

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

Date of decision: 22nd February, 2013

+ **CRL. A. 750/2009**

RAKESH @ RAKU Appellant
Through: Ms. Rakhi Dubey, Adv.

versus

THE STATE (GOVT. OF NCT OF DELHI) Respondent
Through: Ms. Jasbir Kaur, 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 02.04.2009 and an order on sentence dated 29.04.2009 passed by the learned Additional Sessions Judge (“ASJ”) in Sessions Case No.15/1/08 FIR No.642/2005 Police Station Ashok Vihar whereby the Appellant was held guilty for the offences punishable under Sections 342/376/506 IPC. He was sentenced to undergo Rigorous Imprisonment (RI) for a period of six months and to pay a fine of ₹1000/- or in default of payment of fine to undergo Simple Imprisonment (SI) for a period of 30 days for the offence punishable under Section 342 IPC; and RI for a period of one year and to pay fine of ₹1,000/- or in default of payment of fine to undergo SI for 30 days for the offence punishable under Section 506 IPC. The Appellant was further sentenced to undergo RI for a period of seven years and to pay fine of

₹10,000/- or in default of payment of fine to undergo SI for a period of six months for the offence punishable under Section 376 IPC.

2. The prosecution version can be extracted from Para 2 of the impugned judgment as under:-

“2. The facts as emerged from the case of the prosecution are that on 28.08.2005 at about 02:30 PM the prosecutrix ‘Sarika’ was sitting outside her house, the accused Rakesh @ Rakku is happened to be son of her Tau (Uncle) came to her house and told that a quarrel had been taken place with her brother, on this advice she accompanied with the accused. The accused reached in middle of her house and Gali then told her that he was going to take a Danda from his house. The accused then press her hand against her mouth and took her to go to the third floor of his house. The accused threatened her saying that ‘he would kill her and her brother’ if she refused to comply his direction. The accused detained her in that house even during the night and performed sexual intercourse with her. The accused has also shown a knife and threatened to kill her family members in case she raised alarm. The accused performed ‘sexual intercourse’ on her three times. First intercourse was performed immediately after taking her to his house and threatening to her, second intercourse was performed during the night and third intercourse performed at about 06:00 PM next day. The accused then came on down stairs. She also came outside the room from the roof of the adjoining house. The prosecutrix narrated the whole incident to her mother. Thereafter, the prosecutrix and her mother went to the police chowki where a complaint Ex.PW1/A was lodged against the accused. The prosecutrix was taken to the hospital for medical examination and her undergarments were also taken into possession by police. Her statement u/s 164 Cr.P.C. was also recorded before the Ilaka Magistrate. Apart from the statement of the prosecutrix, the statement of Smt. Prema mother of the prosecutrix also recorded u/s. 161 Cr.P.C. The age of the prosecutrix also determined by the IO through the bone-age. The undergarments and sample seals were sent to the FSL. The result from the FSL is obtained which is Ex.PW10/D & Ex.PW10/E.”

3. In order to establish its case, the prosecution examined 12 witnesses. PW-1 'S' (name withheld to conceal identity) the prosecutrix was the star witness of the prosecution. Smt. Prema (PW-2) lends corroboration to the testimony of the prosecutrix. In her examination-in-chief, the prosecutrix testified as under:-

“My father is Safai Karamchari at PNB. My mother used to work in the houses. About a year back, the date was 28th of the month, but I do not remember the month as I am totally illiterate. My father had gone to his place of duty in the morning. My mother had also gone to attend to her duties. It was 2:30 P.M and I was sitting outside my house. Accused Rakesh @ Rakku present in the court today who happened to be son of my Tau came to me and told me that a quarrel had taken place with my brother. I accompanied him. He on reaching in front of his house and in the gali told me that he was going to take a danda from his house. The accused then pressed his hands against my mouth and took me to the third floor (Teesari manjil) of his house. At his house, the accused threatened me saying that he would kill me and my brother. He detained me in his house. Even during the night, he performed sexual intercourse on me. He had also shown me a knife. He threatened to kill my family members in case I raised alarm. The accused performed sexual intercourse on me three time. First intercourse was performed immediately after taking me to his house and threatening me. Second time intercourse was performed on me during night hours. Third time he performed intercourse about 6 PM the next day. The accused then came downstairs. I came outside the room and went to my house from the roof of the adjoining house. I was frightened, I narrated the whole incident to my mother. Myself and my mother first went to the police chowki where a complaint was lodged in this regard. My complaint is Ex.PW-1/A bearing my signatures at point X. I was taken to the hospital for my medical examination. I do not remember the name of the hospital. My undergarments were also taken into possession. My statement was also recorded in the court by the Magistrate.”

4. In cross-examination the prosecutrix denied the suggestion that there was a dispute between her family and the family of the Appellant with regard to possession of the ownership of the house in Sultanpuri which was presently in their (prosecutrix's family's) occupation and that the accused was falsely implicated because of the same.
5. The sole contention raised at the time of the hearing of the Appeal is that there was a love affair between the Appellant and the prosecutrix. The prosecutrix used to have sexual intercourse with the Appellant out of her free will at the house of the Appellant. Whenever somebody would visit the house of the Appellant, she would hide herself behind the refrigerator.
6. Since the sexual intercourse by the Appellant with the prosecutrix is admitted, the presence of sperm on the underwear of the prosecutrix and its matching with the blood group of the Appellant, as a strong corroborative piece of evidence to prove that the Appellant had sexual intercourse with the prosecutrix, loses significance.
7. It may be noted that the age of the prosecutrix as per PW-2 (prosecutrix's mother) was 15-16 years. Even as per ossification test her age was between 15-16 years. Admittedly, there was no documentary evidence with regard to her age. If a small margin towards error is given, the prosecutrix can definitely be considered to be above 16 years and thus if the sexual intercourse done by the Appellant with the prosecutrix was with her consent, it would not amount to rape.
8. The only question for consideration is whether the sexual intercourse done by the Appellant with the prosecutrix was turned into a false allegation of rape because of the alleged property dispute between the

family of the Appellant and that of the prosecutrix. It is important to note that the Appellant was the first Cousin of the prosecutrix. As stated earlier, the Appellant had sexual intercourse with the prosecutrix in the afternoon of 28th, on the night intervening 28-29 and on the evening of 29th. She escaped from the house of the Appellant through the roof of the adjoining house and reached her home and reported the matter to her mother, PW-2.

9. The matter was reported to the police on 30.09.2005 at 12:30 P.M. The statement of the prosecutrix was recorded and the case was registered. Thus, there was a delay of some hours in reporting the matter to the police. Whether there could be deliberation by the prosecutrix and her mother to level false allegations of rape against the Appellant? Although, no evidence was produced by the Appellant either in cross-examination by examining any defence witness to prove by the test of preponderance of probability that there was really any property dispute between the two families (that is the prosecutrix's and the Appellant's), yet even if, it is assumed that there was any such property dispute, would a mother enter into a conspiracy with her daughter to level false allegations of rape against a person and jeopardize the prosecutrix's marriage prospects. The only answer to the question would be in the negative.
10. In case of *Wahid Khan v. State of M.P.*, (2010) 2 SCC 9, the Supreme Court observed that in Indian society any girl or woman would not make false allegation of rape against any person as she would be aware of the repercussions and the stigma attached to such accusations. Para 17 of the report is extracted hereunder:

“17. It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing therefrom. If she is found to be false, she would be looked at by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracised by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward-looking as the western countries are.”

11. Thus, it is difficult to believe that the consensual sexual intercourse was converted into rape because of the alleged enmity between the two families.
12. 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. Once the Appellant admitted to having sexual intercourse with the prosecutrix and pleaded consent, the onus shifted on him to prove by preponderance of probability at least either by creating doubt in the case of the prosecution or by leading defence evidence that the sexual intercourse was done with the consent of the prosecutrix, which he failed to discharge.
14. In the circumstances, the Appeal has to fail; the same is accordingly dismissed.
15. Pending Applications also stands disposed of.

G.P. MITTAL, J.

FEBRUARY 22, 2013

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