

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

% *Judgment reserved on: 28.01.2014.*
Judgment delivered on:03.02.2014

+ CRL.A. 559/2001 & Crl.M.A. No.18/2011
GOPAL ALIAS BABBAL ALIAS PAWAN Appellant
Through: Mr.M.L.Yadav, Advocate.

versus

STATE OF DELHI Respondent
Through: Mr.Navin K. Jha, APP

AND

+ CRL.A. 632/2001 & Crl.M.A. No.2495/2005

HARISH Appellant
Through: Mr.M.L.Yadav, Advocate.

versus

STATE OF DELHI Respondent
Through: Mr.Navin K. Jha, APP

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The appellants Gopal @ Babbal @ Pawan and Harish are aggrieved by the impugned judgment and order of sentence dated 30.07.2001 & 31.07.2001 respectively wherein the appellants had been

convicted under Section 376 (2)(g)/324/506/34 of the IPC and each of them had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.500/- and in default of payment of fine, to undergo RI for 6 months for the offence under Section 376 (2)(g); for the offence under Section 506, both the convicts were sentenced to undergo RI for a period of 3 years; for the offence under Section 324 of the IPC, both the accused had been sentenced to undergo RI for a period of 2 years. All the sentenced were to run concurrently. Benefit of Section 428 of the Cr.PC had been accorded to them.

2 The version of the prosecution was unfolded in the testimony of PW-1. The incident is dated 27.04.2000. As per the prosecutrix 'B' at about 05:00 am when she had gone to ease herself in the forest, the aforementioned accused persons caught hold of her; Babbal gagged her mouth and Harish threatened to kill her. She was taken inside the jungle; Babbal raped her first and thereafter accused Harish committed rape upon her. On her attempt to flee, Harish gave her a push from behind due to which she fell down on the hot ash lying at the spot; she sustained burn injuries. She returned home and narrated the incident to her husband. Police was informed. Her statement (Ex.PW-2/A) was

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recorded pursuant to which the FIR (Ex.PW-5/A) was registered.

3 DD No. 22-A was recorded at PS Inderpur at 03:00 pm on 27.04.2000 giving a first intimation about the incident. It had been recorded that information has been received from house No.67, Dashghara, Inderpuri that one lady has been teased; words used in the DD were “chherchhar”. This was at 03:00 pm. Learned counsel for the appellants has addressed his first argument on this DD; submission being that in this DD, information about ‘chherchhar’ has been mentioned; had rape been committed upon her, this information would have been recorded in this DD. Absence of such information throws a doubt on the veracity of the version of the prosecution.

4 The statement of the victim (Ex.PW-2/A) was recorded at 03:50 pm pursuant to which rukka was taken and the FIR was registered. The second submission of the learned counsel for the appellants is based on the delay in FIR; submission being that the incident as per the prosecution had occurred in the early morning hours at 05:00 am; even as per the FIR, she had reached her residence at 05:45 am; she had informed her husband; there is no explanation as to why DD was lodged after so many hours i.e. at 03:00 pm in the afternoon and FIR was

registered at 04:00 pm. There is no justifiable reason for this inordinate delay; the version of the prosecution becomes doubtful on this count as well.

5 The victim was medically examined in the Safdarjung Hospital at 06:00 pm. Dr. Rahul (PW-10) had conducted her medical examination. He had recorded the alleged history of sexual assault on the girl; her age was given as 27 years. In this history, it is stated that two persons had committed sexual assault upon her of whom the name of Pawan found mentioned in the MLC. Further history-sheet showed that the victim was abducted when she was going to the fields and pushed as a result of which she sustained injuries; rape was committed upon her by both the offenders. In his cross-examination, PW-10 stated that the victim at that time was apprehensive and disturbed; her pulse recording was 104 per minute; she had multiple burn marks on the right forearm, right leg, right foot left leg and foot, right buttock and hip; she also had scratch marks on face and just below the left nostril and bruises on the right breast as well.

6 Dr. Sanjay Sharaf (PW-12) of Safdarjung Hospital was In-charge of the Burn Ward and he had medically examined the burn injuries; he

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had noted the following injuries:-

“1 *Partial thickness burns involving left foot and ankle partially.*

2 *Mixed thickness burns involving right foot ankle and adjoining leg.*

3 *Patches of partial thickness burns over right forearm.*

4 *Patches of partial thickness burns over both buttocks.”*

7 The opinion was 8% burns involving the aforementioned areas. This MLC was proved as Ex.PW-12/A.

8 The next submission of the learned counsel for the appellants is based on this medical record. Submission being that the history given in Ex.PW-12/A has mentioned the name of Pawan alone and name of Harish has not been mentioned. There is no documentary evidence with the investigating agency that Gopal @ Babbal and Pawan are the same persons. The appellants in fact were not involved in the incident. Further submission of the learned counsel for the appellants being that the burn injuries noted upon the body of the victim are in conformity with the defence of the appellants which is to the effect that the victim was found in a compromising position with another person and when both the appellants had seen her in that compromising position, she had tried to run from the spot and in her hurry and haste had slipped on the hot surface as a result of which she sustained burn injuries. Learned counsel

for the appellants on this score has drawn attention of this Court to the statement of Gopal @ Babbal recorded under Section 313 of the Cr.PC wherein this defence has been projected. Submission being that this defence has been adopted by the appellants right from the inception and suggestion to this effect had also been put to PW-1 in her cross-examination. This theory in fact conforms with the medical record. On this count also benefit of doubt must accrue to the appellants and they are entitled to a consequent acquittal.

9 Another argument propelled by the learned counsel for the appellants is that the prosecutrix had made substantial improvements; attention has been drawn to the statement of the prosecutrix under Section 161 Cr.PC made before the Investigating Officer wherein in her first statement her version was that Gopal @ Babbal @ Pawan had first committed rape upon her and thereafter accused Harish; in her version on oath in Court she reversed her stand. Her version being to the effect that accused Harish had first committed rape upon her and thereafter accused Gopal @ Babbal @ Pawan. This is a substantial improvement and goes to the root of the case. Further submission being that in the FIR, the prosecutrix had stated that she was raped when she was going

to jungle wherein in her MLC she stated that she was abducted. Prosecutrix not being a truthful witness, her version cannot be relied upon. There is also no reason as to why if the husband of the victim already knew the names of the appellants (as has been stated by the prosecutrix), why the DD entry recorded at 03:00 pm did not disclose their names. The whole story has been concocted to falsely implicate the accused. There is also no reason as to why the husband of the victim has not been examined; he was a material witness and no reason having been given for his non-examination, adverse inference has to be drawn against the prosecutrix.

10 The accused persons were also medically examined. Dr. D.N. Mishra (PW-7) who had examined both the accused; both the appellants were capable of performing sex.

11 The underwear of the prosecutrix had been seized. It had been sent for scientific examination. The report of the CFSL however does not advance the version of the prosecution as neither any blood and nor any semen had been detected on any of the samples which had been sent for analysis.

12 This was the gist of the version of the prosecution.

13 In the statement of the accused persons recorded under Section 313 of the Cr.PC the defence as discussed herein in above was projected; submission being that the accused persons had seen the prosecutrix in a compromising position with one person which had led to their false implication; she had tried to run away from the spot, slipped on the hot surface as a result of which she sustained burn injuries.

14 No evidence was led in defence.

15 These submissions have been refuted by the learned public prosecutor. It is stated that the testimony of a rape victim itself is sufficient to nail the accused if such a statement is truthful and inspires confidence. The prosecutrix has been truthful, cogent and coherent; minor discrepancies in her version will not dent the otherwise established version of the prosecution. He has relied upon a judgment AIR 2006 SC 2214 Om Prakash Vs. State of Uttar Pradesh to support this submission; argument being that no women would falsely implicate another person which would be at the cost of her prestige and honour. Reason for false implication of the accused persons has not been pointed out by them. Medical record of the prosecutrix also corroborates her

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version. On no count, does the impugned judgment call for any interference.

16 Arguments have been heard. Record has been perused.

17 The star witness of the prosecution is the prosecutrix. She was examined as PW-1. She has reiterated the contents of the FIR detailing the incident. She had deposed that on the fateful day i.e. on 27.4.2000 at about 5.00 a.m. she had gone to ease herself in the nearby forest; when she was returning back Babbal caught hold of her and forcibly lifted her; Harish who was accompanying Babbal threatened that he would kill her if she shouted. Her mouth was gagged by Babbal; she was taken inside the jungle; she was pushed and dragged by both the accused and her feet touched a hot surface; she told the accused that she had recently been operated upon and that there was pus in her stitches. This had prevented her from running. Harish had sexually intercourse with her followed by Babbal; this was against her wishes and forced upon her. She returned home and narrated the incident to her husband. Police was contacted. Her statement Ex.PW-2/A was recorded. She was medically examined.

18 PW-1 was subjected to a lengthy cross-examination. She deposed that there is no toilet in her house and all members go to the jungle to

ease themselves. She reached back home at 5.45 a.m. and her husband and brother-in-law were present at home; she narrated the incident to them. The names of the accused were disclosed by her to her husband. Her husband had gone to police chowki to report the incident. She was taken to the RML Hospital but the doctor refused to attend her. They returned back at 2.30.p.m. At 3.00 p.m. her husband telephoned the PCR. She was then taken to Safdarjung Hospital for medical treatment. The doctor attended upon her. Her statement was also recorded at the hospital. Her clothes were seized by the police. She admitted that in the MLC while giving the history to the doctor she had named Babbal; when confronted with MLC the name of Pawan had been mentioned. Relevant would it be to state that Babbal's name has been described as Babbal @ Gopal @ Pawan. She admitted that she was picked up while she was going to the jungle; her version in the MLC, however, being that she was abducted. She admitted in her statement before the police that Babbal had first committed rape upon her followed by Harish. In Court on oath she stated that Harish had committed rape upon her in the first instance followed by Babbal. She denied the suggestion that the accused persons had been falsely implicated. She admitted that the

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accused persons were living in the neighbourhood; they were known to her.

19 The improvements as appearing in this version of PW-1 as pointed out by the learned counsel for the appellants are to the following effect:

(a) As to who had first committed rape upon her; whether Babbal or Harish. On oath in Court it had been given in the reverse order; whereas in her statement under Section 161 Cr. P.C. PW-1 had named Gopal as the first person who had committed rape upon her; on oath she had stated that Harish had first committed rape upon her.

(b) In her MLC she stated that she had been abducted whereas on oath she stated that she was picked up when she was going to jungle.

(c) While narrating the history to the doctor she had given name of Babbal but the MLC finds name of Pawan mentioned.

20 Submission of the learned counsel for the appellants being that these improvements being material go to the root of the case and destroy the credibility of PW-1.

21 This Court is not in agreement with this submission of the learned counsel for the appellant. Apart from the fact that these instances as noted above are not material and do not affect the gist of the offence which is the offence of rape; whether Harish had committed the sexual act upon the victim first or whether Babbal had done so would not detract from the act itself. The traumatic turmoil that the victim was undergoing not only at the time when she gave her statement to the investigating officer (Ex.PW-2/A) but thereafter again when she was recapitulating it in court; this minor discrepancy would not in any manner subtract from the charge which has been leveled against the accused.

22 The fact that the accused persons were living in the neighbourhood and were known to the victim has not been disputed. In the MLC she had taken name of Pawan; he was also known as Gopal @ Babbal. This has nowhere been disputed by the appellants except a bald submission now made before this court. There is no evidence before trial court that identity of Babbal @ Pawan was in dispute. No such plea was taken before the trial judge.

23 While evaluating the evidence of a rape victim, the courts have to

be conscious of the ground realities. Considerations which have no material effect on the veracity of the prosecution case and which are not fatal in nature cannot allow an otherwise reliable version of the prosecution to be thrown away. It is the broader probabilities of the case which have to be examined; minor contradictions and insignificant discrepancies in the version have to be necessarily ignored.

24 In AIR 1972 SC 2020 Sohrab and Anr. Vs. The State of M.P. the Apex Court in this context had noted as under:

“It is settled proposition of law that even if there are some omissions, contradictions and discrepancies the entire evidence cannot be disregarded. After exercising care and caution and sifting the evidence to separate truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witnesses. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses.”

25 That apart the version of PW-1 is fully corroborated by the medical evidence. The MLC of the victim had been proved as Ex.PW-10/A. The doctor (PW-10) in his deposition has categorically stated that on examination the patient was very apprehensive and disturbed. Her pulse rate was 104 per minute; she had multiple burn injuries on various parts of her body including her right forearm, right

leg, right foot, left leg and foot, right buttock and hip. There were scratch marks on her face also. Ex. PW-10/A further evidences the name of her assailant as Pawan. The doctor who had medically examined the burn injuries on the victim has been examined as PW-12. He had noted patches of burns over both her buttocks, right foot ankle, left foot and partially on ankle and right forearm. The opinion was 8% burns. PW-1 had been dragged on her feet and pulled by her hairs as a result of which she sustained injuries on her hands, legs, ankle and buttocks. The oral version of PW-1 had detailed this incident in Ex. PW-2/A which was recorded at 4.00 p.m. and which was prior in time to the examination of the victim which was at 6.00 p.m.. This medical evidence fully supports her oral testimony.

26 The site plan Ex. PW-15/A also supports this version. The place where the incident had occurred has been shown at point A; this was on the way to the jungle; adjacent thereto was a dump of waste. It was upon this dump of waste which was a burning hot ash that the victim had been pushed and had fallen due to which she sustained burns injuries on various parts of her body as described in Ex. PW-12/A.

27 Thus the evidence of PW-1 which read as a whole and in the

totality of the circumstances which includes the medical evidence as also the site plan establishes the version of the prosecution.

28 Next submission of the learned counsel for the appellant that there was delay in the lodging of the FIR is also an argument which is bereft of force. As per the prosecutrix she had come back from the jungle at 5.45 in the morning of 27.4.2000. She had narrated the incident to her husband. She first went to the RML hospital where she did not get medical aid; PCR call was made at 100 number at 3.00 p.m.; this is also evident from DD No.27A (Ex. PW-4/A). Statement of the victim was recorded at 3.50 p.m. and the rukka was dispatched immediately thereafter. The delay if any has to be viewed in this background.

29 It is an undisputed position that a rape victim is not only apprehensive but in a large number of cases reluctant to go to the police station because of the attitude of the society towards such a victim. The doubt, suspicion and shame with which the society views such a victim is probably the reason for this discomfort in approaching the police.

30 In the instant case the victim had narrated the incident to her husband immediately after returning home and which was most natural.

She disclosed the names of the accused. She first approached the RML

hospital to get her burn injuries attended which she had sustained; she was however refused for medical aid. This part of her deposition has not been challenged; it has to be accepted. Thereafter on her return a call to the PCR at 100 number was made. There is no dispute about this.

31 This submission of the learned counsel for the appellant that this DD (Ex.PW-4/A) only mentioned a teasing and did not contain the ingredients of the offence for which the appellants have been convicted also does not advance the line of argument of the appellants. A “DD” as is suggestive from its name only a daily diary entry which only has to record the time and the place of incident. It does not have to contain any further details. In fact the first information report relating to the commission of offence is recorded by the police under Section 154 Cr.P.C. and which is the FIR. The FIR in fact sets the criminal law in motion; it obtains information about the alleged criminal activity in order that suitable action to book the guilty can be taken. It is not an encyclopedia of the offence which has to contain all the detailed ingredients of the offence.

32 Tested on this touchstone it can in no manner be said that there was any delay in lodging the FIR. The delay, if any, has been justifiably

explained.

33 The defence projected by the appellants is nothing but sham. Admittedly they were known to the victim. They were living in the same neighbourhood. In fact on the questions put to the accused in their statements under Section 313 Cr. P.C. it has not been disputed by them that they were in the jungle with the victim on the fateful day and at the fateful time. Their defence being projected being that they had seen the victim in a compromising position with someone which was the reason for the victim to have falsely implicated them. This line of defence which has been adopted by Gopal @ Babbal but not by Harish. The statement of Harish only being to the effect that he is innocent and has been falsely implicated.

34 This defence appears to be wholly incorrect. This is for the simple reason that if the victim was guilty of adultery, in her guilty state of mind she would not have in the first instance narrated the incident to her husband. Investigation shows that her husband at all times was a part of the investigation; he was supporting his wife. PW-15 SI Vinod Pal has categorically stated that when they had met the prosecutrix, all the times she was accompanied by her husband. If the defence of the appellants

was genuine and the victim had been seen in a compromising position with another man, her husband would not have stood by her side. In fact normal conduct of such a husband would have to slam his wife and not support her. This defence was nothing but projected on ill-legal advice. It necessarily has to be rejected.

35 There was no reason whatsoever for the prosecutrix to have falsely implicated the accused persons. In fact she had lodged this complaint at the peril and risk of her reputation; Indian society, as already noted supra as also in a catena of judgments, only looks down upon a victim of rape; let alone sympathy; it is more in the nature of a condemnation of the victim. It is for this reason that these offences are largely kept in secret and not revealed.

36 The observations of the Supreme Court in AIR 2006 SC 2214 Om Prakash Vs. State of Uttar Pradesh are relevant:

“It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not required corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family. On in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on

behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was apparent reason for a married woman to falsely implicate the accused after scuttling her own prestige and honour.”

37 On no count does the conviction of the appellants under Sections 376(2)(g), 324, 506(II) and 34 IPC call for any interference.

38 In this case the court has been informed that out of total period of 10 years of sentence imposed upon the appellants; Gopal @ Babbal had undergone for a period of 4 years and 5 months as on the date of grant of bail which includes his remissions earned; appellant Harish had undergone a period of 6 years and 1 month including his remission.

39 Section 376 (2)(g) of the IPC prescribes the period of imprisonment for such an offence to be not less than 10 years but which may be for life and shall also be liable to pay fine. The intent of the Legislature can be gathered from the engrafting of this statutory provision. There is no doubt that discretion is vested with the Court in the matter of sentencing but this discretion is not unfettered and it has to be exercised keeping in view the nature and gravity of the offence; the manner and the circumstances of the commission of the offence; character of the accused; the aggravating and mitigating circumstances before the Court. The proviso of Section 376 (2) lays down that the

Court may for adequate and special reasons to be mentioned in the judgment impose a sentence of imprisonment of either description for a term of less than 10 years. Thus the normally the sentence in a case of gang rape is not less than 10 years but for adequate and special reason, the Court can award sentence of less than 10 years. This offence relates to the year 2000. It is almost 1- ½ decades old. The victim was a married lady. However as noted by a three Judge Bench in (2000) 4 SCC 502 Kamal Kishore Vs. State of H.P., the fact that the occurrence was 10 years old and the accused and victim might have settled in life could not be treated as a special reason for reducing the minimum statutory period prescribed. Moreover, the words ‘adequate’ and ‘special’ cannot be read disjunctively; they have to be read in conjunction. No special or adequate reasons have been pleaded and not could this Court decipher any from the record of the case. In this view of the matter, there is no reason for imposing lesser than minimum punishment.

40 Appeals are without any merit. Dismissed.

41 Both the appellants are on bail. Their bail bonds and surety are cancelled. They both are present in Court. They be taken into custody to serve the remaining sentence.

42 A copy of this order be sent to the Jail Superintendent for information and necessary compliance.

INDERMEET KAUR, J

FEBRUARY 03, 2014

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