

R-11

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

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Judgment reserved on :15.5.2014
Judgment delivered on :21.05.2014.

+ CRL.A. 637/2001

AJAY SHARMA

..... Appellant

Through Mr.K.B.Andley, Sr.Advocate
with Mr.M.L.Yadav and Mr.
M.Shamikh, Advocates.

versus

STATE OF DELHI

..... Respondent

Through Ms.Fizani Hussain, APP.

Mr.Kamran Malik, Advocate for
the complainant.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 Appellant is aggrieved by the impugned judgment and order of sentence dated 24.08.2001 and 25.08.2001 respectively wherein the appellant had been convicted for the offence under Section 376 of the IPC and had been sentenced to undergo RI for 1 year and to pay a compensation of Rs.1,50,0000/-.

2 The case of the prosecution was built up in the testimony of the

prosecutrix (PW-5) namely 'V' whose allegation was that on the intervening night of 5/6.7.1997 at about 11.00 p.m. when she was returning home after watching TV in the house of her neighbor Suresh Pal she was called by the appellant; in the normal course she went to him; he caught hold of her by her hand and dragged her inside the room; made her to lie on the bed; gagged her mouth with his hand; her salwar was removed and thereafter in spite of protest he forcibly committed rape upon her. She was threatened not to narrate this incident to anyone and in case she disclosed it to any person she would be killed. On reaching home, PW-5 found her mother Saroj Jain (PW-4) sitting outside. PW-5 did not disclose this incident to her mother but PW-4 noticed that her daughter was frightened. Her mother called her son-in-law and daughter and PW-5 accordingly related the incident to them. PW-4 beat up her daughter.

3 The FIR was lodged on the following day i.e. on 06.5.1997. Admittedly the parties had thereafter got married on 08.8.1997.

4 The MLC (Ex.PW-3/A) of the victim was conducted; this document reflects that the victim was 20 years of age as disclosed by her on 06.7.1997. She had alleged a history of rape. On the date of her

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medical examination she appeared to be conscious and well oriented. There were no external injuries on her body. This MLC was conducted by the CMO of Guru Teg Bahadur Hospital. The patient was then referred to the Gynecologist. The Gynecologist Dr. Seema Gupta (PW-3) vide her report Ex.PW-3/A had noted her hymen to be torn but no other injury marks were noted; slight fresh bleeding was present. The blunt injury marks noted on her forearms were related to the beatings given to PW-5 by PW-9.

5 Apart from the statement of PW-5 statement of her mother (PW-4) was also recorded. In the course of the investigation, it was revealed that the victim was an adult on the date of the incident.

6 Investigation was marked to SI S.B.Gautam (PW-9) who along with constable Ganga Singh (PW-8) had arrested the accused vide memo Ex.PW-8/A. His disclosure statement Ex.PW-8/B was recorded.

7 In the statement of the accused recorded under Section 313 of the Cr.P.C. he pleaded innocence. Submission was that the victim was known to the prosecutrix and they were on friendly terms. This case has now been planted upon him.

8 Four witnesses were led in defence. This was largely to

substantiate the submission of the appellant that there were photographs (Ex.PW-5/D-1 to PW-5/D-13) taken of the appellant and the victim prior to their marriage which evidenced that the parties i.e. the victim and the appellant were sharing a love relationship prior in time.

9 In view of the aforementioned evidence collected by the prosecution the appellant was convicted and sentenced as aforesaid.

10 On behalf of the appellant arguments have been addressed by Mr.K.B.Andley, Sr. Advocate assisted by Mr. M.L.Yadav, Advocate. It has been argued that the victim had set up a false case against the appellant. It would be difficult to believe that the parties who were known to each other admittedly for the last 10-12 years and the victim being an adult i.e. more than 20 years of age had been forced into a sexual act and in spite of her resistance she did not suffer any injury upon her person; attention having been drawn to her MLC where no external injury had been noted. Further submission of the appellant being that admittedly even after the incident the victim had a relationship with the appellant and she had filed an affidavit six days after the registration of the FIR (11.7.1997) admitting the fact that she had entered into a physical relation with the appellant with consent and

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there was no force upon her. It is pointed out that the parties admittedly got married on 08.8.1997 and remained compatible and happy during the next six months during which period a female child was also born to the victim and now only to extort money from the appellant this false case has been pursued. To substantiate his arguments, learned counsel for the appellant has placed has reliance upon a judgment of Apex Court reported in [1] (2006) 9 SC 589 Rajesh Patel Vs. State of Jharkhand .

11 Learned APP for the State has refuted the arguments. It is pointed out that on no count does the impugned judgment call for no interference. The arguments of the learned APP have been supported by the learned counsel for the complainant. It is stated that the accused had in order to win the sympathy of the court built up a drama that he had married the victim on 08.8.1997. He had entered into the marriage on 08.8.1997 only to get out of the rigours of a punishment; he was not really interested in the marriage which is clear from the fact that he has now left the victim and had got re-married. On no count does the impugned judgment suffer from infirmity.

12 Arguments have been heard. Record has been perused.

13 PW-5 is the star witness of the prosecution. She has on oath

deposed that on the fateful day i.e. on the intervening night of 5/6.7.1997 at about 11.00 pm. when she was returning home after watching T.V. in the house of her neighbor Suresh Pal the appellant who was known to her for the last 10-12 years accosted her and forcefully took her into his room; where in spite of her resistance she was raped by the appellant; she shouted but the appellant threatened to kill her in case of further resistance and also threatened her that if this incident was disclosed by her to someone she would be killed. Victim was frightened. She further deposed that on seeing this fright upon her face her mother called her son-in-law; this incident was related to him. PW-5 admitted that her brother-in-law (Jija) had called the police pursuant to which a complaint had been lodged; she further admitted that on a call having been made by her sister and brother-in-law the accused and his mother had come to her house. She denied the suggestion that she had a love affair with the accused and this incident was deliberately not disclosed by her to her mother when her mother caught her red handed. She stated that she lived with the accused for six months after the marriage and she has a daughter from this wedlock. She also admitted that she had lodged an FIR against the accused under Section 498A of CrI. Appeal No.637/2001

the IPC. Her deposition was recorded on 27.02.2001 in the Court on which date she admitted that she could live with the accused only if he leaves his parents as his parents trouble her. She denied the suggestion that the photographs Ex.PW-5/D-1 to D-13 depicting the accused and the victim in a comfortable relationship were taken prior to their marriage. Submission being that these photographs had been taken after their marriage.

14 PW-4 is the mother of the victim. She deposed that on the fateful day when she saw her daughter coming out of the house of the accused, she appeared to be frightened; she questioned her but PW-5 did not reply. Her daughter in fact tried to run away but was caught by a 'tangawala'. PW-4 called her elder daughter and her husband; the incident was told by the victim to them pursuant to which the FIR was lodged on the following day i.e. 06.7.1997. In her cross-examination PW-4 admitted that house of the accused is just across their house; the accused was arrested three months after the date of the incident; she admitted that the accused was their neighbor and her daughter used to visit her house; she further stated that she did not know if there was any love relation between the accused and her daughter. Relevant would

it be to note that there was no denial. She admitted that her daughter and the accused had got married.

15 The medical evidence of the victim shows that admittedly she had not received any injury upon her person after the incident although her version was that she had put up a strong resistance. This fact is relevant; as if a twenty year old girl is subjected to a forceful act of rape and her mouth having been gagged, the resistance on her part would have led some kind of injury or some nail marks or bite on some part of her body but no injury was noted on her person.

16 Testimony of PW-5 also has to be viewed in the background that 6 days after the incident i.e. on 11.7.1997 an affidavit Ex.PW-5/D-14 was filed by PW-5 in Court; this affidavit had been attested by Mr.Abhimanyu Saini, Oath Commissioner (DW-4) and the victim had been identified by her advocate. This affidavit becomes relevant. In this affidavit it had been stated that on the night of 05.7.1997 the victim had gone to the house of appellant (Ajay Sharma) where the parties had a physical relation with one another with consent. Relevant would it be to note that an application had also been filed by the prosecutrix in the Court of the ASJ on 17.7.1997 for getting her statement recorded under
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Section 164 Cr.P.C.. This application is a part of the record. This shows that the victim again wanted to make a statement on oath in Court that the parties had entered into a physical relation on 05.7.1997 voluntarily and with the consent of the victim. The prayer made in the application for recording her statement under Section 164 Cr.P.C had however been disallowed. It is further the matter of record that on 08.8.1997 the parties had got married. It is also a matter of record that the parties had lived together for about six months. A daughter was also born out of their wedlock; she was born on 05.10.1998 meaning thereby that the parties admittedly shared a physical relationship with one another till February 1998. The complainant was present in the Court and in the course of the hearing she admitted all these but stated that even during the 6-7 month tenure of their marriage the victim was troubled and more so by her in-laws.

17 It is in this background that the testimony of PW-5 has to be viewed. The trial judge had convicted the appellant basing his conviction solely on her version holding it to be credible and trustworthy. Trial judge had also disbelieved the defence set up by the accused that the parties had a consent relationship and the photographs

as exhibited in the version of defence witness were all taken after the marriage as they showed the victim wearing a 'Mangalsura'.

18 This Court also notes the fact that during the course of hearing efforts were made to arrive at a settlement between the parties. Parties, however, could not arrive at a settlement.

19 The victim was admittedly an adult on the date when the alleged rape was committed upon her; she was 20 years of age. She was also known to the accused since the last 10-12 years as the parties were neighbours. There was one house between the house of the victim and that of the accused i.e. their houses were adjacent. PW-4 mother of the victim did not deny the suggestion that the parties had a love relation between them. She merely stated that she does not know about this fact. The photographs Ex.DW-5/D-1 to Ex.DW-5/D-13 have been perused. DW-2 was a neighbor and living in the vicinity who knew the prosecutrix for the last 10-12 years and the accused for the last 7-8 years. She had stated that these photographs were taken at her house and at that time the prosecutrix was wearing a 'Saree'; she admitted that this 'Mangalsutra' which the prosecutrix was wearing was hers and these photographs were taken before the marriage. This fact that these

photographs were taken prior to her marriage was also confirmed by DW-3. DW-2 and DW-3 who were both independent witnesses and living in the neighborhood had on oath deposed that this fact i.e. that these photographs were taken prior to the marriage of the parties and at that time 'Mangalsutra' depicted in the photographs was of DW-2; it had been borrowed by the prosecutrix. There was no reason for these witnesses to have made this false statement. DW-2 in fact knew the prosecutrix for a longer period than the accused. She was their neighbor and these photographs were taken in her house. These facts establish that the parties knew one another and were in a love relationship prior to the marriage. The act of the appellant on 05.7.1997 at about 11.00 p.m. was an act done with the consent of the victim. This is also clear for the reason that if there was a resistance by the victim some kind of injuries would be noted upon her person; no scratch marks or nail marks were even noted. That apart when the victim was caught red handed her natural terrified reaction was noted by her mother (PW-4). PW-4 had beaten up her daughter and then called her elder daughter and her son-in-law who persuaded the parties to get married and thereafter on 08.8.1997 PW-5 and the appellant did get married. Had it been a case of

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single act of rape, this marriage would not have culminated in such a short period. Moreover PW-4 (as has been noted supra) did not deny the fact that the parties were having a love relationship. The affidavit given by the victim in the Court of the ASJ also stated that PW-5 had entered into this sexual act with the appellant with her own consent; this also cannot be ignored. The parties did get married and stayed together for six months. They had a child. Their relationship continued for six-seven months.

20 Where the victim is an adult and other evidence pointing out to the fact that the parties had a friendly relationship/love relation with one another (which is evident from the photographs produced in defence), it can in no manner be said that the deposition of PW-5 stating that she was forced to entered into this act of rape is a credible evidence. In fact all other circumstances bely this fact. Version of PW-5 on this score is wholly untrustworthy. Her affidavit on oath in Court i.e. six days after the incident is totally in contrast with her version in her complaint. There was no other compelling reason for the victim to have given this affidavit in Court other than the fact that their love relation finally blossomed into their marriage. It is also cannot be said that the

accused had married her only to get out of the rigours of the law as the parties did continue to have a good relationship for six-seven months; their marriage soured thereafter. This has been admitted by the complainant also; her main grouse was against her in-laws and not against her husband. She even on oath in Court stated that she is willing to live with her husband. In these circumstances it cannot be said that the act of the accused was an act of rape. Benefit of doubt accrues in favour of the appellant.

21 In view of the aforesaid discussion, appellant is acquitted. Appeal is allowed. Bail bond cancelled; surety discharged.

INDERMEET KAUR, J

MAY 21, 2014

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