

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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Judgment Delivered on : July 25th 2011

+ **CRL.APPEAL NO.546/2009**

MUKESH KUMAR Appellant
Through :Ms.Jyotsana Gupta &
Mr.Surinder Kumar, Advs
Versus
STATE Respondent
Through:Mr. M. P. Singh, APP for
State.

AND

+ **CRL.APPEAL NO.756/2009**

RAJESH Appellant
Through:Ms.Rakhi Dubey, Adv
Versus
STATE Respondent
Through: Mr. M. P. Singh, APP for
State.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the 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.

SURESH KAIT, J. (Oral)

1. Since, both the aforementioned appeals are preferred by appellants against their conviction by a common

judgment, therefore, both the appeals are taken up for disposal together.

2. Vide order dated 06.01.2007 charges were framed against the appellants as under:-

“I, Narottam Kaushal, ASJ, Rohini Delhi do hereby charge you: (1) Rajesh s/o Jagmender (2) Mukesh s/o Dhoop Singh as under:-

That on 17.07.2006 at about 07:00PM at Balbir Vihar, Electricity Office, Aman Vihar, within the jurisdiction of P.S. Sultanpuri, you both in furtherance of your common intention you both accused persons wrongfully confined prosecutrix Kiran d/o Rajesh in the room and thereby committed offence punishable under Section 342/34 Indian Penal Code and within my cognizance.

That on the aforesaid date, time and place you accused Mukesh alongwith your co accused Rajesh in furtherance of your common intention committed gang rape on prosecutrix Kiran (who is handicapped person) without her consent, you accused Mukesh and facilitated committed of rape by bolting the door from outside and thereby committed offence punishable under Section 376(2) (g) Indian Penal Code and within my cognizance.”

3. The appellants pleaded not guilty and claimed trial.

4. The statement of the prosecutrix 'K' was recorded (without oath) since the prosecutrix was aged about 13 years of age on 12.03.2007. The Court put certain questions as under:-

“The child is physically handicapped seemingly mentally slow. To ascertain her capacity to depose, she has been put certain questions by the court. She has answered as under:

I have four sisters and a younger brother. My younger sisters Shivani and Priyanka go to school. Myself and my other sisters do not go to school. My younger brother Sagar is a toddler.

Q. Do you know what is the difference between the truth and lie?

Ans. No answer.

I am of the opinion that witness would not be in a position to understand the sanctity of oath. She is therefore, being examined without Oath:”

5. The prosecutrix 'K' examined as PW-1 and deposed as under:-

“My mother goes for work and I remain alone with my sister at the house. I am crippled by both feet. On the day of occurrence, my mother was away for duty. In the evening my Chacha Mukesh (accused present in the Court) came to our house with Rajesh, who is also son of my Dada (accused present in Court). They had come in the evening. My Chacha had brought Samosas. We all ate the Samoas and thereafter my Chacha left the room. He bolted the room. Accused Rajesh then removed my clothes and put his urinary organ in my urinary organ. I felt pain and raised alarm. My Dada and three four other persons reached the spot. Subsequently, my mother also reached there.”

6. Learned counsel for appellants submits that as per the charge framed, firstly; both the appellants in furtherance of their common intention wrongfully confined the prosecutrix in a room and committed rape.

7. As per second part of the charge, appellant Mukesh alongwith co accused Rajesh, in furtherance of their common intention of gang raping on prosecutrix ‘K’, who is handicapped. Further submits that, as per the aforesaid charge, the appellant Mukesh facilitated the commission of

rape by bolting the door from outside and thereby committed rape.

8. Learned counsel for appellants has pointed out that as deposed by the prosecutrix, her mother was away for duty on the day occurrence. In the evening, her Chacha Mukesh came to their house with appellant Rajesh who is also son of her Dada. They had come in the evening. Her Chacha had brought Samosas. They all ate samosas and thereafter her Chacha Mukesh left the room. He bolted the room and co-accused Rakesh then removed her clothes and put his urinary organ into her urinary organ.

9. Learned counsel for appellants submitted that as per the charge, appellant Mukesh has facilitated in commission of rape by bolting the door from the outside, which is corroborated by the deposition of the prosecutrix.

10. Learned counsel has drawn the attention of this Court to the statement of appellant Mukesh (Criminal Appeal No.546/2009) recorded under Section 313 Criminal Procedure Code, which inter alia, reads as under:-

“Statement of accused Mukesh s/o Shri Dhoop Singh R/o P-1, Jhuggi Sultan Puri, Delhi. U/s 313Cr. P.C.

Without Oath.

Question. It is in evidence against you that on 19.07.2006(though mentioned wrongly in place of 17.07.2006) at about 7 pm you alongwith co accused Rajesh had eaten samosas with prosecutrix ‘K’ and thereafter wrongfully confined the prosecutrix PW-1 Kiran in a room in her house situated at Balbir Vihar, Near Electricity office, Anand Vihar. What have you to say?

Ans. It is wrong.

Question : It is in evidence against you that your co accused closed the room when prosecutrix and you were inside the room and you raped her inside the room and she cried and you came out of the room and then you and accused Rajesh were caught hold by her mother and other public persons. What have you to say?

Ans. It is wrong.”

11. Learned counsel for appellant Rajesh has also drawn the attention of this Court to the statement of appellant (in Criminal Appeal No.756/2009) recorded under Section 313 Cr. P.C, which reads as under:-

“Statement of accused Rajesh s/o Jagmendra Singh
r/o House No.34, Hazari Chowk, Village Mundka, PS.
Nangloi, Delhi U/s 313 Cr. P. C.

Without Oath

Question: It is in evidence against you that on 19.07.2006(though mentioned wrongly in place of 17.07.2006) at about 7 pm you alongwith co accused Mukesh had eaten samosas with prosecutrix ‘K’ and thereafter wrongfully confined the prosecutrix PW-1 Kiran in a room in her house situated at Balbir Vihar, Near Electricity office, Anand Vihar. What have you to say?

Ans. It is wrong.

Question : It is in evidence against you closed the room when prosecutrix and your co-accused Mukesh was inside the room intentionally for facilitating the commission of rape and committed by accused Mukesh and thereafter Mukesh raped prosecutrix inside the room and she cried and the accused Mukesh came out of the room when you and accused Mukesh were caught hold by her mother and other public persons. What have you to say?

Ans. It is wrong.”

12. As per the statement u/s 313 Cr. P.C. of appellant Rajesh, the incriminating evidence put to appellant Rajesh that he closed the door of the room where the prosecutrix and co-accused Mukesh were inside, intentionally for facilitating the commission of rape, and thereafter Mukesh raped prosecutrix inside the room.

13. As per the statement of appellant Mukesh, recorded u/s 313 Cr. P. C. that your co-accused closed the room, when prosecutrix and he were inside the room and he raped her inside the room.

14. Learned counsel for appellants submitted that the incriminating evidence against the appellants have not been put to them in their statements recorded u/s 313 Cr. P. C.

15. Further submits that if the incriminating evidence are not put to the accused persons, then the benefit of doubt should be given to the accused persons and they are entitled for acquittal.

16. To support her this arguments, has relied upon the judgment of Supreme Court in the case of **Ranvir Yadav Vs.**

State of Bihar : (2009) 6 SCC 595 wherein the Supreme

Court in para No.9 has observed that :-

“The purpose of Section 313 of the Code is set out in its opening words- ‘for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.’ In **Hate Singh, Bhagat Singh v. State of Madhya Pradesh : AIR 1953 SC 468** it has been laid down that the statements of accused persons recorded under Section 313 of the Code ‘are among the most important matters to be considered at the trial’. It was pointed out that the statements of the accused recorded by the committing magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness box and that they have to be received in evidence and treated as evidence and be duly considered at the trial. This position remains unaltered even after the insertion of Section 315 in the Code and any statement under Section 313 has to be considered in the same way as if Section 315 is not there. The object of examination under this Section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt.

Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus. The word 'generally' in Sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."

17. Same view was taken in the case of **Shaikh Maqsood v/s State of Maharashtra : (2009) 6 SCC 586.**

18. Further, she submits that the sanctity of the statement under Section 313 Cr. P. C. remains unaltered even after the insertion of Section 315 Cr. P. C. in the code and any statement under Section 313 Cr. P. C. has to be considered in the same way as if Section 315 is not there. Further submits that, objective of the examination under this section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus.

19. Further submits that conviction based on the accused's failure to explain what he was never asked to explain, is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is

made out against the accused so that he may be able to give such explanation as he desires to give.

20. In the case of **Ranvir Yadav (supra)** the Supreme Court came to the conclusion that the Section 313 Cr. P. C of the Code is not a empty formality. There is a purpose behind examination u/s 313 of the Code. Unfortunately, that has not been done. The Supreme Court found the lapse in that case and in that situation, the appeal of the appellant was allowed and they were acquitted in that case.

21. Learned counsel for appellants prayed that in the present case also the appellants should be given the benefit of doubt, as the incriminating evidence has not been put to the appellants.

22. Learned APP for the State while opposing the same submitted that appellants were caught at the spot; hymen of the prosecutrix was found torn as per the MLC report and a serious offence of rape has been committed on a handicapped minor girl; prosecutrix identified the appellant Rajesh in the

Court and therefore, this Court should not acquit the appellants on technical grounds.

23. Learned counsel for appellants have argued that the incriminating evidence against the appellants have not been put to them, while recording their statements u/s 313 Cr. P. C. This case has not been agitated on merits by either of the counsels for appellants, therefore, this Court is also not discussing the deposition and other evidences on record.

24. Repeatedly, learned APP for the State has been asked to submit on the legal issue of Section 313 Cr. P. C raised by the Ld. Counsels, but he did not give any plausible answer and continued to rely upon other evidence.

25. I have perused the charge and the statement of the prosecutrix and the statement of the appellants recorded under Section 313 Cr. P. C. There is total contradiction in the charge; statement of the prosecutrix and the questions put to the appellants under Section 313 Cr. P. C. As per the prosecution case, rape was committed by appellant Rajesh and appellant Mukesh bolted the door and facilitated Rajesh in

committing rape. And the same is deposed by the prosecutrix in her deposition. Whereas, the incriminating evidence put to them while recording the statement u/s 313 of the Cr. P. C., is that the appellant Mukesh committed the rape inside the room and appellant Rajesh bolted the room from outside and facilitated in committing the rape.

26. I note these questions put u/s 313 Cr. P. C. are contrary to the charge framed and deposition of the prosecutrix 'K'. The object of examination u/s 313 Cr. P. C. is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt; where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case, if such statement discharges the onus. The question must be framed in such a way as to enable the accused to know what he has to explain, what are the circumstances which are against him for which an explanation is needed. The object of the section 313 Cr. P. C. is to afford the accused a fair and proper opportunity for explaining circumstance which appear against him and that the question

must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and explain. In the instant case, the trial judge has totally failed to put incriminating evidence to the appellants, on the contrary, he has put question which are contrary to the charge against the appellants and the evidences against them.

27. The trial Judge has not dealt this case with due diligence, which he ought to be. The present case of rape being committed with a minor and handicapped girl, who belongs to a lower strata of the society. He should have been more careful, in dealing with such a case.

28. At this juncture, there are three options;

i) to revert back the case to trial Judge for fresh recording of statement u/s 313 of Cr. P. C, while setting-aside the judgment on conviction and order on sentence;

ii) to do the above exercise in the High Court itself;&

iii) to acquit the appellants on this ground alone.

29. I note, as per 'Nominal Roll' dated 22.07.2011, total period undergone as on 22.07.2011 is 05 years and 05 days

and remission earned is 09 months 21 days. Therefore, the total period undergone is 05 years 09 months and 21 days.

30. Since, the appellants have already undergone for a total period almost 06 years, I do not deem it appropriate to adopt aforementioned (i) and (ii) options.

31. Therefore, in these circumstances, putting the curtain down and relying upon the aforesaid two judgments of the Supreme Court, I acquit both the appellants in the case u/s 376 (2) (g) Indian Penal Code.

32. I find no infirmity in the judgment and order passed by the trial Judge against the appellants qua the offence under Sections 342/34 Indian Penal Code wherein the punishment awarded is one year. Both the appellants have already undergone nearly 06 years in custody. Learned counsels for the appellants do not dispute the same and they have not argued on the conviction under Sections 342/34 Indian Penal Code, 1860.

33. Therefore, the conviction of both the appellants u/s 342/34 Indian Penal Code is maintained.

34. In view of the above, both the appellants shall be released from Jail forthwith, if no other case is pending against them.

35. The Registry is directed to send a copy of this judgment to the Jail Superintendent, Tihar Jail, New Delhi.

36. Accordingly, Criminal Appeal No.546/2009 Criminal Appeal No.756/2009 are partially allowed.

37. No orders as to costs.

SURESH KAIT, J

July 25th 2011
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