

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

Judgment delivered on: March 17, 2011

+ **CRIMINAL APPEAL NO. 82/2008**

FEROZ

....APPELLANT

Through: Mr. Zafar Sadique, Advocate.

Versus

STATE (GOVT. OF NCT OF DELHI)

....RESPONDENT

Through: Mr. Sunil Sharma, 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 of learned Additional Sessions Judge dated 04.10.2007 in Sessions Case No.93/2006 FIR No.743/05 P.S. Patel Nagar under Sections 376/342/506/34 IPC as also consequent order on sentence dated 10.10.2007 whereby the appellant Feroz, for the offence under Section 376 IPC, has been sentenced to undergo RI for the period of 07 years, besides fine of ₹20,000/-, in default to undergo SI for further period of two years and for the offence under Section 342

IPC to undergo RI for the period of one year as also for the offence under Section 506 IPC to undergo RI for the period of one year. It is ordered that the substantive sentences shall run concurrently.

2. Briefly stated, case of the prosecution is that on 20.12.2005 at about 3:00 pm when the prosecutrix was coming to home after attending her stitching classes, she met accused Sonu, resident of WZ 68, Shadi Pur, Ranjeet Nagar. Sonu took her to her house and made her sit there and left on the pretext of fetching medicine. While going out of the house, Sonu bolted the door from outside. Appellant Feroz was already present in the rear room. He came to the room where the prosecutrix was sitting and closed her mouth. Thereafter, he forcibly committed rape on the prosecutrix. On hearing the alarm of the prosecutrix, her uncle Net Ram reached at the place of occurrence and rescued her. The matter was reported to the police. The police recorded the statement of the prosecutrix Ex.PW2/A, which formed basis for registration of the case. During investigation, prosecutrix as well as the appellant were got medically examined. Clothes of the prosecutrix were seized and subsequently sent to FSL for chemical examination. Statement of the prosecutrix under Section 164 Cr.P.C. was also recorded. Her bone ossification test was done for verification of age. Her school leaving certificate was also seized. On completion of investigation,

the appellant as well as his co-accused Sonu were challaned and sent for trial.

3. The appellant was charged for the offences under Sections 342, 376 and 506 IPC, whereas his co-accused Sonu was charged for the offences under Section 342 and 376 read with Section 109 IPC. Both the appellant and his co-accused pleaded not guilty and claimed to be tried.

4. In order to bring home the guilt of the appellant and his co-accused, prosecution examined 18 witnesses including the prosecutrix.

5. Prosecutrix was examined as PW1. She, in her evidence, has supported the case of prosecution by stating that on 20.12.2005 at about 3.00 p.m., while she was returning from stitching classes, she met Ms.Sonu, co-accused of the appellant, who took her to her house and made her sit there. After some time, she left the house on the pretext of fetching medicine and while leaving, she bolted the door from outside. Two minutes later, the appellant Feroz came from the rear room and tried to molest her. She screamed but Feroz committed rape on her after removing her clothes. She further stated that her '*chacha*' (uncle) came there on hearing the alarm and rescued her. But, by that time the accused had already raped her. She stated that matter was reported to the police. Police

recorded her statement Ex.PW1/A and also sent her for medical examination.

6. PW2 Shakuntala is the mother of the prosecutrix. She has stated that on 20.12.2005, she heard a noise in the gali and she was informed by her brother-in-law Net Ram that the prosecutrix had been confined by Pushpa @ Sonu. On this, she rushed to the spot and her daughter i.e. the prosecutrix told her that she was taken by Pushpa to her room where she was raped by the appellant Feroz. Appellant Feroz was also present at the spot at that time.

7. PW3 Netram is the uncle of the prosecutrix. He has also supported the prosecution story by saying that on 20.12.2005 at about 3.00 p.m., he found the crowd outside House No.WZ-68. He was told that some child was confined inside. He peeped inside the window and found the prosecutrix there who was crying and screaming. On this, he opened the door which was bolted from outside and the prosecutrix clinched to him and started crying.

8. Statement of the appellant under Section 313 Cr.P.C. was recorded. He claimed that he has been falsely implicated because of a dispute between his father and Net Ram, uncle of the prosecutrix who used to threaten his father for vacating the house. He denied the prosecution evidence in toto and claimed that he has been falsely implicated after picking him up from his house.

9. Learned Additional Sessions Judge, on consideration of the evidence on record, believing the version of the prosecutrix found the appellant as well as his co-accused Sonu guilty of charges. The appellant was convicted for the offence punishable under Section 342/376 and 506 IPC vide impugned judgment and sentenced vide order dated 10.10.2007.

10. Learned Sh. Zafar Sadique, Advocate appearing for the appellant contended that appellant has been falsely implicated in this case at the behest of Net Ram, uncle of the prosecutrix, who had a property dispute with the father of the appellant. Learned counsel argued that case of the prosecution rests solely on the testimony of the prosecutrix, which is not worthy of reliance. Elaborating on the argument, learned counsel for the appellant submitted that the prosecutrix in her testimony claims that after co-accused of the appellant Sonu left the house, appellant Feroz came from the rear room and tried to put his hand on her mouth. On this, she started screaming but Feroz committed rape on her against her consent after removing her clothes as well as his clothes. Learned counsel urged that this version of the prosecutrix is highly improbable for the reason that if the prosecutrix was resisting rape and shouting, the appellant would not have wasted time in removing the clothes of the prosecutrix. Learned counsel further argued that in the cross-examination, the prosecutrix stated that her clothes were torn. This

version, according to the learned counsel for the appellant, runs counter to the earlier version of the prosecutrix and makes her testimony unreliable. It is also contended that if at all, the prosecutrix resisted the rape, there should have been some tell tale signs of struggle on the person of the prosecutrix or the appellant but the MLC of the appellant as well as the prosecutrix tells a different story. Learned counsel has referred to the MLC of the appellant (Ex.PW10/A) as well as MLC of the prosecutrix (Ex.PW4/A/Ex.PW12/A) in support of his contention. Thus, learned counsel summed up that in view of the aforesaid contradictions in the testimony of the prosecutrix, which is not corroborated by the medical evidence, the Trial Court ought not have relied upon her testimony and he should have at least given benefit of doubt to the appellant. In support of his contention, learned counsel for the appellant has relied upon the judgment of Supreme Court in **Radhu Vs. State of Madhya Pradesh**, 2007 (II) SCALE 96 and judgment of this court in **Virender Vs. The State of NCT of Delhi**, 2009 (4) JCC 2721.

11. Before adverting to the submission of learned counsel for the appellant on merits, it would be useful to have a look on the judgments relied upon by the appellant.

12. In **Radhu Vs. State of Madhya Pradesh (supra)**, the Supreme Court while dealing with the testimony of the prosecutrix in a rape case inter alia observed thus:

“5. It is now well settled that a finding of guilt in case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroboration evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a ‘rape’, if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrists, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts, should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case”.

In the matter of **Virender Vs. The State of NCT of Delhi (supra)**, learned Single Judge of this Court has reiterated and followed the above referred judgment.

13. On reading of the above judgments, it is clear that in a rape case, there is no legal bar to return a finding of guilt on the basis of uncorroborated evidence of the prosecutrix. This, however does not mean that the court is bound to rely upon the testimony of the prosecutrix. Before returning a finding of guilt, the court is under

obligation to carefully scrutinise the testimony of the prosecutrix and if it is found reliable, then only, a finding of guilt can be returned without seeking corroboration from extraneous factors.

14. Thus, main question for determination is whether the testimony of the prosecutrix inspires confidence. In the instant case, prosecutrix has supported the case of prosecution on material aspects. In her testimony in the court, the prosecutrix stated that co-accused Sonu had locked her inside her (Sonu) house by bolting the door from outside while leaving. She and the appellant were alone in the house, therefore, if she succumbed to the overtures of the appellant without giving much resistance, it will not absolve the appellant of rape if he had actually committed the rape. Perusal of the MLC Ex.PW4/A of the prosecutrix reveals that prosecutrix was sent for medical examination on the same night at 08.00 p.m. and on medical examination, the doctor concerned found a linear abrasion 3 c.m. long present on volar aspect of forearms. Besides this, the Gynaecologist also found that hymen of the prosecutrix was torn. Torn hymen as well as abrasion on forearms indicates a possibility of rape on the prosecutrix, particular when, the prosecutrix, as per her Birth Certificate (Ex.PW13/A) was only 16 years & 3½ months old. Further PW2 Shakuntla has corroborated the version of the prosecutrix by stating that on 20th December, 2005, she heard a noise in the '*gali*' and she was informed by her brother-in-law

(devar) Netram that her daughter was confined by Pushpa @ Sonu. On this, she rushed to the house of Pushpa and found the prosecutrix there, who told her that she was called by Pushpa to her room and thereafter in the said room, appellant Feroz forcibly raped her. This version of the prosecutrix given to her mother is evidence relating to her conduct after the occurrence, which is relevant under Section 8 of the Evidence Act and gives an assurance that the prosecutrix is telling the truth.

15. Further, the stand taken by the appellant is that he has been falsely implicated by the prosecutrix at the instance of her uncle Netram because there was a property dispute between Netram and the father of the appellant. It is highly improbable that a young lady would put her honour as well as honour of her family at risk by making allegation of rape against someone to settle a minor score. Thus, under the circumstances, I find no reason to disbelieve the testimony of the prosecutrix and I am of the considered view that learned Additional Sessions Judge has rightly relied upon the testimony of the prosecutrix, which is corroborated not only by her mother but also by the medical evidence. It may not be out of place to mention that as per the noting in the MLC of the prosecutrix, her underwear was seized by the police. It was sent during investigation for CFSL examination and as per the report of CFSL, the underwear

gave positive test for presence of human semen. This circumstance also corroborates the testimony of the prosecutrix regarding rape.

16. Learned counsel for the appellant has further referred to the judgment of Supreme Court in the matter of **Aman Kumar & Another Vs. State of Haryana**, 2004 SCC (Cri) 1226 and submitted that in order to bring home the guilt of the appellant and the charge of rape under Section 376 IPC, there ought to have been a clear evidence of penile penetration in the vagina of the prosecutrix. Learned counsel submits this is missing in the FIR as well as the statement of the prosecutrix under Section 161 CrPC and even in her testimony in the court, prosecutrix has vaguely stated that she was raped by the appellant but she is not specific whether or not, there was penile penetration. Even the MLC does not specifically record that there was any evidence of rape or recent sexual activity.

17. I am not convinced with this argument. Perusal of the FIR would show that prosecutrix has categorically stated "*Iske baad Feroz ne mera marzi ke bagair mera muh dabakar zabardasti mere saath sharirik sambandh banaye*". In my considered view, this version itself is sufficient to mean that Feroz actually had sexual intercourse with the prosecutrix. Even in the statement under Section 164 Cr.P.C., prosecutrix stated before the Magistrate that

the appellant tried to kiss her. He tore her clothes and placed himself upon her despite her resistance. No doubt, in the aforesaid statement, she has not mentioned about penile penetration in so many words but the words used by her convey the meaning that she was actually raped. In her testimony on oath, prosecutrix has categorically stated that she was raped by Feroz, therefore, there is no doubt in my mind that it is a case of penile penetration, particularly when, semen traces were found in the underwear of the prosecutrix and her hymen was found torn.

18. Learned counsel for the appellant has lastly submitted that sentence of seven years awarded to the appellant in the given facts and circumstances of the case is too harsh. Learned counsel submitted that at the time of the incident, the appellant was aged between 18 to 19 years. He has his whole life ahead of him and he deserves at least a chance to correct himself and prove to be a useful member of the society.

19. Section 376 provides that whosoever commits rape shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to life or for a term which may extend to ten years. Proviso to this section provides for an exception that court may, for adequate and special reasons in the

judgment, impose sentence of imprisonment for a period of less than seven years.

20. The prosecution has been able to establish that prosecutrix was induced by the co-convict Ms.Sonu to visit her house and thereafter she was confined in the house of Sonu, who bolted the main door of the house from outside while leaving on the pretext of fetching medicine. Thereafter, the appellant came from the rear room and raped the prosecutrix. From this, it is evident that prosecutrix was raped pursuant to a pre-conceived plan between the appellant and his co-accused Ms.Sonu. In view of the above factual matrix, this is not a fit case for showing indulgence to the appellant by awarding him sentence of imprisonment for a term of less than seven years with the aid of proviso to Section 376 IPC. The plea for reduction of sentence is, therefore dismissed.

21. In view of the discussion above, I do not find any infirmity in the impugned judgment of conviction, which may call for interference in appeal.

22. Appeal is accordingly dismissed.

(AJIT BHARIHOKE)
JUDGE

MARCH 17, 2011

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