

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

+ Crl. Appeal No. 77/2002

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Reserved on: 16th February, 2012

Decided on: 7th March, 2012

MANOJ KUMAR

..... Appellant

Through: Mr. P. Sureshan, Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Mukesh Gupta, APP for the State
with SI Manoj Kumar.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, the Appellant lays challenge to the judgment dated 17th November, 2001 convicting him for offence under Sections 342/363/376 read with Section 34 IPC and the order dated 1st December, 2001 whereby he was directed to undergo Rigorous Imprisonment for a period of three months and a fine of Rs.100/- for offence under Section 342 IPC and in default of payment of fine to further undergo Simple Imprisonment for a period of 7 days, Rigorous Imprisonment for a period of two years and a fine of Rs.500/- for offence under Section 363 IPC and in default of payment of fine to further undergo Simple Imprisonment for a period of one month and Rigorous Imprisonment for a period seven years and a fine of Rs. 5,000/- for commission of offence punishable under Section 376 IPC and in default of payment of fine, to further undergo Simple Imprisonment for a period of six months.

2. Learned counsel for the Appellant contends that the allegation of rape is against Brijesh, who, though taken into police custody as per the statement of the witness, was permitted to go and thereafter was declared a proclaimed offender. As regards the Appellant, the prosecutrix clearly stated that after the Appellant tried to rape her, she felt giddy and did not know what happened thereafter and when she regained consciousness, she saw Appellant was going outside after wearing his clothes and opening the shutter. Thus there is no allegation that the Appellant committed rape on her. The testimonies of the witnesses are full of contradictions. As per the prosecutrix, while taking her away from her house, the Appellant and his co-accused closed the door from outside however, all the other witnesses have stated that the door was opened and they found the prosecutrix missing. There is no evidence of forced entry into the house, thus, the allegations are concocted in nature. The prosecutrix has on the one hand stated that she was sleeping in the room with her brother however, in the cross-examination she admitted that her parents were also sleeping in the said room. The prosecutrix denied that her house consists of only one room however, the Investigating Officer has clarified that the house of the prosecutrix was a one room house. It is the case of the prosecutrix that immediately on the offence being committed, neighbours and relatives collected but since she was not in a position, she said that nothing had happened, however, still each of the witnesses said that the police went to the house of Brijesh and took him along with him. It is thus apparent that immediately after the incident there was no mention of the Appellant. The Appellant has been falsely implicated on the next day at the instance of the family members because the family members were against the love affair of the Appellant with the prosecutrix.

PW2 the prosecutrix completely exonerates the Appellant in her statement made in the examination-in-chief and even in cross-examination states that she had not told to the police that Manoj removed his clothes and laid upon her. Further the allegation of kidnapping cannot be attributed to the Appellant as it is the case of the prosecutrix that she was taken away by Brijesh and other boy.

3. PW9 has stated that the police took away Brijesh with other person. In the first complaint made by the father of the prosecutrix to the DCP, only Brijesh has been implicated. The father of the prosecutrix had borrowed a sum of Rs. 50,000/- from the Appellant and has thus implicated him in this false case. There are contradictions in the testimonies of the witnesses as to when the incident took place. Further there is no evidence that the Appellant owned or possessed the shop from where the prosecutrix was recovered. It is thus prayed that the Appellant be acquitted of the charge framed. In the alternate, it is prayed that since the Appellant has been in custody for more than four years, he be released on the period already undergone.

4. Learned APP for the State on the other hand contends that there are clear allegation that the prosecutrix was kidnapped by Brijesh and the other boy and taken to the shop of the Appellant. It has been proved beyond reasonable doubt that the prosecutrix was recovered from the shop of the Appellant when the Appellant was present. The rape on the prosecutrix is confirmed by the FSL report Ex. PB which shows that human semen was detected on the clothes and vaginal swabs of the prosecutrix. PW3 Sub-Registrar of Birth and Death, MCD has appeared in the witness box and proved the date of birth of the prosecutrix as 18th September, 1984 vide Ex.

PW4/A. The alleged incident took place on the intervening night of 25th and 26th August, 1998. Thus, the prosecutrix was less than 14 years when she was raped and her consent is thus immaterial. Hence there is no infirmity in the impugned judgment of conviction and the order on sentence and the appeal be dismissed.

5. I have heard learned counsel for the parties.

6. PW2 the prosecutrix in her statement stated that on the night of 26th November, 1998 when she was sleeping with her younger brother in her house, at about 12.30 a.m. Brijesh a proclaimed offender whom she could identify along with one another boy not known to her entered her house. Brijesh kept one handkerchief on her mouth and took her outside the house. Thereafter they bolted the room from outside. At that time, her younger brother was sleeping. Brijesh and the other boy took her to the shop of the Appellant. The shop was already lying open and the Appellant Manoj was present in the shop at that time. Brijesh, Manoj and other boy forcibly dragged her inside the shop and closed the shutter of the shop. The third boy, whose name she did not know, went out of the shop in order to keep a watch. Thereafter Brijesh tried to rape her and despite her protest he committed rape on her. Thereafter the Appellant tried to rape her. She felt giddy and did not know what happened thereafter. Before she felt giddy, the Appellant had removed his clothes and lay upon her. When she gained consciousness, she saw the Appellant going outside after wearing his clothes and opening the shutter of the shop slowly. The voice of the neighbours was coming. At that time none of her family members was present. While going, the Appellant threatened the prosecutrix that in case she told the true

facts, he would kill her and her brother. Her uncle came and took her out of the shop. Her clothes were wet. Her uncle informed the police and the police came on the spot. However by that time the accused had already managed to escape. Since the prosecutrix was frightened at that time she told the police that no untoward incident had taken place with her. When her aunt came and enquired from her, she told the true facts. Next day she went to the police station and a report was lodged by her uncle. She was made to sign a blank paper and she did not know what was written on it. She identified her signatures on the carbon copy of the FIR. She gave her clothes to the police which were seized and her grandmother took her to the hospital along with police personnel where she was medically examined. The statement of the prosecutrix was also recorded before the Magistrate being Ex. PW2/C.

7. No doubt, there are a few contradictions in the sense that in the cross-examination the prosecutrix has stated that there are two rooms in the house constructed on the area of 100 sq. yards, however, the Investigating Officer stated that there is one room only. Further the prosecutrix has stated that while taking her away, the accused bolted the door from the outside whereas all the other witnesses have stated that the door was open. To my mind, these contradictions do not go to the root of the prosecution case.

8. In the examination-in-chief, the prosecutrix has stated that Manoj tried to rape her, she felt giddy and did not know what happened thereafter. She has also stated that before she felt giddy, Manoj had removed his clothes and he lay on her. When she gained consciousness, Manoj was going outside after wearing his clothes and he was opening the shutter of the shop slowly.

In the cross-examination, PW2 has stated that she did not say before the Magistrate that accused Manoj had removed his clothes and lay upon her. However, this witness before the Magistrate in her statement under Section 164 Cr.P.C. had stated that Manoj took out her salwar and started doing forcefully wrong act with her and she felt giddy. Outside her uncle and father came, knocked the shutter and stated that the police be called on which Manoj opened the shutter and ran away. It may be noted that there is no material improvement in the statement of the prosecutrix from the one stated by her in her complaint to the police resulting in registration of the FIR or the one made to the learned Metropolitan Magistrate under Section 164 Cr.P.C. as regard the Appellant is concerned.

9. Further the FSL report Ex. PB-PC shows that human semen was detected on Ex. 1a, 1c, 2a, 2b and 3, which are the clothes and the micro slides prepared from the vaginal smear of the prosecutrix. Thus this proves beyond reasonable doubt that the prosecutrix, who was aged below 14 years was raped.

10. Further the version of the prosecutrix is supported by the testimonies of PW7 Sheela Rani her grandmother, PW8 Kamlesh her mother and PW9 Amarjit her father. They have stated that at the night when PW8 got up, she saw that the lock of main gate was broken. She informed her mother-in-law and her husband and checked their household articles. When they went inside the room, she found her daughter aged about 14 years missing. They informed the police and raised suspicion on Manoj as on previous occasion he misbehaved with 2/3 girls in the locality. They went to the shop of Manoj and found the prosecutrix inside the shop.

11. The Appellant has stated that there is no evidence to show that the shop belonged to the Appellant. It may be noted that no suggestion has been given to the witnesses that the shop did not belong to the Appellant. Further though the Appellant has confronted PW9 Amarjit with the alleged letters of the prosecutrix however, the prosecutrix the purported author of the letters has not been confronted with the alleged letters. PW9 has clearly denied the love letters to be in the handwriting of the prosecutrix.

12. As regard Brijesh co-accused, it may be noted that he was not available and thus, he was declared a proclaimed offender and as and when he is available, he would be tried before the Court concerned. The non-availability of the co-accused Brijesh does not absolve the Appellant of the offence committed by him.

13. In view of the overwhelming evidence on the record I find no infirmity in the impugned judgment. Further the Appellant has committed the offence of rape on a girl below 14 years of age and thus I find no ground to reduce the sentence of the Appellant to the period already undergone.

14. The appeal is dismissed. The Appellant is in custody. He will undergo the remaining sentence. The Appellant be informed through the Superintendent, Tihar Jail.

(MUKTA GUPTA)
JUDGE

MARCH 07, 2012
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