

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

Judgment delivered on: January 07, 2011

+ **CRIMINAL APPEAL NO. 989/2008**

SUNIL

....APPELLANT

Through: Mr. Rajesh Mahajan, Advocate.

Versus

THE STATE (GOVT. OF NCT)

.....RESPONDENT

Through: Ms. Fizani Husain, 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.(ORAL)

1. This appeal is directed against the impugned judgment dated 07th August, 2008 in Sessions Case No. 107/06, FIR No. 150/05, P.S. Model Town and the consequent order on sentence dated 23rd August, 2008 whereby the Additional Sessions Judge has convicted the appellant for the offence of rape punishable under Section 376 IPC and sentenced him to undergo RI for the period of 10 years and also to pay a fine of ₹ 5000/-, in default to undergo SI for a period of four months.

2. Briefly stated, case of the prosecution is that the appellant, who is the father of the prosecutrix, committed rape on her on 09th March, 2005 during night time at his Jhuggi located at Kaushal Pura, Phatak No. 4, Bada Bagh, Model Town, Delhi.

3. The police machinery was put into motion in this case when PW3 Munni Devi accompanied the prosecutrix "P" (name withheld) to police station Model Town to report the rape committed on the prosecutrix by the appellant. WSI Mukesh Devi recorded statement of the prosecutrix wherein she stated that she was living in a Jhuggi at Kaushal Pura, Phatak No. 4, Bada Bagh, Model Town, Delhi along with her father (appellant) who is a TSR driver. She claimed that three years prior to the complaint, her mother had died and for the last few days, her father used to make her sleep with him and indulge in wrong talks. On night of 09th March, 2005, while she was sleeping, her father, after consuming liquor indulged in a wrong act with her against her consent. When she started crying, he gagged her by pushing a cloth into her mouth. In the morning, she narrated the incident to two ladies of the neighbourhood and thereafter, she started living with PW3 Munni Devi, who had taken her to the police station.

4. Investigating Officer SI Mukesh Devi sent aforesaid statement Ex.PW1/A to the Duty Officer after endorsing the same and on the basis of said '*rukka*', FIR Ex.PW2/A was registered.

5. During investigation, Investigating Officer prepared the site plan, recorded statements of the witnesses, got conducted medical examination of the prosecutrix and arrested the accused. Accused was also got medically examined in Hindu Rao Hospital. Prosecutrix was subjected to Bone X-Ray to fix her age and her statement under Section 164 Cr.P.C. was also recorded. The exhibits seized during investigation were sent to FSL for analysis and reports were collected. On completion of investigation, the appellant was charge sheeted and sent for trial.

6. The learned Additional Sessions charged the appellant for the offence of rape punishable under Section 376 IPC. Appellant pleaded not guilty to the charge and claimed to be tried.

7. In order to prove the guilt of the appellant, prosecution has examined as many as 11 witnesses. Case of the prosecution is mainly based upon the testimony of the prosecutrix (PW1), PW3 Munni Devi and the medical evidence.

8. The prosecutrix in her testimony in the court has reiterated the version given in the complaint. She has proved her statement Ex.PW1/A. In the cross examination, she stated that the appellant

had a quarrel with a neighbour Durga about 10 days prior to the incident. She denied the suggestion that Durga used to tutor her against her father by saying that he was a bad person and she should start living with her (Durga). She also stated that one person, whose name she did not know, slept in their Jhuggi on the night of occurrence but she denied the suggestion that the aforesaid person had committed rape on her.

9. PW3 Munni Devi is the neighbour of the prosecutrix. She testified that in the year 2005 i.e. about 1-1½ year prior to the recording of her testimony, prosecutrix informed her that her father Sunil was in the habit of consuming liquor and committing sexual assault on her and this was going on since last three or four months. She (PW3) offered the prosecutrix to come and live with her. Witness further stated that on the same day, she took the prosecutrix to police station Model Town, where the police recorded her (prosecutrix) statement and sent her for medical examination. She further stated that the appellant was arrested in her presence vide memo Ex.PW3/A and his personal search was conducted vide memo Ex.PW3/B. According to her, on the relevant day, prosecutrix told her that the appellant had raped her after gagging her mouth with a cloth.

10. PW7 Dr. Ruchi Singh medically examined the prosecutrix at Hindu Rao Hospital on 14th March, 2005 and has proved her MLC Ex.PW7/A.

11. PW8 Dr. Rajni Mittal, Medical Officer, Hindu Rao Hospital has proved the report of Dr. Sushma Tiwari by way of secondary evidence wherein she has observed that hymen of the prosecutrix was found torn and that the undergarments of the prosecutrix were sealed, slides were prepared and those exhibits were handed over to the Investigating Officer.

12. PW9 Dr. Sudhir Mittal, CMO, Hindu Rao Hospital, by way of secondary evidence has proved the MLC of the appellant Ex.PW9/A prepared by Dr. Poonam Gupta. He testified that he could identify the handwriting of Dr. Poonam Gupta as he had seen Dr. Poonam Gupta writing and signing during the course of official duties.

13. The appellant, when examined under Section 313 Cr.P.C. denied the prosecution case in totality and he claimed that he has been falsely implicated in the case at the instance of PW3 Munni Devi. He also claimed that the prosecutrix had given a wrong version in the court as a result of tutoring by his sister-in-law Basanti and neighbour Munni Devi. No witness in defence was examined.

14. Learned Additional Sessions Judge, on consideration of the record, relying upon the testimony of the prosecutrix, which finds corroboration from the medical evidence as well as testimony of PW3 Munni Devi, held the appellant guilty of the offence of rape punishable under Section 376 IPC and convicted and sentenced him accordingly.

15. Learned Sh. Rajesh Mahajan, Advocate appearing for the appellant submitted that the appellant is innocent and he has been falsely implicated in this case at the instance of PW3 Munni Devi. In support of this contention, he has drawn my attention to the cross examination of the prosecutrix wherein she stated that 10 days prior to the incident, the appellant had a quarrel with Durga, who also is a neighbour. Learned counsel argued that Durga and Munni Devi were on friendly terms and because of the aforesaid quarrel, they were nursing a grudge against the appellant, as such, they got him falsely implicated in this case.

16. I am not impressed with this contention. Admittedly, the prosecutrix is the daughter of the appellant, therefore, if there was no grain of truth in the complaint, the prosecutrix was not expected to falsely implicate her own father at the instance of a neighbour.

17. It is further contended by learned counsel for the appellant that the prosecution story regarding rape of the prosecutrix by the

appellant is highly doubtful for the reason that as per the testimony of PW3 Munni Devi, prosecutrix told her that the appellant was in the habit of consuming liquor and had been sexually abusing her for the last three or four months. Learned counsel argued that if the aforesaid version is true, then under the natural course of circumstances, the prosecutrix was expected to complain about conduct of the appellant to the neighbour Munni Devi much earlier. From this, he has urged this court to infer that Munni Devi is not telling the truth.

18. I do not find any merit in this contention. Admittedly, prosecutrix is the daughter of the appellant. As per the report of Radiologist Ex.PW10/A, she was about 10 to 12 years old. Taking into account the fiduciary relationship between the appellant and the prosecutrix, much significance cannot be attached to failure of the prosecutrix to report the sexual advances made by the appellant under the influence of liquor to the neighbours. In Indian society, chastity and honour of a family is sacrosanct. Therefore, a possibility cannot be ruled out that the prosecutrix till she was actually raped, suffered the sexual abuse silently and did not report the matter to the neighbours to preserve her honour as well as the honour of the family.

19. Learned counsel further argued that the prosecutrix (PW1), in her cross examination, has stated that on the relevant night, one other person whose name she was not aware of, had slept in the Jhuggi. He contended that if the aforesaid version is true, then it is highly improbable that the appellant would have tried to rape the prosecutrix in presence of a witness and had the rape actually taken place, aforesaid person would definitely have come to know about it. He further argued that the investigating agency has not tried to locate and produce that person as a witness and his non-production has caused a great prejudice to the defence.

20. I am not impressed with this argument. The testimony of the prosecutrix is consistent with the allegations in the complaint and finds corroboration from her MLC Ex.PW7/A whereupon the doctor concerned had opined that her hymen was found torn, which is an indication of penile penetration in the vagina of the prosecutrix. It is true that no marks of external injury were found on medical examination of the prosecutrix, but this by itself does not rule out rape for the reason that the FIR has been registered four or five days after the occurrence and MLC was prepared after the registration of FIR. The absence of external injury marks, at the time of medical examination, therefore, is of no consequence. Further, it may be added that the prosecutrix was a young child aged about 10 to 12 years, therefore, there is a possibility that due to fear of her father,

she did not give any resistance, which explains the absence of injury on the person of the prosecutrix.

21. Coming to the second limb of the argument that as per the testimony of prosecutrix (PW1), a third person was also present in the Jhuggi, much importance cannot be attached to the aforesaid version of prosecutrix in her cross examination, taking into account that she was a young girl at the time of examination and she must have been under great trauma while testifying about the traumatic experience suffered by her in the court and if in the process, she faltered in her cross examination, much importance cannot be attached to it. Further, if the aforesaid suggestion given to the prosecutrix was correct, then obviously, appellant knew the identity of the person whom he had invited to sleep in the Jhuggi and nothing prevented him to produce said person in his defence to negate the version given by the prosecutrix. Thus, I do not find any merit in the above contention of learned counsel for the appellant.

22. Lastly, it is contended that it is not safe to rely upon the story of the prosecution for the reason that the complaint in this case was lodged five days after the alleged incident for which there is no explanation. It is contended that the aforesaid unexplained delay in lodging the FIR raises a strong possibility of false implication of the appellant after due deliberation and manipulation.

23. I do not find merit in this contention. One cannot lose sight of the fact that it is a case of rape and victim of rape is generally reluctant to disclose the fact because of the fear of loss of honour and prestige in the society. Therefore, much importance cannot be attached to the delay in filing of FIR. Otherwise also, it is highly improbable that without any reason, a daughter would falsely implicate her father for committing rape on her. There is nothing on the record to suggest that the prosecutrix had any reason whatsoever to falsely implicate her father. Therefore, I find no reason to disbelieve the testimony of the prosecutrix on account of delay in filing of FIR.

24. In view of the facts and circumstances discussed above, I do not find any merit in this appeal. It is accordingly dismissed.

(AJIT BHARIHOKE)
JUDGE

JANUARY 07, 2011

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