

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

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Judgment reserved on :01.5.2014
Judgment delivered on :06.5.2014

CRL.A. 514/2003

SHANKAR

..... Appellant

Through Appellant with his counsel
Mr.Ashok Kumar Mahapatra,
Adv.

versus

STATE

..... Respondent

Through Mr. Navin K. Jha, APP

CORAM:

HON'BLE MS. JUSTICEINDERMEET KAUR

INDERMEET KAUR, J.

1 The appellant is aggrieved by the impugned judgment and order of sentence dated 13.9.2001 and 14.9.2001 respectively wherein he had been convicted along with his co-accused Shail Kumar for the offences under Sections 376 (2)(g) and 366 of the IPC and had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.5000/- in default of payment of fine to undergo SI for 6 months for the offence

punishable under Section 376(2)(g) of the IPC; for the offence under Section 366 of the IPC he has been sentenced to undergo RI for 5 years and to pay a fine of Rs.5000/- in default of payment of fine to undergo SI for 6 months. Both the sentences were to run concurrently.

2 The version of the prosecution has been unfolded in the testimony of the prosecutrix 'VL' examined as PW-3. She had deposed that on the intervening night of 26-27th of August, 1992 when she was on her way in a mini bus from Okhla Mandi to Lajpat Nagar, while she was sitting in the front row she dozed off. At the Fountain bus stand accused Shankar (present appellant) woke her. PW-3 asked him as to whether the bus had reached Lajpat Nagar; she was told that the bus was at the Fount bus stand. There were 2-3 passengers in the bus; they got down at ISBT. PW-3 remained sitting in the bus. The bus was taken behind the Red Fort. It was 1.00 a.m.; PW-3 has categorically deposed that she was raped by Shankar by spreading four seats of the bus on the rear portion of the bus. Shail Kumar (co-accused) thereafter attempted to commit rape upon her but then the police arrived. PW-3 and both the accused persons were taken to the police station. Statement of PW-3

Ex.PW-3/A was recorded. Salwar of PW-3 was taken into possession. She was medically examined.

3 PW-5 H.C. Satpal has corroborated this version. He had on oath deposed that he along with Jaipal Singh (PW-9) were on beat duty. When they were near Yamuna Pusta at about 1.00 a.m. they noted a mini bus parked on one side of the road; they found that one girl lying on the rear portion of the bus; she was naked. The appellant Shankar and co-accused Shail Kumar were present; they were in their under wears. The accused were apprehended. PW-3 was subjected to a lengthy cross-examination. She admitted that she had given her statement both before the police and Court. She denied the suggestion that she had deposed on tutoring. She admitted that in those days she was residing near Kalyanpuri at Shashi Garden; she admitted that they are four sisters and two brothers and she is the eldest; she stated that she never left her parental house prior to this incident. She denied the suggestion that she used to remain away from her house for several nights at a stretch. This cross-examination was effected on 01.7.1994. She was again recalled for cross-examination on 20.9.1994. In this

version there was discrepancy wherein she had stated that first Shail Kumar raped her and when Shankar (the appellant) was just going to commit rape upon her the police reached there.

4 As pointed out by learned public prosecutor keeping in view the trauma suffered by the victim—physical, emotional and psychological—as also the fact that the incident was of the year 1992 and she had appeared thereafter on several occasions and being grilled by the defence counsel minor discrepancy in her statement at one point of time that it was Shail Kumar who had committed rape upon her is an argument of little value.

5 Statement of the prosecutrix recorded under Section 164 of the Cr.P.C. has also been perused. This statement was recorded by the learned Magistrate (PW-10) on oath on 08.9.1992 wherein PW-3 had disclosed that conductor of the bus (appellant Shankar) had committed rape upon her and when the driver co-accused Shail Kumar had attempted to commit rape upon her the police had arrived. The graphic details of the incident and the manner in which it had occurred had been given by PW-3 both in her statement under Section 164 of the Cr.P.C.

(ExPW-10/C) as also her version on oath. Version of PW-3 otherwise was cogent, clear and coherent. This Court is in agreement with the submission of the learned public prosecutor that this discrepancy does not dent the otherwise credible testimony of PW-3.

6 The oral testimony of PW-3 has also been corroborated by the medical evidence. The medical evidence is the MLC of the victim Ex.PW-13/A which has been proved by Dr.Sudha Prasad (PW-13) as the concerned Dr.Simmi had left the hospital. This MLC reflects the history which have been given by the patient herself alleging that while she had fallen asleep in the bus on the fateful day she was taken by conductor and driver of the bus to Red Fort and was raped by the conductor (appellant Shankar was the conductor). There was a bruising noted on the vestibule; hymen was however intact.

7 Learned counsel for the appellant on this count has submitted that the hymen of the victim being intact the question of penetration does not arise and in such a case the definition of rape (in the un-amended old Section 375) would apply. Needless to state that learned public prosecutor has refuted this argument. Submission being that penetration

under Section 375 of the IPC is an essential ingredient, however, it need not be a full penetration; even without the hymen being torn there can be penetration.

8 PW-13 the concerned doctor in her cross-examination has also admitted that in a sexual intercourse it is not necessary that hymen must be ruptured and this by itself is not enough to draw an inference that the victim was not subjected to an intercourse.

9 In this context the Supreme Court in 2012(2) Scale 506 Radhkrishna Nagesh Vs. State of Andhra Pradesh made the following observations which are relevant and read as under:

“25. The mere fact that the hymen was intact and there was no actual wound on her private parts is not conclusive of the fact that she was not subjected to rape. According to PW9, there was a definite indication of attempt to rape the girl. Also, later semen of human origin was traceable in the private parts of the girl, as indicated by the FSL Report. This would sufficiently indicate that she had been subjected to rape. Penetration itself proves the offence of rape, but the contrary is not true i.e. even if there is no penetration, it does not necessarily mean that there is no rape. The explanation to Section 375 IPC has been worded by the legislature so as to presume that if there was penetration, it would be sufficient to constitute sexual intercourse necessary for the

offence of rape. Penetration may not always result in tearing of the hymen and the same will always depend upon the facts and circumstances of a given case.”

10 The Apex Court in 2004 Cri LJ 1399 Aman Kumar and Anr. Vs. State of Haryana had held as follows:

“ In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity..... Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.”

11 The doctor had gone on to clarify that the MLC noted that the hymen was intact and thus it cannot be said that PW-3 was in the habit of sexual intercourse. Thus the submission of the learned defence counsel that the victim was a call girl and was habitual to sexual intercourse is negated by this MLC which had recorded that the

hymen was intact.

12 Apart from the medical evidence which has been collected by the prosecution the CFSL had also advanced the version of the prosecutrix. The report of the CFSL has been proved as Ex.PW-12/X. The salwar of the victim had detected blood stains upon it; so also the underwear of the appellant Shankar which had also been taken into possession. The vaginal slides of the victim which had been preserved and handed over to the investigating officer and subsequently sent to the CFSL had also detected sperm heads; this has been proved in the report Ex.CW/A. This corroborative scientific evidence which had noted blood stains not only on the salwar and underwear of the appellant but also sperm heads on the vaginal swab of the victim is a clear indicator that rape had been committed i.e. how the vaginal swab taken from the vagina of the victim had sperm heads.

13 In this background the submission made by the learned counsel for the appellant that the testimony of PW-3 is only based on presumption and she being a call girl and a habitual sex worker and subjected to intercourse several times in her life is clearly obviated.

14 The victim was stated to be 15 years of age. The investigating

officer SI Ravinder Singh (PW-12) in his cross-examination has however admitted that in spite of inquiry from the parents of the prosecutrix regarding proof of her age they could not give him any proof nor they could give him the year of birth or the place of birth of the prosecutrix. Dr.A.K.Lahiri (PW-2) had conducted radiological examination of the shoulder, epiphysis of head of humerus, chest, radius ulna of the prosecutrix. He had opined the age of the victim to be between 12 to 15 years. His report has been proved as Ex.PW-2/A. In his cross-examination, he admitted that he had given a range of three years i.e. between 12 to 15 years.

15 The law on this aspect is clear. Where the age of the victim has been based on a radiological examination there can be a variation of two years on either side and benefit of this variation must accrue in favour of the accused. Apex Court reported in 1999 (1) Crimes 1 Mahabir Prasad Vs. State while dealing with the age of the prosecutrix, in this context has held as under:-

“On consideration of the entire evidence on record and the judgment cited at the bar, if there can be difference of two years, even in the ossification tests, in that event, the benefit of doubt has to go to the

accused.”

16 The victim would thus qualify as a major on the date of the offence.

17 Section 376 (2)(g) (un-amended) reads herein as under:

“376. Punishment for rape- (1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a terms which shall not be less than seven years but which may be for life or for a terms which may extend to ten years and shall also be liable to fine unless the women raped in his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a terms which extend to two years or with fine or with both;

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a terms of less than seven years.

(2)Whoever-

.....

(g) commits gang rape,

Shall be punished with rigorous imprisonment for a terms which shall not be less than ten years but which may be for life and shall also be liable to fine;

Provided 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 terms of less than ten years.

Explanation1. Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

18 The explanation appended to this Section shows the complicity of both appellant and his co-accused Shail Kumar. The appellant is thus guilty of the offence under Section 376(2)(g).

19 In this context the observations of the Supreme Court in (2014) 2 SCC 476 State of Rajasthan Vs. Roshan Khan and Ors. is relevant; they read as under:

“This court has, therefore, consistently held that where there are more than one person acting in furtherance of their common intention of committing rape on a victim, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim. (See Om Prakash v. State of Haryana, Ashok Kumar v. State of Haryana, Bhupinder Sharma v. State of H.P., Pardeep Kumar v. Union Admn. And Priya Patel v. State of M.P.) Thus, we cannot accept the submissions of Mr. Mukesh Sharma, learned counsel for Respondents 1,2,3,4 and 6, and Mr. Siddharth Dave, learned amicus curiae for Respondent 5, that the medical evidence does not establish a case of gang rape under Section 376(2)(g) IPC.

20 A conviction under Section 376(2)(g) mandates a minimum

sentence of 10 years. The proviso no doubt empowers this Court to reduce the sentence for adequate and special reasons to a period less than 10 years but the words “adequate” and “special” have to be read conjunctively and not disjunctively. No adequate or special reason has come before this Court for reducing the minimum punishment except the submission of the learned counsel for the appellant that out of the period of 10 years of incarceration the appellant has already undergone 8½ years. This by itself would not qualify for a reduction of the minimum sentence which has been engrafted by the Legislature for gang rape.

21 Appeal is dismissed.

22 Appellant be taken into custody to serve his remaining sentence.

INDERMEET KAUR, J

MAY 06, 2014

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