

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

+ **Crl. Appeal No. 999/2008**

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Reserved on: June 02, 2010

Decided on: July 09, 2010

Anil Kumar S/o Shivan Shah
R/o Jhuggi No. 5, Block – I,
Shakur Pur, Near Jeevan Jyoti Appts.
Delhi.

(Presently confined in District Jail Rohini, Delhi-89.) Appellant

Through: Mr. S.M. Chopra, Advocate

versus

State

..... Respondent

Through: Mr. Naveen Sharma, APP

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+ **Crl. Appeal No. 13/2009**

Shankar S/o Shri Vasudev
R/o Jhuggi No. 5, L-Block,
Near Jeevan Jyoti Apartments,
Delhi.

(Central Jail No. 3, Tihar, New Delhi.) Appellant

Through: Mr. S.M. Chopra, Advocate

versus

The State (NCT of Delhi)

..... Respondent

Through: Mr. Naveen Sharma, APP

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment?

Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported
in the Digest? Yes

MUKTA GUPTA, J.

1. These appeals arise from a common judgment and order whereby the appellant in Crl. Appeal No. 999/2008 has been convicted for offences punishable under Sec. 363/366/376/504 IPC and the Appellant in Crl. Appeal No. 13/2009 has been convicted for offences punishable under Sections 376/506 IPC.

2. Both the Appellants have been awarded sentence of RI for 7 years and fine of Rs. 2,000/- each, in default, RI for one month under Section 376 IPC and RI for one year under Section 506 IPC. The Appellant Anil Kumar has also been awarded sentence of RI for 7 years for offence punishable under Section 366 IPC and fine of Rs.2,000/-, in default RI for one month, and RI for a period of 2 years and fine of Rs.1,000/-, in default RI for 15 days for offence punishable under Sec.363 IPC.

3. The allegations in brief against the Appellants are that on 1st April, 2005, the Appellant Anil Kumar took the Prosecutrix from her house to jhuggi No.5, L-Block, Jivan Jyoti Apartment, Sakur Pur on the pretext that he would marry her and there committed rape with her without her consent twice, after

threatening her. Appellant Anil threatened her that if she disclosed he would kill her by knife, so she did not cry there. After six days her parents traced her and took her away. The allegations against the Appellant Shankar are that at the said jhuggi he also committed rape with the Prosecutrix after threatening her, when Anil went away somewhere.

4. Learned counsel for the Appellants contends that the finding of the learned trial court that the Prosecutrix was a non-consenting party, is not based on correct appreciation of evidence. According to him, the Prosecutrix was aged 20 years and she willingly went with the Appellant Anil Kumar and stayed with him for 6 days in a thickly populated area. Though it is alleged, that both the Appellants raped her in the six days, the Prosecutrix did not raise any alarm nor informed anybody about the misdeeds of the Appellants. It is further contended on behalf of Appellant Shankar that if Anil had promised to marry her he would not have permitted Shankar to indulge in the said offence against his prospective wife. It is stated that though allegedly the girl was recovered on 6th April, 2005, however, the statement of the Prosecutrix under Section 164 Cr.P.C. was recorded after two months and thus the same was a tutored one.

5. Per contra, learned APP for the State contends that the present is a case where the girl was taken away on false assurance of marrying her and there she was threatened to be killed by knife and thereafter the Appellants committed rape on her forcibly without her consent. As per the MLC, the doctor found that

the hymen of the Prosecutrix was ruptured, which fact duly corroborates her version. It is contended that there is no infirmity in the impugned judgment and the appeals are liable to be dismissed.

6. I have heard learned counsel for both the parties. As per PW8 Dr. Shipra Rampal who examined the X-ray plates of the Prosecutrix on 19.5.2005, the estimated bone age of the Prosecutrix was more than 20 years. Thus, even by giving the benefit of ± 2 years, the Prosecutrix, on the date of offence was more than 18 years of age. The issue that arises in the present appeals is whether the Prosecutrix was a consenting party and in case it was not so, whether the Prosecution has been able to prove its case against the Appellants beyond reasonable doubt.

7. The Prosecutrix has been examined as PW5. She has categorically stated that she was taken away from her house by Appellant Anil Kumar and kept in a jhuggi on the pretext of marrying her. There he committed rape on her twice. He also extended threats to her that if she disclosed to anyone about the same, he would kill her and thus, she did not cry. This witness has been cross examined at length and it has been put to her that because of the love affair between her and Anil Kumar, she had accompanied him with her own consent and will, which fact has been denied by her. As per her statement before the Court, she states that she was taken away and was kept in a jhuggi on the pretext of marrying her. Thus, the actus reus and mens rea of taking away on a

false pretext as the Appellant Anil did not marry her rather forcibly committed sexual intercourse with her without her consent after threatening her by knife is clearly established. The fact that the Appellant Shankar also committed rape on the Prosecutrix also shows that the Appellant Anil had no intention to marry her and had enticed her to the jhuggi on the false pretext of marrying her. The Appellants have not been able to elucidate anything in cross examination from the Prosecutrix to show that she was a consenting party and had intercourse with her own consent.

8. As per Black's Law Dictionary 'consent' as used in the law of rape means: -

"Consent" means consent of the will, and submission under the influence of fear or terror cannot amount to real consent. There must be an exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent. And if woman resists to the point where further resistance would be useless or until her resistance is overcome by force or violence, submission thereafter is not "consent".

9. It would be appropriate to reproduce the observations in ***Rao Harnarain Singh Sheoji Singh and others vs. The State, AIR 1958 P&H 123***: -

"A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent" as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise

of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.

Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure.

A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.”

10. Thus, the ingredients of commission of the offence of rape as defined in Section 375 IPC are established beyond reasonable doubt in the present case. From the evidence led during the trial the taking away of the Prosecutrix for the purpose of committing illegal sexual intercourse falling within the ambit of kidnapping as punishable under Section 366 IPC has also been established beyond reasonable doubt. In the present case the Appellant Anil Kumar took the Prosecutrix on a false pretext and instead of marrying committed illegal sexual intercourse with her and thus has been rightly convicted for offences under Sections 366 and 363 IPC. Both the Appellants threatened the

Prosecutrix with knife and thus have been rightly convicted of offence punishable under Section 506 IPC.

11. I find no infirmity in the impugned judgment of conviction and order of sentence. The appeals are accordingly dismissed.

(MUKTA GUPTA)
JUDGE

JULY 09, 2010
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