unwell, in fact, when SI Jit Singh reached the hospital, he did not find the prosecutrix there as she had already left for home. PW8 ASI Jit Singh even visited the house of the prosecutrix but found it locked. During his subsequent visits also, no statement was made before him. Not only this, PW3 even did not inform that she had witnessed the incident. PW5 Garima has categorically deposed that she visited the house of the prosecutrix on 26th September, 2006 and advised the family of prosecutrix to lodge a police report. According to the mother, prosecutrix narrated the incident of rape to her, this also shows that a plea taken that FIR was not

recorded as prosecutrix was unwell, is not convincing. In the facts of this case it cannot be said that prosecutrix and her family did not make statement promptly as they were hesitant due to variety of reasons including the fear of ostracization and to avoid disrepute to the family.

14. Prosecutrix was taken to AIIMS by her brother and mother. However, name of the appellant was not disclosed to the doctor. At the first instance, even incident of sexual assault was not disclosed. PW3 had told the doctor that prosecutrix had gone out and when she returned she was bleeding per vagina. Had PW3 witnessed the appellant raping her daughter, she would not have kept silent on this aspect and would have disclosed the name of the appellant to the doctor. In view of this, statement of PW3 that she had witnessed the appellant committing rape upon her daughter, loses its credit worthiness.

15. PW2 admitted in her cross-examination that her father had asked the appellant either to marry her or to pay Rs. 1 lakh so that she could be married elsewhere. Her this statement creates a doubt about the whole episode and also creates suspicion about the whole prosecution story. Contention of the appellant that he had been falsely

implicated by her parents on his refusal to marry the prosecutrix and to pay Rs. 1 lakh cannot be ruled out. Not only this, it has also been admitted by PW1 to PW3 that appellant had come to Delhi in search of a suitable job. Moreover brother of the prosecutrix had admitted, that his father had taken Rs. 35,000/- in order to secure a job for the appellant. Neither the job was arranged nor money was returned. In view of this, false charge of rape against the appellant cannot be ruled out.

16. It is no doubt true that the conviction, in a rape case, can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast shadow of doubt over her veracity. If the evidence of the prosecutrix is of such a quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony, then in that case it can be relied upon. In the instant case, I do not find her evidence to be of such quality.

17. Cumulative effect of the adverse circumstances as detailed above coupled with the fact that FIR was lodged after

about a month which delay remained unexplained, appellant is entitled to the benefit of doubt.

18. Accordingly, impugned order is set aside and appellant is acquitted of the charge under Section 376 IPC.

19. Appellant is in judicial custody. He be set free forthwith if not wanted in any other case.

20. Appeal is disposed of in the above terms.

A.K. PATHAK, J

February 04, 2010

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