

R-12

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

% Date of Decision: 15th March, 2010

+ **CRL. APPEAL NO.5/2008**

VIRENDER SINGH Advocate
Through: Ms. Shraddha Bhargava, Advocate

Versus

STATE Respondent
Through: Ms. Richa Kapoor, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J. (Oral)

1. Noting that none appears for the appellant at the hearing of the appeal we appoint Ms. Shraddha Bhargava Advocate on the panel of the Delhi High Court Legal Services Committee as the Amicus Curiae to argue the appeal.
2. Fee of learned counsel is fixed in sum of Rs.7,500/-, to be paid by the Delhi High Court Legal Services Committee.

3. With reference to the testimony of the prosecutrix Ms.'SB', believing her version to be true, the learned Trial Judge has convicted the appellant for the offence of having raped the prosecutrix.

4. Vide order on sentence dated 6.11.2007, holding that the appellant being a member of the police force justified imposition of sentence to undergo imprisonment for life, thus, sentence imposed upon the appellant is to undergo imprisonment for life for the offence of rape. For the offence of intimidating the prosecutrix i.e. the offence punishable under Section 506 IPC, the appellant has been sentenced to undergo RI for one year.

5. The appellant examined himself as DW-1 and before that when examined under Section 313 Cr.P.C, stated as under:-

"I was posted as constable at PS Kalkaji for about 1-1½ year prior to the date of my apprehension. During the course of my duty I met the prosecutrix while MCD official wanted to demolish a shutter placed by her at her shop cum residence. After that she also met me and complaint about a lady residing at B 133 behind her house. She gave me her mobile number as well as I also gave my mobile number to her. I alongwith ASI Anita conducted the inquire to that complaint and on 23/12/04 I went to her house alongwith ASI Anita where her father and retired ACP Hukum Chand Rana were present and subsequently a false case was registered by prosecutrix on the dictation of Hukum Chand Rana and I was arrested.

She used to call me on my cell phone occasionally and I also used to respond. I had a mobile phone number 9818165880 and Sangeeta had a mobile phone no. 9818105276. There are many calls exchange between before to the date of incident and also on the night of the alleged incident i.e. 23/12/04 details of these calls have been put by me in my cross examination of prosecutrix.

On 22/12/04 at about 10:15 p.m that Sangeeta accompanied me from her house to Jain Restaurant at Connaught Place and we took dinner there and remained there till 12 mid night. She told me that I should do something of her in laws and also the neighbourer with whom she had quarreled. She insisted that I should lodge false complaint against her in laws on which I told her that I will inform them of her intention. I came back to her house and she wanted me to drop her on the back side of her house and when she left the gypsy she left the purse in the gypsy and I then went to her house to deliver the purse, she asked me to take tea and she started seducing me which I resisted because of which she got annoyed. She also called me in the morning but disconnected it and on seeing missed call I called her and tried to pacify her. Her father is a close friend of Hukum Chand Rana Retired ACP and in consultation with them a false complaint was lodged and I was arrested because she apprehended that I might inform her in laws about her intentions of making false complaint. I would like to produce evidence in defence."

6. A perusal of the testimony of the prosecutrix shows that she was having a matrimonial problem with her husband and the appellant who was a beat constable in the area and had probably been helping her in the said matter.

7. The prosecutrix claimed that on 23.12.2004 at

around 9:30 PM the appellant came to her house and asked her for a glass of water. As she went to the kitchen to bring water, appellant followed her and threatened her using his service pistol and compelled her to succumb to his demand for sexual favour. As per the prosecutrix after satisfying his lust the appellant remained in her house till 5:30 AM. She was confused and did not know what to do till she consulted her parents and only thereafter reported the matter to the police the next date i.e. on 23.12.2-004 at around 1:45 PM.

8. On being cross-examined the prosecutrix admitted that telephone No.26210874, a landline number, was installed in a boutique being run by her and that she was the subscriber of a mobile telephone having No.9818105276. She neither affirmed nor denied that the mobile number of the appellant was 9818165880.

9. During cross-examination she admitted having given her mobile number to the appellant. Confronted with various calls made from the landline No.26210874 and the mobile No.9818105276 to the mobile No.9818165880 she feigned ignorance of having rung up the appellant. But, she admitted: *'the accused used to telephone to me and I also used to telephone him in case of any difficulty'*.

10. Pertaining to the events between 9:30 PM to 5:30

AM on the intervening night of 22nd and 23rd December 2004 the prosecutrix stated that no person had visited her house during said time period and that she did not remember whether the appellant received any call on his mobile number. She denied having made a call at mobile number of the appellant at 21:35 hrs on 22.12.2004 or that the appellant rang her on her mobile number at 12:45 AM i.e. in the middle of the night. She volunteered: *'the accused might have telephoned on my mobile and left it open for 8 minutes'*.

11. As noted hereinabove, the defence of the appellant was that he did nothing of the sort as claimed by the prosecutrix and that the prosecutrix has been in constant touch with him through their respective mobile telephone numbers and that the two had taken dinner at Jain Restaurant at Connaught Place where they remained till 12:00 midnight. Thereafter, he left the prosecutrix to her house.

12. We note that the mobile call details of the telephone No.9818165880 i.e. of the appellant have been marked 'B' during trial by the learned Trial Judge and the same shows 7 calls made by the appellant to the prosecutrix on 22.12.2004 between 8:05 PM to 5:57 AM the next day i.e. 23.12.2004. The same also shows that at 11:35 PM on 22.12.2004 the prosecutrix has made a call to the appellant.

13. Interestingly, the 8 calls exchanged between the prosecutrix and the appellant show that the appellant was within the vicinity of cell tower No.1603 on three occasions, at the vicinity of cell tower No.1601 on one occasion, in the vicinity of tower 20581 on one occasion, in the vicinity of tower No.3271 on two occasions and in the vicinity of tower No.23 on one occasion. The date and the time of the said 8 calls are as under:-

S.No.	Date	Time
1.	12/22/2004	20:05:30
2.	12/22/2004	20:40:09
3.	12/22/2004	20:48:52
4.	12/22/2004	21:24:46
5.	12/22/2004	21:31:31
6.	12/22/2004	21:35:28
7.	12/23/2004	00:40:45
8.	12/23/2004	05:57:07

14. It is apparent that between 9:30 PM of 22.12.2004 and till 5:57 AM on 23.12.2004 the appellant was within the vicinity of different mobile towers.

15. The aforesaid prima facie belies the claim of the prosecutrix.

16. How has the learned Trial Judge dealt with the aforesaid evidence?

17. To our mind, in a most clumsy and injudicious manner. The learned Trial Judge has trivialized the same, in para 8, as under:-

“So far as the relations and making calls are concerned that in my opinion is of no help to the accused. Simply because the accused was having her number and accused was known to the prosecutrix or that the prosecutrix discussed her problems with the accused herein and asked him to solve the same does not mean that he got the right to have sexual intercourse with her.”

18. The learned Trial Judge has treated the issue as if it was child play.

19. It is apparent that material evidence has been deliberately misread by the learned Trial Judge after trivializing the same. The stand of the prosecutrix during cross-examination that on 21:35 hours the two telephone numbers show a talk of considerable duration is the result of the appellant telephoning on her mobile and leaving her mobile open for 8 minutes, to say the least, is ridiculous.

20. It is apparent that the appellant and the prosecutrix were known to each other. It is apparent that the prosecutrix was using the services of the appellant to further her interest in the criminal prosecution which she had launched against her

husband and in return, the appellant was using the youth of the prosecutrix. It is apparent that the two were on more than on friendly occasion. If at all they had sex in the night as claimed by the prosecutrix it has to be sex by consent.

21. In any case the claim of the prosecutrix that the accused i.e. the appellant remained in her house from 9:30 PM to 5:30 AM is false.

22. The appellant is accordingly entitled to an acquittal.

23. We may clarify that if the department is interested in any action against the appellant they may proceed against him for having intimate relations with a lady in distress and to that extent misusing his position as a police officer to help her in prosecuting the husband of the prosecutrix.

24. But, as regards the charge against the appellant of having raped and criminally intimidated the prosecutrix, we hold that the appellant is entitled to be acquitted of the said charges framed against him.

25. The appeal is allowed. Impugned judgment and order dated 30.10.2007 convicting the appellant for offences punishable under Section 376 (2)(a) and Section 506 IPC is set aside. The order on sentence dated 6.11.2007 is quashed.

26. The appellant is directed to be set free unless he is required in custody in some other case.

27. Since the appellant is in jail we direct that a copy of this decision be sent to the Superintendent Central Jail Tihar for necessary action.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

March 15, 2010
mm