

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

+ CRL.A. 608/2003

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Reserved on: 1st April, 2013

Decided on: 29th May, 2013

CHANDRA PRAKASH TIWARI

..... Appellant

Through: Mr. Kedar Yadav, Advocate.

versus

STATE OF N.C.T. OF DELHI

..... Respondent

Through: Mr. Mukesh Gupta, APP for the State
with ASI Baldev Raj PS Khazoori
Khas.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, the Appellant impugns the judgment dated 31st July, 2003 whereby he has been convicted for offence under Section 376 IPC and the order on sentence dated 5th August, 2003 directing the Appellant to undergo Rigorous Imprisonment for seven years with fine of Rs. 2,500/- and in default of payment of fine to undergo Rigorous Imprisonment for a period of 2½ months.

2. Learned counsel for the Appellant contends that the statement of the prosecutrix is not reliable. At the time of the alleged incident she was 30 years old and mother of three children. The medical evidence on record does not support the case of the prosecutrix. There is no injury mark on the body of the prosecutrix. Further the prosecutrix herself also does not state that she raised any hue and cry when she was being allegedly raped by the Appellant. No other person from the household, including the landlord has been examined to prove that the Appellant visited PW1/prosecutrix. Learned

Trial Court has erroneously convicted the Appellant treating the argument of learned counsel for the defence as a false plea. There is no evidence on record to connect the Appellant to the alleged crime if at all committed. Reliance is placed on *Narender Kumar vs. State (NCT of Delhi)*, AIR 2012 SC 2281 to contend that corroboration of the testimony of the prosecutrix is necessary to base conviction under Section 376 IPC. The defence of the Appellant that the husband of the prosecutrix assaulted him and in order to avoid any case against him, the Appellant had been implicated in this false case through his wife has not been considered by the learned Trial Court.

3. Learned APP for the State on the other hand contends that despite extensive cross-examination, nothing could be elicited from the prosecutrix. After the incident the prosecutrix informed her neighbour, who was her cousin as well, who in turn called her husband. The alleged incident took place at 8.30 a.m. and by 9.55 a.m. a DD entry was lodged regarding the rape of the prosecutrix. On the same day the MLC of the Appellant was conducted which shows injuries to the Appellant. The prosecutrix has clearly explained that to resist the Appellant, she gave fist blows on his face, which explains the injury. Further as per the MLC, the husband of the prosecutrix took her to the hospital thus corroborating the version of the prosecutrix.

4. I have heard learned counsel for the parties.

5. FIR No. 158/2001 was registered at PS Khajuri Khas on the complaint of PW1/the prosecutrix. The prosecutrix before the Court stated that the Appellant was also residing as a tenant in the same premises where she was residing for the last more than one year with her husband and three children. Around six months ago at about 8.30 a.m. her husband had gone to his duty

when a juice seller came there. The Appellant brought juice and offered her to drink but she declined. Thereafter the Appellant entered her room and shut the door. He gagged her mouth and raped her. The prosecutrix gave a fist blow on his mouth but could not succeed to save herself. Thereafter the Appellant ran away from the spot from the back door. She got up and went to her cousin sister's house, who was residing in the same locality, and told her about the said incident. The cousin sister in turn called the prosecutrix's husband on the mobile phone who arrived at home. She narrated the entire incident to her husband. In the meantime, somebody telephonically informed the police which came to her house. She got recorded her statement Ex. PW1/A and thereafter she was taken to hospital where she was medically examined. PW2 the cousin of PW1/prosecutrix and PW3, her husband have deposed about the information received by them.

6. The defence of the Appellant is primarily that he was beaten by PW3 in the morning and thereafter he has been falsely implicated by PW1 so as to avoid implication of assaulting the Appellant. A perusal of the MLC Ex. PW5/A conducted on the same day shows that he had swelling on the upper lip, abrasion behind the left ear and tenderness over the left side of the shoulder and upper incisor teeth. The prosecutrix in her statement has clearly stated that to avoid commission of rape, she gave fist blow on the face of the Appellant. The injuries of the Appellant correspond to the fist blow given. Further in case the defence of the Appellant is to be accepted no complaint has been made by the Appellant to the police with regard to the alleged beating by PW3 on that day or thereafter and no defence evidence has been led in this regard. No doubt, as per the FSL report, semen could not be detected on the clothes of the prosecutrix and the glass slides prepared

from the vaginal swab, however, penetration itself is sufficient to constitute the offence of rape. Further in the statement under Section 313 Cr.P.C. though the Appellant states that he had dispute over water with the husband of the prosecutrix, that is, PW3 however, he nowhere states that PW3 assaulted him resulting in injuries on him.

7. Learned counsel for the Appellant has contended that the argument of the counsel has been taken as false plea and the Appellant has been convicted on the said basis by the learned Trial Court. This contention is wholly erroneous. In Para 13 of the impugned judgment, the learned Trial Court has only discussed the contention of the learned defence counsel that this was a case of consent on the part of the prosecutrix. The learned Trial Court held that the consent was not borne out from the record as the prosecutrix on oath had clearly and unambiguously stated that she was subjected to forceful sexual intercourse despite resistance and there was no proof on the record to the fact that she had any oblique or ulterior motive to falsely implicate the accused. The plea of the Appellant has not been taken as an additional link in the chain of circumstances.

8. In the present case despite extensive cross-examination of the material witnesses, nothing could be elicited in favour of the defence and thus the learned Trial Court committed no error in basing the conviction on the testimony of the prosecutrix. In *Narender Kumar* (supra) relied upon by the learned counsel for the Appellant itself, the Hon'ble Supreme Court held that the conviction can be based on the sole testimony of the prosecutrix provided it is trustworthy however, if the version of the prosecutrix on its face value cannot be accepted then the Court should look for corroboration and in case the evidence read in totality and the story projected by the prosecutrix is

found to be improbable then the entire prosecution case is liable to be rejected. In the present case the version of the prosecutrix is not unreliable rather it is corroborated by the injuries on the face of the Appellant which according to the prosecutrix were inflicted by fist blow given by her. Thus the prosecution has discharged its onus to prove the case against the Appellant beyond reasonable doubt. The Appellant has taken the plea of false implication for having allegedly beaten by PW3 however nothing has been proved in this regard during trial. Though suggestions have been given to the witnesses however, the explanation of beating by the PW3 has not even been stated by the Appellant in his statement under Section 313 Cr.P.C. Thus the defence of the Appellant is not even proved by preponderance of the probability.

9. In view of the aforesaid discussion, I find no infirmity in the impugned judgment and the order on sentence. Appeal is accordingly dismissed.

(MUKTA GUPTA)
JUDGE

May 29, 2013
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