

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

Judgment reserved on: January 10, 2011
Judgment delivered on: February 10, 2011

+ **CRIMINAL APPEAL NO.503/2008**

BHOLA RAM

....APPELLANT

Through: Ms. Rakhi Dubey, Advocate with Mr. Raj
Mangal, Advocate

Versus

STATE(DELHI ADMN.)

.....RESPONDENT

Through: Mr. R.N. Vats, APP

WITH

CRIMINAL APPEAL NO.45/2009

PUTUL

....APPELLANT

Through: Ms. Rakhi Dubey, Advocate with Mr. Raj
Mangal, Advocate

Versus

STATE(NCT OF DELHI.)

.....RESPONDENT

Through: Mr. R.N. Vats, APP

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.

1. Above referred appeals filed by the appellants Bhola Ram and Putul are directed against the impugned judgment of the Additional Sessions Judge dated 07th December, 2007 in Sessions Case No. 135/2006, FIR No. 334/2005 under Sections 376/506/34 IPC, P.S. Sarojini Nagar and the consequent order on sentence dated 08th December, 2007 whereby the appellants have been convicted for the offence punishable under Section 376(2)(g) IPC and Section 506/34 IPC and sentenced for the offence under Section 376(2)(g) IPC to undergo RI for the period of 10 years and also to pay fine of ₹5000/-, in the event of default, to undergo SI for the period of three months and for the offence under Section 506/34 IPC to undergo RI for the period of six months.

2. Briefly stated, case of the prosecution is that on 07th July, 2005 at about 10.33 p.m., Constable Satpal of PCR informed P.S. Sarojini Nagar on wireless about receipt of information regarding rape committed at House No. A1/288, Safdarjung Enclave, New Delhi. This information was recorded in the Daily Diary register maintained at the police station as DD No. 29A (Ex.PW8/A) and copy thereof was entrusted to SI Yad Ram (PW6) who along with Constable Jakir Husain left for the spot of occurrence. Additional SHO was also informed about the call, who also proceeded to the spot in the official vehicle.

3. Pursuant to the information, Woman ASI Kailash (PW10) also reached at the place of occurrence where she met SI Yad Ram (PW6) and Constable Jakir Husain. PW3 Ram Narayan, brother of the prosecutrix produced the appellants Putul and Bhola Ram before the police. Prosecutrix 'P' (name withheld) was also present there. Her statement Ex.PW10/A was recorded by ASI Kailash with the assistance of her sister-in-law Prabha (PW1) and aforesaid statement was forwarded by ASI Kailash to the police station for the registration of case after appending her endorsement Ex.PW10/B on the same.

4. The prosecutrix, in her statement Ex.PW10/A disclosed that on 01st July, 2005, she was present at the second floor of property No. A1/228, Safdarjung Enclave, New Delhi and her father was doing his duty at the lower floor. Appellant Putul, who was working as a labourer at the said house came upstairs to take his lunch and he took her to the roof of the house on the pretext of giving her a biscuit. There, he intimidated and threatened her and after removing her underwear, forcibly raped her. She further stated that on the same day after some time, Chowkidar Bhola Kaka, who was present there, took her to the room downstairs where he removed her underwear and raped her against her wish. She claimed that even on the next day, both the appellants raped her and threatened her that if she dared to tell about incident to anyone, they would kill her. Therefore, she did not tell her father about the incident. She further stated that on Sunday, her brother Ram Narayan took her to Hauz Khas where she narrated the

entire incident to her sister-in-law Prabha (PW1) on 07th July, 2005. On this, her brother and sister-in-law brought her to A-1/288, Safdarjung Enclave and informed the police on telephone. They also caught hold of the appellants Putul and Bhola Chowkidar, who were handed over to the police by her brother Ram Narayan.

5. It is further the case of the prosecution that from the spot of occurrence, prosecutrix 'P' was taken to Safdarjung Hospital where she was medically examined and her MLC Ex.PW13/D was obtained. The MLC records that the prosecutrix, aged 10 years was brought to the hospital with "H/o sexual assault and as per the informant, her '*bhabhi*', she was raped by two men four days back while she was sleeping alone in the vacant house and that the patient confirmed the H/o sexual assault given by the '*bhabhi*'.

6. On 08th July, 2005, the Investigating Officer seized a parcel of vaginal swab and the undergarments of the prosecutrix. The IO also seized the underwear of respective appellants. Those exhibits were sent to CFSL for serological examination but semen could not be detected on the underwears of the appellants. On completion of investigation, appellants were challaned and sent for trial.

7. The appellants were charged by the learned Additional Sessions Judge for the offences punishable under Section 376 and 506 IPC. Both of them pleaded not guilty to the charges and claimed to be tried.

8. In order to bring home the guilt of the appellants, prosecution has examined 13 witnesses in all, including the prosecutrix (PW2).

9. Prosecutrix was examined on 19.04.2006 and she testified that the occurrence took place many days ago when she was raped by both the appellants. As a result, she was having difficulty in walking. Her sister-in-law (bhauji) noticed it and inquired about the reason for her finding it difficult to walk. On this, she told her that she was raped by the accused persons. Thereafter, she was taken to the Police Station from where she was sent to the hospital for medical examination. She further stated that her statement was recorded in the court and her underwear was seized by the police.

10. PW1 Prabha is sister-in-law of the prosecutrix. She testified that it was the month of July 2005 when she noticed that her husband's sister i.e. the prosecutrix was not able to walk properly. When she asked for the reason, the prosecutrix told her that both the appellants Bhola Ram Putul had raped her. She also told that both the appellants had threatened to kill her if she disclosed their act of rape to anybody. Witness further stated that she noticed some discharge from the private parts of the prosecutrix and there were some abrasions. She told her husband about the incident who called the police by dialling telephone No.100. Thereafter, the police arrived and both the appellants were nabbed and taken to the Police Station. She further stated that police recorded the statement of the prosecutrix as well as

her statement and statement of prosecutrix was also recorded in the court. She has proved her aforesaid statement recorded under Section 164 Cr.P.C. as Ex.PW1/A.

11. PW3 Ram Narayan is the brother of the prosecutrix and he has supported the version of his wife, namely, PW1 Prabha.

12. PW13 Abhay Ram, Record Clerk, Safdarjung Hospital has proved the respective MLCs of the appellants prepared by Dr. Jai Mala, Jr. Resident, Safdarjung Hospital by way of secondary evidence as Exhibits PW13/A and PW13/B. He also proved the OPD Card of the prosecutrix, her MLC and the report of Radiologist Exhibits PW 13/C to PW13/E by way of secondary evidence by identifying the signatures and hand-writing of respective Doctors and Radiologist, who had left the service of the Hospital.

13. Appellants in their statements under Section 313 Cr.P.C. denied the prosecution evidence in totality. They claimed that father of the prosecutrix had borrowed a sum of Rs.14,000/- from the appellant Bhola Ram, which he was avoiding to pay and in order to escape the liability to repay the loan, he in collusion with his family members has falsely implicated the appellants. No witness has been examined in defence.

14. Learned Ms.Rakhi Dubey, Amicus Curiae appearing for the appellants submitted that the appellants are innocent and their conviction is the result of wrong appreciation of facts by the learned

Additional Sessions Judge. Dilating on the argument, learned Amicus Curiae firstly referred to the purported statement of the prosecutrix Ex.PW-10/A which is the basis of the registration of case. She pointed out that in the said statement, prosecutrix has named both the appellants as rapists whereas in her cross-examination, the prosecutrix, who appeared as PW-2 stated that she had not seen the accused persons prior to the date of incident. If that is the case, it defies reason as to how the prosecutrix was aware of the names of the appellants. Therefore, a possibility cannot be ruled out that the appellants have been named by the prosecutrix at the instance of someone.

15. Learned counsel for the appellants further contended that the prosecution case is not reliable for the reason that FIR in this case was registered after a long delay of almost a week, which remains unexplained. In this regard, learned APP submitted that the delay in this matter is explained from the testimony of the prosecutrix, wherein she has categorically stated that while committing rape, both the appellants had threatened and cautioned the prosecutrix to refrain from telling anyone about the incident, failing which they had threatened to kill her and for that reason she did not tell her father about the incident.

16. Aforesaid explanation for delay in the FIR recorded on the basis of the statement of the prosecutrix Ex.PW-10/A, in my view, appears to

be a make believe story for the reason that the prosecutrix in her cross-examination has categorically stated that she told her father about the occurrence on the very same day. If this version is true, then it is obvious that there is a delay of almost a week in reporting the matter to the police, which remains unexplained. This circumstance also casts a doubt against the prosecution story.

17. Further, if PW-1 Prabha, sister-in-law of the prosecutrix, is to be believed, she noticed that the prosecutrix was unable to walk properly and when she asked the prosecutrix as to what had happened, she told her that Bhola Ram and Putul (appellants) had committed rape upon her. Aforesaid version of PW-1 Prabha does not inspire confidence for the reason that medically there is a rare possibility that 7 days after the rape, the prosecutrix might have been finding it difficult to walk properly, particularly, when as per her MLC Ex.PW-13/D, the doctor concerned did not find any external mark of injury on her body or her private parts. Had this version of PW-1 Prabha been correct, there should have been some tear in the vagina of the prosecutrix. It is pertinent to note that PW-1 Prabha, in her examination-in-Chief, had stated that after being told about the rape, she noticed some discharge from the private part of the prosecutrix and also found some abrasions on the private part. Aforesaid version of PW-1 Prabha is belied by the MLC of the prosecutrix, wherein there is no mention of abrasions on the private part of the prosecutrix and it is also recorded that no discharge

was noticed from the vagina of the prosecutrix. Thus, in my view, testimony of PW-1 Prabha does not inspire confidence.

18. There is another peculiar factor which goes against the prosecution. In the instant case, Ms.Niveditta Anil Sharma, Metropolitan Magistrate has recorded the statement of the prosecutrix under Section 164 Cr.P.C. on 12th July, 2005. Ex.PW-12/A is the record of proceedings conducted by the concerned Magistrate, wherein the concerned Magistrate has recorded the statement of Prabha wherein she stated that she acted as interpreter for recording of the statement of the prosecutrix. It is recorded in the statement Ex.PW-1/A that questions were put to the prosecutrix in Hindi to which she replied in Maithili and PW1 Prabha translated her reply in Hindi, which was recorded by the learned M.M. Similarly, the Investigating Officer in his endorsement Ex.PW-10/B, which was sent to the police station along with complaint statement of the prosecutrix Ex.PW-10/A for the registration of the case, has recorded that he recorded the statement of the prosecutrix through the medium of her sister-in-law Prabha. From the above, it is evident that the prosecutrix was not conversant with Hindi, as such the investigating Officer as well as the concerned M.M. found the need of an interpreter for recording her statement. Despite that, the statement of the prosecutrix in the Court has been recorded without the assistance of an interpreter. From this, a possibility cannot be ruled out that the facts stated in the complaint Ex.PW-10/A purported to have been made by the prosecutrix and in the

statement under Section 164 Cr.P.C. of the prosecutrix may be the version of PW-1 Prabha and not of the prosecutrix. This circumstance also casts a doubt on the correctness of the prosecution case.

19. Further, on perusal of the complaint Ex.PW-10/A, it transpires that according to the prosecutrix, she was taken to the roof of House No.A-1/288, Safdarjung Enclave by the appellant Putul on the pretext of giving her a biscuit where she was raped by him and thereafter the appellant Bhola Ram took her down stairs and raped her. This version is contradictory to the facts recorded in the MLC Ex.PW-13/D. In the MLC, it is recorded that as per the informant i.e. sister-in-law of the prosecutrix, the prosecutrix was raped four days back while she was sleeping in an empty room. This mismatch in the facts recorded in MLC and the complaint also casts a strong doubt against the correctness of the prosecution case. Further, had the prosecution story been true and had the prosecutrix been raped by two fully grown men, taking into account her age, there ought to have been a serious tear injury on the vagina of the prosecutrix resulting in bleeding and in that eventuality the father of the prosecutrix would have come to know about the rape. This, however, is not the case and as a matter of fact, as per the MLC, no external mark of injury was found on the vagina of the prosecutrix. This circumstance also casts a doubt on the prosecution case.

20. In view of the circumstances discussed above, I do not find it safe to rely upon the testimony of the prosecutrix to hold the appellants guilty of the charge under Section 376 IPC. In my considered view, the appellants are entitled to benefit of doubt.

21. The appeals are accordingly allowed.

22. Appellants are in jail. They be released forthwith, if not required in any other case.

(AJIT BHARIHOKE)
JUDGE

FEBRUARY 10, 2011

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