

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

% *Judgment reserved on :04.7.2014.*
Judgment delivered on :10.7.2014

+ CRL.A. 561/2003
RAVINDER YADAV @ DHILLO Appellant
Through Mr.M.L. Yadav, Adv.

Versus

STATE OF DELHI Respondent
Through Mr. Varun Goswami, APP

+ CRL.A. 614/2003 & Crl. M.A. No.1359/2005
PREETAM SINGH Appellant
Through Mr.Amit Sarkar, Adv.

Versus

STATE (GOVT. NCT OF DELHI) Respondent
Through Mr. Varun Goswami, APP

+ CRL.A. 249/2004 & Crl. M.A. Nos.10593/2005 & 1166/2006
LOVE KUSH @ RAVINDER Appellant
Through Mr.Amit Sarkar, Adv.

Versus

STATE (NCT OF DELHI) Respondent
Through Mr. Varun Goswami, APP

CORAM:
HON'BLE MS. JUSTICEINDERMEET KAUR

INDERMEET KAUR, J.

1 The appellants are aggrieved by the impugned judgment and order of sentence dated 19.07.2003 & 25.07.2003 respectively wherein all three of them i.e. Ravinder Yadav @ Dhillo, Preetam Singh @ Raju @ Raj and Love Kush @ Ravinder had been convicted under Sections 376 (2) (g), 363 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.10,000/-; in default of payment of fine to undergo SI for one year for the offence under Section 376 (2)(g); for the offence under Section 366 of the IPC, they had been sentenced to undergo RI for a period of seven years and to pay a fine of Rs.200/-; in default of payment of fine to undergo SI for 7 days; for the offence under Section 363 of the IPC, they had been sentenced to undergo RI for a period of three years and to pay a fine of Rs.200/-; in default of payment of fine to undergo SI for 7 days. The sentences were to run concurrently. Benefit of Section 428 of the Cr.PC had been granted to them.

2 The facts as emanating from the record reveal that on 17.11.1998 at 07:45 am, the prosecutrix 'S' (PW-3) who had left her house for going to school, being a student of 10th class; had alighted at the bus stand at Tilak Nagar and was walking on the jail road to take a rickshaw;

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at about 08:30 am a motorcycle bearing No. DDX 3951 stopped near her. The motorcycle was being driven by Preetam Singh; appellant Love Kush was the pillion rider. She was informed that her brother had met with an accident and they would take her to him. She accordingly accompanied appellants Preetam and Love Kush on their motorcycle. She was taken to a flat on the ground floor. Two other boys were already there. On inquiry by her about her brother, she was told that they would take her to him after sometime. One boy bolted the door from outside. Preetam committed rape upon her and thereupon Love Kush threatened her with a knife that if she raised alarm or told anyone of the incident, her brother would be kidnapped; he also committed rape upon her. She was again threatened that in case she raised alarm, acid would be thrown upon her. The tape recorder was put at a high volume. The third boy also committed rape upon her. While leaving, appellant Preetam wrote his telephone number on her school register.

3 Complaint was lodged by PW-3 on the following day i.e. on 18.11.1998 pursuant to which rukka was dispatched and the present FIR was registered.

4 On 19.11.1998, Preetam was arrested. In his disclosure statement

(Ex.PW-14/F) the names of his co-accomplices were disclosed. It was disclosed that house No.DG-3/217 where the heinous act was committed belonged to the bua of appellant Ravinder. The co-accused Love Kush and Ravinder were subsequently arrested on 19.11.1998. In the TIP proceedings, the fourth accused Bhagwan was not identified by the prosecutrix. From the place of offence, a bed-sheet, pillow cover, bottle of acid as also a kirpan was seized and taken into possession vide memo Ex.PW-1/D.

5 The victim was medically examined on 18.11.1998. Her MLC (Ex.PW-5/A) was prepared by Dr. Pratibha Nanda (PW-5). Her hymen was found to be torn. Patient at that time was under menstruation. The findings of PW-5 were suggestive that the patient was subjected to sexual intercourse; bruises were also noted on her body. The underwear of the victim was seized and taken into possession vide memo Ex.PW-1/B. The accused were also medically examined. Their underwears were also seized and sent to the FSL for examination. The FSL vide its report (Ex.PA) had noted blood of 'AB' group on the underwear of the prosecutrix as also semen stains on her underwear as also on the underwear of the two accused namely Luv Kush and

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Ravinder Yadav were taken into possession vide memo Ex.PW-8/A.

6 The father of the prosecutrix C.P. Kapoor was examined as PW-4. He had deposited the birth certificate of the victim evidencing her date of birth as 14.08.1982. The prosecutrix was aged 16 years & two months and her date of birth was proved by Sohan Singh (PW-13).

7 In the statement of the accused recorded under Section 313 of the Cr.P.C. they pleaded innocence; submission was that this is a clear case of false implication.

8 Shailli Yadav was examined as DW-1. She was the wife of the appellant Ravinder. Her evidence was to the effect that appellant Ravinder was suffering from epilepsy and his medical papers had been filed on record substantiating this submission.

9 On behalf of the appellants, arguments have been addressed in detail. Learned counsel for appellant Preetam and Love Kush has argued that this is a clear case of false implication; this is evident from the fact that the MLC of the victim does not evidence a brutal rape as has been described by the victim and her oral version does not match with her MLC as apart from minor bruises, there is no evidence of forceful rape and if three persons had committed rape upon a girl of tender years, this

would have been evident from her medical examination. It is pointed out that the doctor who had examined the prosecutrix had not disclosed as to whether the hymen was an old tear or a fresh tear and as such the possibility of her hymen having been torn on an earlier date cannot be ruled out. It is pointed out that the incident had occurred at 07:45 am and the victim remained with the appellant till 02:30 pm and there is no explanation as to why she lodged the FIR on the following date i.e. on 18.11.1998; it was only an afterthought and a concocted story. This was also a case where no fair trial has been afforded to the appellants. Attention has been drawn to the order dated 17.10.2002 wherein two applications filed by appellant Preetam Singh seeking permission to get the handwriting alleged to be of Preetam Singh on the school register to be examined had been dismissed. The second application to get his blood tested substantiating his submission that he was of 'O' positive group had also been dismissed summarily. Submission being that the appellants were not afforded a fair representation. The trial Court holding that there was a delay on the part of the appellant in moving the aforementioned applications is also belied by the fact that the appellant was in judicial custody and there would have been no purpose on his part to

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prolong his judicial custody. The version of PW-5 is even otherwise full of contradictions. The judgment was delivered after nine months. It is pointed out that the judgment is liable to be set aside as the appellants have been able to create a dent in the version of the prosecution. On behalf of the third appellant Ravinder Yadav, arguments have been reiterated. It is pointed out that the impugned judgment is liable to be set aside.

10 There is an inordinate delay of 22 hours in lodging of the FIR; the medical report of the girl speaks a volumes; no external injuries were noted upon her person.

11 Arguments have been refuted by the learned public prosecutor. It is pointed out that even in the absence of injuries the act of rape can be committed and the injuries upon a person are not the concluding factor. Reliance has been placed upon (2010) 8 SCC 191 Vijay alias Chinees Vs. State of Madhya Pradesh to substantiate this proposition. Submission being that non-resistance because of fear has been held not to be an unnatural conduct on the part of the victim. It is pointed out that the statement of the prosecutrix even by itself without corroboration is also

sufficient to nail the accused and for this proposition reliance has been placed upon AIR 2013 SC 1784 Lillu Vs. State of Haryana. Minor discrepancies and variations in the version of the prosecutrix which do not adversely affect the case of the prosecution also have to be ignored. For this proposition reliance has been placed upon (2012) 7 SCC 646 Shyamal Ghosh Vs. State of West Bengal. The delay in lodging the FIR in such like cases is explained as it involves the honour of the family and reputation of the prosecutrix are at stake and if the delay is adequately answered as in this case, this delay would be of little material value. To support this proposition reliance has been placed upon DLT 167 (2010) 91 Shankar Sahani Vs. State (GNCT) of Delhi. It is pointed out that the defence of the accused is totally erratic and whereas in the cross-examination of the witnesses of the prosecution a suggestion has been given that the victim had falsely implicated the appellant because of a tiff between the appellant Preetam Singh and her landlord but in the statement of the accused recorded under Section 313 Cr.P.C. a plea of plain innocence has been set up. Submission being that the shifting stands of the defence make it clear that they have in fact no defence; submission being that it would be an unimaginable situation that a

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victim of tender years would put at stake her honour for the benefit of her landlord. On no count does the impugned judgment call for any interference.

12 Arguments have been heard. Record has been perused.

13 The prosecutrix 'S' has been examined PW-3. She has detailed the incident. She has deposed that while she was studying in 10th class standard in Sarswati Bal Mandir, Hari Nagar she was travelling on the Jail Road to get a rickshaw she was accosted by accused Love Kush and Ravi; witness had correctly identified the accused by pointing her finger towards them. She has deposed that the motorcycle was being driven by the appellant Ravi and Love Kush was a pillion rider; they informed her that her brother had suffered an accident and they would take her to him; she accompanied the appellants; they took her to a flat in Vikas Puri itself; on further inquiry she was told that she would be taken to her brother; two boys were already present in the flat of whom one is third appellant Ravinder. She has in her deposition stated that she was made to remove her clothes and was threatened by Love Kush and she was raped by Preetam Singh @ Raju; thereupon Love Kush committed rape

upon her and Ravinder @ Dhillo also followed with the same act; she was threatened that in case she raised alarm she would be killed and acid would be poured upon her; she managed to leave the flat at 2.00-3.00 p.m.; she reached her home but since her mother who mostly used to remain unwell, she did not disclose the incident to her. On the following day i.e. on 18.11.1998 when her father who was out of station had returned she related the incident to her father. This was her justifiable explanation qua the delay in lodging the complaint.

14 The witness was cross-examined at length; she stuck to her stand. A suggestion has been given to her by learned defence counsel appearing for Preetam Singh that she has falsely implicated him because he was working as an electrician with her landlord and since there was a dispute between him and the landlord, at the asking of the landlord PW-3 has falsely implicated the present appellant.

15 The victim on the relevant date was stating was studying in the 10th class; her birth certificate reflects that she was born on 14.8.1982 meaning thereby that on the date of the offence she was about 16 years and 5 months. Her mental faculties were fully developed. Her testimony being coherent and cogent was rightly relied upon by the trial

judge.

16 The age of the victim had been proved by Sohan Singh (PW-13) who had brought the record of the victim from her school evidencing her date of birth as 14.8.1982 which has been disclosed by her father C.P.Kapoor (PW-4) on oath as well.

17 The MLC (Ex.PW-5/A) of the victim was proved through Dr.Pratibha Nanda (PW-5) suggesting that patient was subjected to sexual intercourse; she was menstruating at the time when she was medically examined. In her cross-examination PW-5 reiterated that violence marks were found on her body and injuries were found on her back. This was noted by the CMO of the hospital (he had first examined the examined). PW-5 did not separately mention the injury marks as the CMO in this MLC Ex.PW-5/A had already recorded these injury marks. Hymen was torn.

18 The vehement submission of the learned counsel for the petitioner is that if three persons had raped the victim the injury marks would have been much more violent and would have been all over her body as a girl of tender years who has been subject to a forceful act of the nature as described by her could have several minor injury marks if such an

incident had occurred. This Court is not inclined to accept this submission of the learned counsel for the appellants. Admittedly, injury marks were noted on the body of the victim and the same have been recorded by the CMO noting that there was injury marks on her 'peeth' (back). Merely because expensive, violent and aggravated injury marks were not noted upon the victim, would be no ground to falsify her otherwise coherent and cogent version which has withstood the test of cross-examination. In the judgment of Vijay (supra), the Apex Court has dealt with this issue and it had been held that even in the absence of any injury mark the testimony of a victim of rape which is otherwise coherent and cogent cannot be rejected. In this context the following observations of the Apex Court are relevant and reproduced herein as under:

“If we examine the whole case in the totality of the circumstances and consider that an illiterate rustic village girl having no sense/estimate/assessment of time and place, found herself apprehended by the appellant and his accomplices and forced to surrender under the threat to life, it is quite possible that she could not even raise hue and cry. She had no option except to surrender. It appears to be a case of no-resistance on the part of the prosecutrix because of fear and the

conduct of the prosecutrix cannot be held to be unnatural.”

19 There was absolutely no reason for the victim to have falsely implicated the appellants. In the statement of the appellants recorded under Section 313 Cr.P.C. they have pleaded mere innocence; stating that they have been falsely implicated in the present case. In the cross-examination of PW-3 the counsel for the appellant Preetam has set up a contrary stand. A suggestion has been given to PW-3 that she had falsely implicated the appellant because of a tiff of Preetam with her landlord which was at the behest of her landlord when she falsely named him. The trial court has rejected this argument and rightly so. A girl whose reputation is probably her biggest asset and wealth would not put it to stake merely at the asking of a third person and that too with whom she has no interest. It was not the case of the appellant Preetam that the landlord had a special relationship with the victim which had led her to falsely implicate the appellant and that too because of a dispute over some electricity charges interse them. This defence which was thereafter never reiterated in the statement of the appellants recorded under Section 313 Cr.P.C. and neither at the stage of the defence evidence is palpably false. It was rightly rejected.

20 The identity of the appellants stood fully established. The appellant Preetam Singh was known to the victim. Admittedly the appellant Preetam was an electrician who was regularly coming to the house where the victim was staying to attend to the electricity complaints of her landlord. The pillion rider on the scooter with him was Love Kush who was also identified by the victim; so also Ravinder. Relevant would it be to state that the victim remained in the flat with the accused persons between 7.45 a.m. to 2.30 p.m. i.e. for almost seven hours in which period of time there was ample opportunity for the victim to have noted their features and faces. The fact that all the accused persons had refused TIP (which is evident from the TIP proceedings Ex.PW-17/A) also leads to the drawing of an adverse inference against them. The report of the FSL also specifically fully corroborates the version of the prosecution; blood group AB was found on the underwear of the prosecutrix; semen was also detected on her underwear as also on the underwear of appellant Ravinder and Love Kush.

21 Record further shows that all the appellant had been given time to lead evidence in defence; one witness was produced in defence; he was

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DW-1; he had appeared on behalf of the appellant Ravinder Yadav; this was to substantiate his submission that Ravinder Yadav was suffering from epilepsy.

22 Learned counsel for the appellant Preetam had vehemently argued that he had filed two applications before the trial court and the same had been summarily dismissed without examining the purports and purpose for which they had been filed; this has prejudiced him. For this purpose he has drawn attention of this Court to the order of the trial judge dated 17.10.2002. This order reflects that Preetam had filed two applications before the trial court. These applications were filed at the fag end of the trial. This was at the stage of leading evidence in defence. In the first application his prayer was that his blood group be ascertained. FSL had recorded a finding which had evidenced blood group of AB but the appellant Preetam had a blood group of 'O-Positive'. The second application had a prayer that the school register of the victim on which purportedly the appellant had written his phone number was not in his handwriting. For this purpose he sought direction for sending the said register for calling the handwriting expert report on the handwriting of Preetam. Both the applications were considered and after hearing the

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arguments of the respective parties the Court had dismissed these application. This was vide a speaking order dated 10.10.2002. Admittedly no appeal has been filed against the said order; that order had become final. Even before this Court no separate application has been filed challenging the aforementioned order. The submission of the learned counsel for the appellant that he has suffered a prejudice on this count is thus wholly negated.

23 On no ground do the appellants deserve any sympathy. The prosecution has been to prove its case to the hilt. The conviction of the appellants calls for no interference.

24 Nominal roll of Ravinder Yadav @ Dhillo reflects that as on 07.4.2014 he has suffered incarceration of 3 years 11 months and 29 days besides remissions earned of 11 months and 15 days meaning there he had suffered incarceration of about 4 years 11 months and 14 days. Preetam Singh @ Raju as on 07.4.2014 has undergone incarceration of about 7 years 8 months and 6 days besides remissions earned of 10 months and 25 days meaning thereby he has suffered incarceration of about 8 years 7 months. Love Kush as on 07.4.2014 has undergone incarceration of about 6 years 11 months and 23 days besides remission

earned of 1 year and 18 days meaning thereby he has completed almost 8 years of sentence. On the question of leniency of sentence this court reiterates the facts that the sentence which is to be imposed besides having a social goal must relate to the nature of the offence and the manner in which it has been committed. The purpose of sentence is not only to curb the crime and protect the society from its turmoil but the sentence should also be adequate and must commensurate with the gravity of the offence.

25 Section 376(2)(g) of the IPC for which the appellants have been convicted has a minimum sentence prescribed which reads herein as under:

“376. Punishment for rape.—

(1)

(2) Whoever,-

(a).....

(b).....

.....

(g) commits gang rape, shall be punished with rigorous imprisonment for a term 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 term of less than ten years.

Explanation 1.—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.

Explanation 2.—“Women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected woman or children or a widows’ home or by any other name, which is established and maintained for the reception and care of woman or children.

Explanation 3.—“Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.”

26 The proviso no doubt vests discretion with the court for adequate and special reason to impose a sentence less than the minimum. The words adequate and special have to be read conjunctively and not disjunctively.

27 In the facts of the instant case, this Court notes that the victim was studying in the 10th standard; she was just about 16 years of age; the emotional turmoil which the victim must have faced and even though

the offence is of the year 1998 but probably its effect has not worn out even today. In this background this Court is not inclined to modify the minimum sentence of 10 years.

28 Appeals are dismissed.

29 Bail bonds are cancelled; surety discharged; appellants be taken into custody to serve remaining sentence.

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30 These applications have become infructuous; disposed of accordingly.

INDERMEET KAUR, J

JULY 10, 2014

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