

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

Date of decision: 7th March, 2013

+ **CRL. A. 237/2009**

UDAI SHANKAR KUMAR Appellant
Through: Mr. Arvinder Kumar Patel, Advocate

versus

STATE (NCT OF DELHI) Respondent
Through Ms. Rajdipa Behura, APP for the State.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. This Appeal is directed against a judgment dated 24.02.2009 and an order on sentence dated 25.02.2009 passed by the learned Additional Sessions Judge(“ASJ”) in Sessions Case No.32/2006 FIR No.163/2006 P.S. Mehrauli whereby the Appellant was held guilty for the offence punishable under Section 376(2) IPC and was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of ₹3,000/- or in default to undergo SI for one year.
2. In nutshell, the case of the prosecution is that on 17.03.2006 Sanju Devi and her husband Manoj Mehto were out for their work while their four children were at home. Their third child, the prosecutrix aged eight years was tempted by the Appellant who was their neighbour to a vacant room in the same building. He took off the prosecutrix’s panty. He(the Appellant) also took off his trousers and committed rape on the prosecutrix. The Appellant threatened the prosecutrix not to disclose the

factum of rape committed by him to anybody else. When they returned home, the prosecutrix, however, reported the matter to her father and then to her mother. The prosecutrix's parents initially preferred not to lodge the report out of shame. On 23.03.2006 Nirmala Devi(PW9) (PW5's brother's wife) visited the house of the prosecutrix's parents where Sanju Devi disclosed the factum of rape to her. She (PW9) being their close relation advised them not to forgive the Appellant and to report the matter with the police. Thus, the matter was reported to the police. The police recorded statement of Smt. Sanju Devi(PW2). During the course of investigation, statement of the prosecutrix was also recorded under Section 164 Cr.P.C. by the learned Metropolitan Magistrate("M.M."). After completion of the investigation, a report under Section 173 Cr.P.C. was presented against the Appellant.

3. In order to establish its case, the prosecution examined 15 witnesses. PW1(the prosecutrix), Sanju Devi (PW2) (her mother), Manoj Mehto(PW5) (prosecutrix's father), Dr. Anupama Bahadur(PW6) and Nirmala Devi(PW9) are the material witnesses examined by the prosecution.
4. In his examination under Section 313 Cr.P.C., the Appellant denied prosecution's allegations and pleaded false implication on the ground that he had demanded the amount loaned by him to the father of the prosecutrix. The Appellant examined Smt. Geeta Devi(DW1) in support of his defence.
5. On appreciation of evidence, the learned ASJ found the testimony of the prosecutrix to be natural, convincing and worthy of reliance which was supported by the testimony of PWs 2, 5, 6 and 9. Relying on the same,

the learned ASJ opined that the case under Section 376 IPC was proved against the Appellant beyond all reasonable doubt. The Appellant was accordingly convicted and sentenced as stated earlier.

6. It is urged by the learned counsel for the Appellant that the evidence adduced by the prosecution has not been properly appreciated by the learned ASJ. The learned ASJ did not take into consideration the fact that the investigation in the case was conducted by ASI Kala Joshi(PW14) who was not posted in Police Station Mehrauli which is within the jurisdiction of the place where the offence allegedly took place. A false case was concocted by the parents of the prosecutrix in collusion with PW14. The delay of six days in recording the FIR, according to the learned counsel, establishes the Appellant's false implication as the amount of ₹10,000/- loaned by the Appellant was demanded back from the prosecutrix's father.
7. The learned ASJ dealt with the evidence of the prosecutrix, her mother Sanju Devi, her father Manoj Mehto and Smt. Nirmala Devi(PW9) in paras 3 to 6 of the impugned judgment, which are extracted hereunder:

“3. Prosecution in support of its case had cited 16 witnesses, all of whom have been examined by the prosecution. The star witness of the prosecution was PW1 Kumari Bharti, the prosecutrix herself who was stated to be aged about 8 years on the date of incident. Preliminary questions had been put to her by the Ld. Predecessor of this court to verify her competence to depose in the court and after being satisfied, she had entered into the witness box and made her deposition without oath. This witness has categorically stated that on the fateful day, she was living alongwith her family members in a house belonging to one Sardare. The accused was also living in their

neighbourhood. On the day of the incident, at about 1 PM, she was alone in her house and her brothers had gone to play, her month had also gone to a kothi for house work, accused came to her house and tempted her by saying that he will give her an orange and took her to a vacant room in the same plot where he removed his pyjama and removed the underwear of the prosecutrix. Thereafter, he put his organ of urination into her place of urination, pursuant to which, she felt pain and started crying but accused pressed her mouth with his hand; this witness has further deposed that some liquid had also come out from the male organ which he thereafter wiped off. The accused threatened her not to disclose the incident to anyone, otherwise he would give her beatings. PW1 has further stated that when her father came back, she narrated this incident to him and thereafter, in the evening, when her month returned, she confirmed this version to her mother as well as she was feeling pain; the matter was thereafter reported to the police. PW1 Kumari Bharti had further testified that she had also given her statement Ex.PW1/A before the Magistrate PW11 Shri J.P. Nahar which was thumb marked by her. In her cross-examination, she has stuck to her stand and the answers given by her show that the witness is capable of understanding and comprehending as to what she is saying as she has categorically answered that she has three brothers, out of whom two are elder to her and one is younger and all of them go to the same school which is a factual averment as has been corroborated by the version of her mother Smt. Sanju Devi examined as PW2. PW1 Kumari Bharti had further confirmed that her mother is working as a maid and used to leave the house at 8 A.M. and returned back in the afternoon. ON that day, her father had come at about 1 PM and she narrated the incident to her father. She denied the suggestion that she is deposing falsely under the influence of her parents because of some dispute which had

arisen between her parents and the accused or that the accused has been falsely implicated.

4. *Smt. Sanju Devi, mother of the prosecutrix has been examined as PW2 who has corroborated the version of PW1. She has admitted that apart from her daughter Bharti, she has three sons, two of whom are elder to her and one is younger. On the fateful day, she had gone for her work at Vasant Kunj where she was working as a maid and her husband being a riskshaw puller and also gone for his duty; in the evening when she returned, she found her daughter sleeping on the cot and when she queried her, it was confirmed by her daughter Bharti that the accused had committed rape upon her at a nearby room after tempting her with an orange. PW2 had further stated that she had narrated the incident to her husband but he told her not to raise the issue as it would tarnish their reputation. However, in the evening complaint was made to brother and bhabi of accused but they sought forgiveness and requested them not to report the matter to the police, accused was also present there at that time. On 23/3/2006 when the bhabi of PW2 had come to their house, they narrated the incident to her who then advised them not to leave the accused, pursuant to which, they lodged the report with the police on 23.3.2006 i.e. six days after the date of incident. In her cross-examination, this witness has denied the suggestion that she is deposing falsely and accused has been falsely implicated because of dispute over a loan given by accused to them and on his demand, when PW2 and PW5 had refused to return the same, accused was falsely implicated in the present case.*

5. *PW5 is Shri Manoj Mehto, father of the prosecutrix and he has also confirmed the versions as set up by PW1 and PW2; he has deposed that on the fateful day of 17.3.2006, he had come home in the afternoon, his daughter narrated part*

incident to him; in the evening, this incident was narrated to him by his wife but he advised his wife and daughter not to relate this incident to any outsider as it would affect their reputation but nevertheless, they decided to meet the brother and bhabi of accused who live nearby who both sought pardon on behalf of the accused and requested them not to report the matter to the police. This witness had further deposed that on 23.3.2006 when his brother and bhabi came to their house, they narrated the incident to them who advised them to report the matter to the police pursuant to which this complaint was lodged on 23.3.2006. In his cross-examination, this witness has not lost his credibility and has stated that he did not inform his own brother and bhabi straight away but it was only on 23.3.2006, this incident was narrated to them. He had admitted that his daughter was suffering from chickenpox. He had denied the suggestion that he had taken money from accused and when accused demanded his money back, he was falsely implicated in this case.

6. PW9 is Smt. Nirmala Devi, bhabi of PW2 and PW5 on oath has stated that she is also living in the same neighbourhood where prosecutrix and her parents are living. On 23.3.2006 when she had gone to the house of PW2 and PW5, this incident was narrated to her, she advised them to report the matter to the police and not to forgive the accused. This witness had denied the suggestion that she had not advised Sanju Devi in the aforesaid manner; it is relevant to state that no suggestion has been given to this witness that she would be deposing falsely for any particular motive or purpose.”

8. Admittedly, as per prosecution version, the alleged act of rape was committed by the Appellant on 17.03.2006 and the report was lodged with the police only on 23.03.2006. Thus, there is a delay of six days in

making report to the police by the mother of the prosecutrix. With regard to this delay, the prosecution gave an explanation through the testimonies of PWs 2, 5 and 9, which is also reflected from the report Ex.PW2/A lodged with the police on 23.03.2006. PW2 testified that her husband advised her not to raise the issue as it was a matter of prestige of the family. This is corroborated from Ex.PW2/A wherein PW2 while lodging the police report informed ASI Kala Joshi that they did not lodge the report immediately because of shame. Nirmala Devi (PW9), wife of her husband's brother had stated in her testimony that when she visited their house and came to know about the incident told them not to forgive the Appellant for this serious offence. To the same effect is the testimony of PWs 5 and 9.

9. In several cases, the Supreme Court noticed the delay in lodging FIR in rape cases and took a view that delay in lodging FIR in such cases is a normal phenomena and the Court must seek explanation for the delay to test the truthfulness and plausibility of the reasons assigned for the delay. Similarly, in *State of Rajasthan v. N.K.*, (2000) 5 SCC 30 while relying on its earlier decision in *State of Rajasthan v. Narayan*, (1992) 3 SCC 615, *State of Punjab v. Gurmeet Singh*, (1996) 2 SCC 384 and *Karnel Singh v. State of M.P.*, (1995) 5 SCC 518, the Supreme Court held as under:

“15. We may however state that a mere delay in lodging the FIR cannot be a ground by itself for throwing the entire prosecution case overboard. The court has to seek an explanation for delay and test the truthfulness and plausibility of the reason assigned. If the delay is explained to the satisfaction of the court it cannot be counted against the prosecution. In State of Rajasthan v. Narayan [State of Rajasthan v. Narayan, (1992) 3 SCC 615 : 1992 SCC (Cri) 781 : AIR 1992 SC 2004] this Court observed: (SCC p. 623, para 6)

“True it is that the complaint was lodged two days later but as stated earlier Indian society being what it is the victims of such a crime ordinarily consult relatives and are hesitant to approach the police since it involves the question of morality and chastity of a married woman. A woman and her relatives have to struggle with several situations before deciding to approach the police....”

16. In State of Punjab v. Gurmeet Singh [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] this Court has held: (SCC p. 394, para 8)

“The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. ”

17. So are the observations made by this Court in Karnel Singh v. State of M.P. [Karnel Singh v. State of M.P., (1995) 5 SCC 518 : 1995 SCC (Cri) 977] repelling the defence contention based on delay in lodging the FIR. In the present case, in our opinion the delay in lodging the FIR has been satisfactorily explained.”

10. The Court has to be conscious of the fact that the rape was committed on a child aged about eight years. The parents of the child are not only concerned about the reputation of their family but also about the marriage of the child in due course. It may be noted that the prosecutrix's testimony is corroborated not only by the statements of PWs 2 and 5, but is also supported by the MLC Ex.PW6/A which confirms hymen rupture. In view of the explanation rendered through PWs 2, 5 and 9, I do not find that the delay in the instant case creates any doubt in the prosecution version.

11. Coming to the contention that part investigation was conducted by ASI Kala Joshi(PW14) who was not posted in P.S. Mehrauli which had the jurisdiction over the area where the offence was committed, I may say that no question was put to ASI Kala Joshi as to why she carried out the investigation. However, a close look at the examination-in-chief discloses that PW14 reached AIIMS on the direction of senior police officers. The Supreme Court has laid down that statement of a prosecutrix should preferably be recorded by a lady police officer. It is just possible that a lady police officer was not available in P.S. Mehrauli and ASI Kala Joshi who at the relevant time was posted in P.S. Hauz Khas which was very close to AIIMS was deputed to record the prosecutrix's statement. In any event, in the absence of any question in cross-examination to ASI Kala Joshi as to how she came to record the statement of the mother of the prosecutrix, it cannot be inferred that the prosecutrix's parents in collusion with PW14 implicated the Appellant falsely.
12. As far as the defence version that the Appellant was falsely implicated as he had demanded the loan of ₹10,000/- back from the prosecutrix's father is concerned, I may say that the Appellant was not sure of his defence during examination of the prosecutrix's parents. A general suggestion was given to PW2 and PW5 in their cross-examination that the Appellant was falsely implicated as the Appellant had demanded return of the loan amount. It was not suggested as to when the loan was advanced and what was the amount of loan. So much so, it was only in his examination under Section 313 Cr.P.C. that the Appellant came up with a specific defence that the prosecutrix's parents had taken a loan of ₹10,000/- from him. Here again, he did not give the date as to when the loan was taken

and when the same was promised to be returned. Although, Geeta Devi examined as DW1 by the Appellant testified in her examination-in-chief that the Appellant had given a loan of ₹10,000/- to Sanju Devi, yet in her cross-examination she was candid enough to admit that the loan was not given in her presence. Thus, DW1's testimony was only a hear-say evidence and was, therefore, rightly discarded by the learned ASJ. Otherwise also, it is difficult to believe that prosecutrix's parents (PW2 and PW5) would level false allegation of rape of her daughter against the Appellant. In *State of Punjab v. Gurmit Singh & Ors.*, (1996) 2 SCC 384, the Supreme Court laid down that normally no self respecting woman would come forward to make false allegation of rape. Relevant portion of the report is extracted hereunder:

“8...The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable....”

13. In the circumstances, the defence version that the Appellant was falsely implicated because of non-return of the loan amount is not believable.

14. There is no error or infirmity in the impugned judgment. The Appeal has, therefore, to fail. It is accordingly dismissed.
15. Pending Applications stand disposed of.

(G.P. MITTAL)
JUDGE

MARCH 07, 2013
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