

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **CRL.A. No. 69/2007**

Reserved on: 13.01.2011

Date of Decision 08.03.2011

IN THE MATTER OF :

TASLEEM @ PAPPU

..... Appellant

Through: Mr. Anurag Jain, Advocate

versus

STATE (NCT GOVT. OF DELHI)

..... Respondent

Through: Mr. Navin Sharma, APP for the State

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

- | | |
|--|-----|
| 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 the judgment should be reported in the Digest? | Yes |

HIMA KOHLI, J.

1. The present appeal arises out of the judgment of conviction dated 29.04.2006 and order on sentence dated 01.05.2006, whereunder the appellant was convicted under Sections 376 IPC in S.C.No. 168/05 arising out of FIR No. 242/2003 registered with PS Subzi Mandi, Delhi and sentenced to undergo rigorous imprisonment for a period of 10 years and pay fine of ₹3,000/-, in default thereof, to undergo rigorous imprisonment for a period of 3 months under section 376 IPC and undergo rigorous imprisonment for a period of 4 years and pay fine of ₹2,000/-, in default thereof, to undergo rigorous imprisonment for a period of 2 months under

section 506 part (II) IPC. Both the sentences were directed to run concurrently and the benefit of Section 428 Cr.P.C. was given to the appellant for the period already undergone by him during the trial.

2. The incident, subject matter of the impugned judgment, occurred on 23.09.2003, when, as per the prosecutrix, the appellant, who was a neighbour, entered her house at 11 am, when she was alone, on the pretext of borrowing a screwdriver, and bolted the door to her room. He, thereafter threatened her with a knife picked up from the room itself and committed rape on her. On 24.09.2003, information of the incident was given to the police and at 1.55 pm, FIR no. 242/03 under Sections 376/506 IPC was registered at PS Subzi Mandi against the appellant. The appellant was arrested on the next day i.e. on 25.09.2003. Both the prosecutrix and the appellant were medically examined and swab slides and clothes were sent to the FSL for examination.

3. After the investigation was completed, a challan was filed before the court of the learned MM, who committed the case to the court of Sessions. Charges were framed against the appellant/accused who pleaded not guilty and claimed trial. In the trial, 13 prosecution witnesses including the prosecutrix and her husband, PW-2 were examined. Though an opportunity was afforded to him, the appellant did not lead any defense evidence. On an examination of the evidence which came on record, the trial court arrived at the conclusion that the said evidence was sufficient to hold the appellant/accused guilty of rape and criminal intimidation and convicted him for the offences under Sections 376 and 506 (II) of the IPC.

4. Counsel for the appellant commenced his argument by pointing out that the forensic evidence adduced was wrongly appreciated by the trial court. He submitted that absence of smegma from the glan penis of the accused as mentioned in EX. PW-10/B, the report of the doctor who examined the appellant, was wrongly relied upon by the learned ASJ and the said fact was not of any significance to show that the appellant had recent sexual intercourse as it is settled law that any examination of smegma after 24 hours of the incident would be inconsequential. To support his contention, he placed reliance on the following judgments:

(i) S.P. Kohli (Dr) v. High Court of P&H **(1979) 1 SCC 212**

(ii) Aman Kumar v. State of Haryana **(2004) 4 SCC 379**

5. The second argument of the counsel for the appellant *qua* the forensic evidence was that even though human semen had been detected on Ex. 1a and 1b, the vaginal swab slides of the prosecutrix and Ex.5, the underwear of the appellant, there is still nothing in the FSL Report dated 17.02.2004, Ex. PW-12/D and Ex. PW-12/E, to connect the semen on these exhibits to the appellant, to establish the crime.

6. It was argued that the learned ASJ had erroneously turned down the contention of the appellant that he had been falsely implicated in the rape case on account of a quarrel between him and the husband of the prosecutrix. It was urged that the trial court overlooked the fact that the medical evidence in the present case runs contrary to the ocular evidence of the prosecutrix, to the extent that no injury was found on the body of the prosecutrix, nor was the presence of semen found on her blouse, petticoat and socks as per the FSL report (Ex. PW-12/D), even though in her

testimony, the prosecutrix had alleged that after the crime was committed, the same socks were used by her and the accused for cleaning the semen. Counsel for the appellant pointed out that there existed several improbabilities in the testimony of the prosecutrix such as the fact that she raised no hue and cry on being raped, even though she resided in a thickly populated building, or her contention that the appellant had held the knife in one hand and disrobed her with the other hand.

7. It was the contention of the learned counsel for the appellant that there exists settled law to show that the recovery of the knife Ex. P-1 from the house of the prosecutrix could not be used against the appellant unless it could be established that there was some connection between the knife and the appellant, especially when the knife did not bear his fingerprints and the recovery of the knife was not supported by the recovery witnesses i.e. PW-2 and PW-9. He argued that the prosecutrix, who appeared as PW-1, was not examined under Section 164 of the CrPC and no explanation was offered by the State for not doing so. He also urged that the delay of one day in filing the FIR was a crucial factor which was completely overlooked by the trial court. Lastly, counsel for the appellant adverted to the statements of the prosecutrix (PW-1); husband of the prosecutrix, Phool Chand (PW-2); neighbour of prosecutrix, Radhika (PW-9) and, Raj Kumar (PW-13), a recovery witness, who was another neighbour of prosecutrix and canvassed that the other prosecution witnesses examined by the State to corroborate the testimony of the prosecutrix had resiled in Court from their statements as given to the police, such as the neighbour, Raj Kumar (PW-13) who had earlier made a statement that he had seen the appellant run away from the scene of the crime, but later on, he had

changed his stand. In the light of the above submissions, it was urged that the prosecution had not been able to prove the case against the appellant beyond a shadow of reasonable doubt, and therefore, he was entitled to be acquitted. It was further submitted that without prejudice to the above arguments on merit, in case this Court is not inclined to set aside the judgment of conviction, it may consider modifying the order on sentence by releasing the appellant for the period already undergone by him, which as per his nominal roll, was 4 years and 23 days as on 22.12.2009.

8. Learned APP appearing for the State refuted all the arguments raised by the learned counsel of the appellant and supported the impugned judgment. He placed reliance on the testimonies the prosecutrix (PW-1); husband of the prosecutrix (PW-2); Ct. Sheoveer (PW-11); A.S.I Neena Devi, Investigating Officer of this case (PW-12); and the statement of the appellant under Section 313 Cr.P.C., to urge that the impugned judgment is a well-reasoned decision, based on the evidence, including testimonies on record, and should not be interfered with. He emphasized that there were no material contradictions in the statement of the prosecutrix and the other evidence brought on record, was sufficient to corroborate her testimony and support the conviction of the appellant. On the point of sentencing, he opposed the prayer of the appellant for reduction of the sentence imposed on him to the period undergone and stated that in view of the gravity of the offence, no leniency ought be shown to him.

9. This Court has heard counsels for the parties and perused the evidence placed on record. There is merit in the first ground taken by the learned counsel for the appellant to assail the impugned judgment that the learned ASJ erred in holding that the commission of rape by the appellant on

the prosecutrix found corroboration from the FSL Report by placing reliance on Ex.PW-10/B, a report prepared by Dr. Parvinder Singh, PW-10, which indicated that the smegma was absent. In the decision of Aman Kumar (supra), it was observed by the Supreme Court that examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. Hence, reliance of learned ASJ on the FSL report to corroborate the finding that the sexual act was committed by the appellant, cannot be validated. However, keeping aside the aforesaid evidence for the present, the question which arises is whether there was other material evidence brought on record to indict the appellant. When the remaining evidence is scrutinized in conjunction with the testimony of the prosecutrix, this Court finds that there exists sufficient evidence on the record to lead to the conviction of the appellant. It has been held in a number of decisions that it is not the law that in every case version of the prosecutrix must be corroborated in material particulars by independent evidence on record. It is the quality of the evidence of the prosecutrix, which is material and if the said evidence is found to be free from blemish and implicitly reliable, then the conviction can be recorded even on the sole testimony of the prosecutrix. (Ref: State of Rajasthan Vs. Biram Lal **AIR 2005 SC 2327**).

10. In the present case, after analyzing the evidence, the learned ASJ came to the correct conclusion that the substantive part of the deposition of the prosecutrix, who was examined as PW-1 and her husband, who was examined as PW-2, could not be demolished in their cross-examination and further, that the minor discrepancies in their cross-examination and that of PW-9, which was brought on record, were usual and natural and did not strike at the root of the matter. A perusal of the

testimony of the prosecutrix bears out the aforesaid position. The improbabilities in the testimony of the prosecutrix sought to be emphasized by the learned counsel for the appellant, as for example, failure on her part to raise a hue and cry at the time of incident, are easily explainable. When a lady is subjected to rape on a knife point, one is left wondering as to how it is expected that she would gather the courage in such adverse and fear inducing circumstances, to raise a hue and cry. In any case, each individual reacts differently in the same set of circumstances and no uniform yardstick of action and reaction can be prescribed, by which the prosecutrix's reactions could be measured. Furthermore, the record reveals that the incident took place at about 11 AM, when there was no one present on the floor of the building, where the prosecutrix was residing. Hence, the version of the appellant that the prosecutrix failed to raise a hue and cry could not be substantiated due to the absence of independent witnesses. Reliance may be placed on the Supreme Court judgment referred to by the learned APP for the State in the case of State of H.P. v. Asha Ram reported as **(2005) 13 SCC 766**, wherein it was held as follows:-

"5. ... It is now a well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given

circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. **Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.**" (emphasis added)

A similar view has been propounded by the Supreme Court in the cases Rajinder v. State of H.P. reported as **(2009) 16 SCC 69**, State of Rajasthan v. Biram Lal reported as **AIR 2005 SC 2327** and Vishnu v. State of Maharashtra reported as **(2006) 1 SCC 283**. The case of Karnel Singh v. State of M.P. reported as **(1995) 5 SCC 518**, had held that a woman who is a victim of sexual assault is not an accomplice to the crime and therefore her evidence need not be tested with the same amount of suspicion as that of an accomplice and at the most the court should just look for some evidence which lends assurance to her testimony.

11. Furthermore, there are numerous decisions of the Supreme Court which lay down that minor discrepancies in the testimony of a witness would not be so material as to affect the conviction based on such testimony. In the case of Narotam Singh v. State of Punjab reported as **(1979) 4 SCC 505**, in the words of Krishna Iyer, J. (as he then was), it was held:-

"3. Discrepancies do not necessarily demolish testimony; delay does not necessarily spell untruth and tortured technicalities do not necessarily upset conviction when the Court has had a perspicacious, sensitive and correctly oriented view of the evidence and probabilities to reach the conclusion it did. Proof of guilt is sustained despite little infirmities, tossing peccadilloes and peripheral probative shortfalls. The "sacred cows" of shadowy doubts and marginal mistakes, processual or other, cannot deter the Court from punishing crime where it has been sensibly and substantially brought home."

A similar view was expressed in the case of Leela Ram v. State of Haryana reported as **(1999) 9 SCC 525**, wherein it was held:-

"9. ... There are bound to be some discrepancies between the narrations of different witnesses when they speak on details, and unless the contradictions are of a material dimension, the same should not be used to jettison the evidence in its entirety. Incidentally, corroboration of evidence with mathematical niceties cannot be expected in criminal cases. Minor embellishment, there may be, but variations by reason therefor should not render the evidence of eyewitnesses unbelievable. Trivial discrepancies ought not to obliterate an otherwise acceptable evidence."

In the above context, reliance may also be placed on Sukhdev Yadav v. State of Bihar reported as **(2001) 8 SCC 86** and Shrishail Nageshi Pare v. State of Maharashtra reported as **(1985) 2 SCC 341**.

12. As far as the argument of the learned counsel for the appellant that it could not be established by the prosecution that there was any connection between the knife and the appellant, is concerned, not much would turn on this aspect for the reason that even if the knife was not recovered, it would not have been of much significance as the present case is one of rape and not of murder. The submission of the counsel for the appellant that PW-2 had resiled from his statement as far as the recovery of knife was concerned, is also irrelevant for the same reason and also for the reason that the remaining evidence of PW-2 remained unchallenged by the appellant and hence, the rest of his statement could certainly be treated as reliable.

13. Coming to the argument urged on behalf of the appellant that there was a delay in lodging of the FIR, the said delay can be satisfactorily explained in the light of the facts, which have emerged on the record. It

was the case of the prosecutrix that she and her husband had gone to the Police Station to make a complaint on the date of incident. However, the police refused to lodge the FIR and they had to return and it was only on the next day that the FIR was got registered. Hence no blame can be attributed to the prosecutrix for the delay in registering the FIR. Even otherwise, the delay of one day in filing the FIR would not materially prejudice the case of the prosecution. This view is fortified by the observation of the Supreme Court in the case of Karnel Singh(supra), as follows:-

"7. ... The submission overlooks the fact that in India women are slow and hesitant to complain of such assaults and if the prosecutrix happens to be a married person she will not do anything without informing her husband. Merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false." (emphasis added)

14. The contention of the learned counsel for the appellant that the case of the prosecution was weakened on account of non-recording of the statement of the prosecutrix under Section 164 of the Cr.PC, is also devoid of merits. Non-recording of the statement of the prosecutrix cannot prove fatal to her case inasmuch as recording of such a statement is the prerogative of the prosecution and this Court is inclined to agree with the submission of the learned APP for the State that as a matter of practice, such statements are usually recorded in cases of the nature, where the witnesses are very young or likely to turn hostile. Hence, no benefit of non-

recording the statement of the prosecutrix under Section 164 Cr.PC can go to the appellant. Similarly, absence of any injury on the body of the prosecutrix is also not of much importance, as it is a settled principal of law that in cases of rape, injuries to the prosecutrix need not necessarily be shown.

15. It was further canvassed by the learned counsel for the appellant that conviction of the appellant could not be based on the serological evidence produced before the Court. Serological evidence is just one one piece of evidence, which is brought on the record but expert medical evidence cannot be treated as binding on the ocular evidence. In the case of Vishnu v. State of Maharashtra reported as **AIR 2006 SC 508**, the Supreme Court held that “.....the opinion of the Medical Officer is to assist the court as he is not a witness of fact and the evidence given by the Medical Officer is really of an advisory character and not binding on the witness of fact” (para 21). Similarly in the case of Madan Gopal Kakkad v. Naval Dubey reported as **(1992) 3 SCC 204**, the Supreme Court held as follows: -

“34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert’s opinion because once the expert’s opinion is accepted, it is not the opinion of the medical officer but of the Court.” (emphasis added)

In the instant case, the medical evidence adduced may not directly point to the culpability of the appellant, but is sufficient to corroborate the testimony of the prosecutrix and the other prosecution witnesses. Furthermore, the learned ASJ has also placed reliance on the medical evidence only as corroboratory of the other evidence on record. Even de hors the said evidence, there is sufficient material on the record to point towards the culpability of the appellant. Hence, no fault can be found in the approach of the learned ASJ in this regard.

16. The argument of the learned counsel for the appellant that there was a previous quarrel between the appellant and the husband of the prosecutrix due to which, the appellant was sought to be framed by them, has to be examined in the light of the evidence placed on the record. In the first instance, the husband of the prosecutrix(PW-2) categorically denied in his cross-examination the allegation that there was any quarrel between them, thus corroborating the prosecutrix's statement on this point. This denial has remained unchallenged by the appellant because the record reveals that he did not lead any defence evidence on this point. In fact, he did not enter the witness box to support his case on this point. The statement of the appellant recorded under Section 313 Cr.PC reveals that he was specifically asked by the trial court if he would like to lead any defence evidence but he refused to do so. Further, Ct. Sheoveer(PW-11), who was a witness to the seizure of the underwear of the appellant, was also not cross-examined by him. Similarly, WASI Neena Devi(PW-12), who deposed that the appellant got recovered his underwear which he was wearing at the time of incident and the same was taken and sealed as Ex.PW-11/B, was

not cross-examined despite an opportunity given to the appellant for the said purpose. The testimony of the aforesaid witnesses remained unrefuted and clearly corroborated the testimony of the prosecutrix. In such circumstances, it is very difficult to accept the contention of the counsel for the appellant that the appellant had been falsely implicated in the case by the prosecutrix on account of a quarrel with her husband, relating to a demand of ₹200/- for repairing the spectacles of the appellant.

17. There is merit in the submission of the learned APP for the State that there was no time to create a false case against the appellant for the reason that on the very next day of the incident, i.e., on 24.09.2003, IO/WASI Neena Devi, on being informed of the offence, immediately sent a *rukka* Ex.PW6/A at 1:53 PM and the FIR, Ex.PW6/B was registered at 1:56 PM. Further, nothing has been brought on the record to indicate that the police officers investigating the case, were hand in glove with the prosecutrix only to falsely implicate the appellant as alleged.

18. In view of all the above facts and circumstances, this Court is of the opinion that the trial court rightly arrived at the conclusion that the deposition of the prosecutrix itself was sufficient to convict the appellant as the same was found trustworthy and reliable. Not much would turn on PW-9 and PW-13 having turned hostile, as the depositions of the prosecutrix and her husband, PW-2 are clearly corroborated from other circumstantial evidence on the record. In these circumstances, this Court has no hesitation in holding that the impugned judgment of conviction dated 29.04.2006 does not deserve to be interfered with as it does not suffer from any illegality, perversity or miscarriage of justice.

19. As far as the impugned order on sentence dated 01.05.2006 is concerned, it was argued by the learned counsel for the appellant that if this Court is not inclined to interfere in the order of conviction, it may consider releasing the appellant for the period of sentence already undergone by him, which is less than six years. It was submitted by him that the mitigating circumstances in his favour are that on the date of the offence, the prosecutrix was 20 years of age and it is not a case of rape of a minor; that there was also a remote possibility of consent having been given by the prosecutrix for the sexual act in the absence of any hue and cry raised by her. Further, he urged that the background of the appellant, who is a scrap dealer, may be taken into consideration apart from the fact that the appellant himself was 20 years of age on the date of incident and was not mature enough to understand the gravity of the offence, whereas today he is married and has a wife and family to support. Lastly, it is submitted that the conduct of the appellant in jail may also be taken into consideration for showing leniency towards him. In support of his aforesaid submissions, he relied on the following judgments:-

- (i) Subrata Roy v. State **93 (2001) DLT 149**
- (ii) Rabu v. State of NCT of Delhi **2005 [1] JCC 330**
- (iii) Ram Milan v. State **2005 [2] JCC 904**
- (iv) Ravinder v. State of MP **(2006) 9 SCC 590**
- (v) Jaswinder Singh v. State **Crl. App. 36/2007 [DHC]**
- (vi) Zindar Ali Sheikh v. State of W.B. **(2009) 3 SCC 761**

20. Section 376 IPC has envisaged punishment with rigorous imprisonment for a term of not less than ten years but which may extend to life for the offence of rape with a *proviso* that for adequate and special reasons to be mentioned in the judgment, sentence of imprisonment may be imposed of either description for a term of less than ten years. There are hardly any mitigating circumstances indicated for the appellant to claim reduction of sentence to less than ten years as imposed under the order on sentence. The hard facts of the case are that the appellant gained entry into the house of the prosecutrix, who was a neighbour, residing in the same building, under a false pretext and thereafter, betrayed her by sexually assaulting her at the point of a knife. Merely because the appellant has entered into matrimony during the pendency of the present appeal can hardly be a ground for him to seek leniency.

21. The court must be mindful of the fact that relaxation of sentence without keeping in view its impact on the society is likely to have an adverse effect. Crimes such as sexual assault, kidnapping, dacoity, misappropriation of public funds and those related to moral turpitude have a serious negative impact on the society. While imposing appropriate punishment, the Court is required to keep in view not only the rights of the accused but also the rights of the victim of the crime and the effect it has on the social order. Taking a sympathetic view in favour of the appellant by imposing a minor sentence on him or reducing the sentence to the period already undergone, in a case like the one at hand, goes against the grain of societal interest. In the present case, the punishment imposed on the appellant befits the crime. Merely because the victim is not before the Court to narrate her tale of woe

and anguish, while the appellant seeks to take the plea of mitigating circumstances which hardly exist, is no ground to show any leniency to the appellant. There is no such adequate or special reason, shown by the appellant to seek reduction of sentence. This Court is therefore not inclined to accede to the alternate prayer of reduction of sentence of the appellant.

22. In the aforesaid facts and circumstances, the impugned judgment of conviction and the order on sentence are upheld. The appeal is dismissed as being devoid of merits.

MARCH 8, 2011
pm/rkb

(HIMA KOHLI)
JUDGE