

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

% CRL.A. NO. 876/2001

+ Date of Decision: 5th October, 2012

JAIBEER Appellant
! Through: Mr. Durgesh Gupta, Advocate

Versus

\$ STATE ...Respondent
Through: Mr. M.N. Dudeja, APP for the State

CORAM:
*** HON'BLE MR. JUSTICE P.K.BHASIN**

JUDGMENT

P.K.BHASIN, J:

The appellant-accused was convicted under Section 354 of the Indian Penal Code ('IPC' in short) vide judgment dated 30th June, 2000 passed by the Additional Sessions Judge and was sentenced to imprisonment for the period which he had spent in jail as an under trial prisoner and which period was about 13 months. Feeling aggrieved by his conviction the appellant-accused filed this appeal challenging the trial Court's judgment of conviction.

2. The prosecution case, briefly stated, is that on 16th September, 1997 at about 10.45 p.m. appellant-accused Jaibir brought a mentally retarded girl to the Tefla restaurant in JNU Campus where he ordered food for himself and the girl and while eating food he started lifting the frock of the girl with his foot. After having dinner Jaibeer took her towards the bushes near the Open Air Theatre where he pushed that girl on the bushes and as per the FIR he “tried to force himself sexually upon her”. All that was witnessed by four persons and they managed to catch hold of the appellant-accused Jaibeer at the spot itself.

3. On the basis of the joint written complaint of the four eye witnesses(PWs 1,3,4 & 12) FIR, Ex PW 8/A, was registered at Vasant Vihar Police Station under Sections 354/376/34 IPC on 17.9.97 at 1.45 a.m. It was the further case of the prosecution that at the time of the incident two other persons, namely, Battan Singh and Rajendra, were also present with an intention to commit rape upon that mentally retarded girl but they had fled away. However, the police arrested both of them. After completion of investigation the police filed the charge-sheet in the Court of concerned Metropolitan Magistrate, who after completing the necessary

formalities committed the case to the Court of Sessions and vide order dated 6th, July, 1998 all the three accused persons were charged and tried for the offence under Section 376/34 IPC.

4. To prove its case the prosecution examined fifteen witnesses. In their statements under Section 313 Cr.P.C. all the three accused persons had claimed that they were innocent and had been falsely implicated. No evidence had been adduced by any of the accused.

5. The learned trial Court after considering the prosecution evidence and particularly of the four eye witnesses convicted the appellant-accused alone and that too for the offence punishable under Section 354 IPC and not under Section 376 IPC. The other two accused were acquitted.

6. The appellant then filed this appeal challenging his conviction by the trial Court.

7. The trial Court dealt with the prosecution evidence and the submissions advanced on behalf of the prosecution and the accused in paragraphs 6-8 of the impugned judgment and those paras are being re-produced below:-

“6. PW 1 Gajinder Nath Dubey, had stated that on 16.9.97 at about 9.30 p.m. he along with Irfan, Animesh and Jaswant was having tea outside Tefla restaurant and their attention were diverted towards accused Jaibir and Guddi as dogs had started barking and they saw both of them entering Tefla restaurant. He had further stated that the girl was wearing a long Frock, and appeared to be mentally retarded as her hairs were undone and froth was coming out of her mouth. He had further stated that they both had dinner and during that time they saw accused Jaibir lifting the Frock of the girl with his foot and after having dinner they proceeded towards the Children Park, and after again returning towards Tefla went to nearby bushes and the accused and the girl were chased by them. He had further stated that he saw accused lying over the girl whose Frock had been completely lifted and when he tried to lift the accused, he was pushed by the accused and he also felt that two other persons were running away from the bushes. He had further stated that the accused was nabbed and the girl was also lifted from the spot and thereafter they were handed over to the police and accused Jaibir was arrested by the police. To the similar aspect are the statements of Irfan PW12. Animesh PW and Jaswant PW4. All of them had corroborated the version given by PW1 in all material aspects and despite extensive cross examination they all had held their grounds and no material discrepancy had been brought in their statements and their credibility could not be shaken. They all have categorically denied that they have lodged a false report in order to gain advantage in the forthcoming students union elections. Even otherwise it is hard to believe that a person unconnected with the elections will be falsely roped in that too for a serious offence like that of rape simply to gain advantage in the elections. Furthermore except the suggestions that there were elections after two or three days

which suggestion was admitted, no further suggestion was given to any of these witnesses that any one of them was a candidate in the elections, or that each one of them were supporting the same candidate, and in the absence of such a suggestion, the factum of forthcoming elections will be of no significance. The only improvement made by PW1 is regarding pushing of him by accused Jaibir, from which statement he had been confronted from the complaint Ex.PW1/A. However to my mind this will not be of any significance as this is an act unrelated to the actual incident for which the accused persons have been charged with but relates to the mode and manner by which the accused had been apprehended by these eye witnesses. Ld. Counsel for the accused had pointed out that in the statements of Gajendra the distance of the bushes from the place where the eye witnesses were sitting had been mentioned as 10 to 15 meters while PW3 had stated the same to be 50 yards. In fact it cannot be said to be a difference at all as the distance are almost the same and one cannot loose sight of the fact that such distance are given as per approximation which also differs from person to person.

7. So from the testimonies of PW1, PW3, PW4, and PW 12 it stands established on record that accused Jaibir had lifted the Frock of Guddi while being at Tefla Restaurant and thereafter was found lying over Guddi while Frock was completely lifted in the bushes. However the fact remains that none of these witnesses had stated that they have seen accused Jaibir committing rape on Guddi, or that accused Jaibir was also naked at that time, or that accused Jaibir was trying to force his male organ into the vagina of the prosecutrix. In the absence of such a testimony, and in the absence of medical report to the effect that recent sexual intercourse was committed with Guddi, no finding that the accused committed rape or attempted to commit rape on Guddi can be arrived at. The acts committed only amounts

to outraging the modesty of a woman, punishable under Section 354 IPC. The report of Dr. Kiran PW7 is to the effect of suggesting a previous intercourse and not of a recent intercourse. Though it is a fact that Guddi had not been examined as a witness in this case but the same will not make any difference as not only on the date of incident as described by the PWs she appeared to be mentally retarded but PW6 Dr. R.K. Chandra had found her to be emotionally disturbed on 18.9.97 and suffering from Psychotic disorder on 6.10.97. Not only this, Guddi was found to be not capable of giving statement or understanding, and she did not respond at all to the queries raised by this Court, when she was produced in Court on 3.1.2000, as observed in the proceedings sheet dated 3.1.2000.

8. So far as accused Rajinder and Battan Singh are concerned PW-1 Gajinder Singh had only stated that he felt that two persons were running away and he had failed to identify either accused Battan Singh or accused Rajinder in the Court. To the similar effect is the statement of PW3 Animesh. He had identified accused Rajinder only in the Court but had stated that he was not knowing this accused prior to the incident and accused Rajinder was shown to him at the police station where he was called after accused Rajinder was arrested. In his cross examination PW3 had stated that it was Gajinder, Irfan and Jaswant who had told him that two persons were seeing running away from the bushes, and he himself had not seen them so the testimony of PW1 and PW3 are of no avail to the prosecution. Similarly it can be said of Irfan PW12 who had also not identified any of these accused in the Court nor have seen them in the Court, and had rather stated that there was no occasion to see these accused as neither there was enough light nor he had seen their faces. The only testimony of having seen accused Rajinder and accused Battan Singh running away from the spot is that of PW4 Jaswant who had identified them in the

Court and have stated that he had seen their faces while they turned back. However, though it has come in the testimony of other witnesses that except Animesh who was handicapped, all the other three reached at almost about the same time and none of them could see the faces of accused Rajinder and Battan Singh, it cannot be said that PW4 Jaswant could have seen their faces, and no other witness had stated that the two persons who were running away had turned around. Moreover no overt act had been attributed to any of these accused i.e. Rajinder and Battan Singh, and simply the fact that they were seen running away from the bushes will not expose them to conviction for committing an offence. As such no case is made out against accused Rajinder and accused Battan Singh.”

8. Learned counsel for the appellant submitted that all the four eye witnesses did not corroborate each other's version of the incident and, therefore, testimony of all of them should have been viewed with suspicion particularly when the victim girl was not examined as a prosecution witness. I, however, do not find any merit in this submission of the learned counsel for the appellant. The learned trial Judge has recorded in the impugned judgment that all the four witnesses had corroborated each other. I have myself also gone through the evidence of all the four eye witnesses and have found that all of them had fully corroborated each other's version of the incident. All of them claimed to have seen the appellant lifting the frock of the victim girl at the restaurant while

eating food and then taking her to the nearby bushes where she was pushed down by him. All these witnesses also claimed to have seen the appellant lying over the victim girl. None of them could be shattered in their cross-examination on behalf of the appellant.

9. Learned counsel for the appellant had also submitted that even though as per the prosecution case many persons had come to the spot after the four eye witnesses had seen the appellant lying over the victim girl but none of them had been examined by the prosecution and for that reason also the prosecution case became doubtful. I find no force in this argument also of the learned counsel for the appellant. All the four eye witnesses have not been shown to be in any way known to the victim girl and, therefore, all of them were independent witnesses and there was no necessity of multiplying the witnesses by the investigating officer. The appellant had not claimed that the four eye witnesses had any grudge against him for which they wanted to falsely implicate him in a rape case. Therefore, the learned trial Court was fully justified in accepting the evidence of the four eye witnesses.

10. No other submission was made by the learned counsel for the appellant.

11. I, therefore, find no illegality committed by the learned trial Court in convicting the appellant. This appeal is accordingly dismissed.

P.K. BHASIN,J

October 5, 2012