

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

Reserved on : 25.09.2014

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Pronounced on : 30.09.2014

+ CRL.A. 91/2009

RAJENDER SINGH @ THOLU

..... Appellant

Through : Mr.Tanmaya Mehta and
Ms.Swati Gupta, Advocates along
with Appellant in person.

versus

STATE

..... Respondent

Through : Mr.Rajdipa Behura, APP for the
State.

AND

+ CRL.A. 142/2009

BHUPENDER SINGH @ BINDER

..... Appellant

Through : Mr.Tanmaya Mehta and
Ms.Swati Gupta, Advocates along
with Appellant in person.

versus

STATE

..... Respondent

Through : Mr.Rajdipa Behura, APP for the
State.

AND

+ CRL.A. 151/2009

GURPAL SINGH @ VICKY

..... Appellant

Through : None

versus

STATE

..... Respondent

Through : Mr.Rajdipa Behura, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J

1. By this common judgment, I shall dispose of the three Criminal Appeals bearing No.91/2009, 142/2009 and 151/2009, which have been filed by the Appellants Rajender Singh @ Tholu, Bhupender Singh @ Binder and Gurpal Singh @ Vicky respectively on being convicted in Sessions Case No.312/2006 by learned Addl. Sessions Judge, Rohini Courts, Delhi.

2. Briefly stating, the case FIR No.278/2005 under Sections 363/376/120-B/34 IPC was registered at PS Prashant Vihar on the basis of statement Ex.PW2/A made by Km. 'R' (name withheld to conceal her identity) aged about 13 years, who is the victim of sexual assault. The contents of FIR reveal that 'R' alongwith her family was residing at the third floor in Sardar Colony. On 27.03.2005 at about 7.30 pm when 'R' came downstairs to use the bath room, all the three Appellants forcibly took her to the house of Appellant Tholu in a room situated at the third floor. After taking her there, all the three Appellants bolted the room from inside. While Appellants Tholu and Binder continued standing in the room on one side, Appellant Vicky started molesting her. She suffered injury on her head when her head got hit on the surface of window. She raised alarm. On hearing her noise, her mother Maya (PW-1) came upstairs and knocked the door due to which Appellant Vicky became nervous and jumped from another door of the room. On getting the opportunity, she opened the *kundi* and while her mother was taking care of her, the other two Appellants Tholu and Binder got the chance to flee from there.

3. DD No.34-A has been recorded at PS Prashant Vihar to the effect that an information from PCR has been received about a quarrel at Sardar Colony. DD No.34-A was assigned to ASI Jai Bhagwan, who alongwith Ct.Braham Prakash, left for the spot.
4. Appellant Gurpal @ Vicky and the child victim alongwith her mother were taken to Baba Saheb Ambedkar Hospital for their medical examination and subsequent investigation was assigned to W/SI Sudesh Dahiya.
5. During investigation, the other two Appellants namely Tholu and Binder were also arrested and got medically examined. After completion of investigation, chargesheet was filed.
6. The prosecution has examined 15 witnesses in support of its case. After examination of the Appellants under Sections 313 CrPC, opportunity was given to them to lead defence evidence. The Appellants have examined three witnesses in their defence.
7. After considering the testimony of material prosecution witnesses and the medical report, learned Trial Court handed down verdict of guilty against the Appellants for committing the offences punishable under Section 366 read with Section 34 IPC and under Section 376 (2)(g) IPC and sentenced them to undergo RI for 10 years with fine of Rs.25000/- payable by Appellant Gurpal @ Vicky and Rs.5000/- each payable by Appellants Rajender @ Tholu and Bhupender @ Binder, in default to undergo SI for three months for the offence punishable under Section 376(2)(g) IPC and further to undergo RI for four years with fine of Rs.5000/- each and in default to undergo SI for three months for the offence punishable under Section 366 read with Section 34 IPC.

8. When these appeals came up for hearing on their turn, production warrant was ordered to be sent for production of Gurpal @ Vicky, who committed rape on the child victim. The report has been received from Jail to the effect that he has already been released from Jail after undergoing the sentence awarded to him. Thereafter the Appellant Gurpal @ Vicky has not appeared either in person or through counsel to pursue the appeal.

9. The Appellants Rajender @ Tholu and Bhupender @ Binder as on bail. They are being represented by Mr.Tanmaya Mehta, Advocate, ,Amicus Curaie and have challenged their conviction and sentence contending that there are serious infirmities in the statement made by PW-2 'R' – the child victim and PW-1 Smt. Maya – mother of the child victim on material aspects. Mr.Tanmaya Mehta, Advocate submitted that as per statement Ex.PW2/A made by the child victim, both the Appellants were present inside the room when rape was committed by the third Appellant Vicky and room was bolted from inside. It is further mentioned in the statement Ex.PW2/A that while Appellant Vicky jumped from another door in the room, PW-2 – the child victim opened the door and while her mother was busy in taking care of her, both these Appellants namely Tholu and Binder escaped from there. This is in total contradiction to the version of PW-1 Smt.Maya, who is the mother of the Child Victim and was the first person to reach the scene of occurrence.

10. Mr.Tanmaya Mehta, Advocate submits that as per version of PW-1 Smt.Maya, when she reached the third floor on hearing the cries of her daughter, she found both the Appellant standing outside the room and the room was locked from outside. Learned counsel for the

Appellants has also drawn the attention of this Court to various other material contradictions appearing in the testimony of PW-2 – the child victim. As per the complaint Ex.PW2/A and her MLC, the rape was committed only by one person i.e. Appellant Gural @ Vicky whereas in her statement before the Court, she stated that she had been raped by all the three Appellants which is clear to establish that these Appellants have been falsely implicated in this case due to enmity and every effort was made to ensure their conviction by making material improvements over the initial case of the prosecution. However, Mr. Tanmaya Mehta, Advocate, on instructions from both the Appellants namely Rajender @ Tholu and Bhupender @ Binder, further submitted that from the record, it is proved that these Appellants were not present in the room where the rape was committed or outside the room. At the most, it can be a case where occurrence took place in the room of Appellant Tholu but that itself is not sufficient to hold him guilty under Section 376 (2)(g) IPC as held in ***Om Prakash vs. State of Haryana (2011) 14 SCC 309***. Thus, at the most the statement of the Prosecutrix proved that both the Appellants namely Tholu and Binder accompanied Appellant Vicky when ‘R’ was taken to a room on the third floor. In respect of this act, both these Appellants can at the most be convicted under Section 366/34 IPC. Learned counsel for the Appellants submitted that Appellants Tholu and Binder had been sentenced to undergo RI for four years with fine of Rs.5000/- each for committing the offence punishable under Section 366/34 IPC whereas they have already undergone four years, seven months and nine days in judicial custody. In the given circumstances, as there is no evidence of gang rape, he is restricting his prayer to the extent

that both the Appellants namely Tholu and Binder may be acquitted of the offence punishable under Section 376(2)(g) IPC and their conviction under Section 366/34 IPC may be maintained.

11. On behalf of State, Ms.Rajdipa Behura, APP submitted that statement of PW-2 – the child victim is sufficient to prove the guilt of all the Appellants beyond reasonable doubt and there is no ground to interfere with the impugned judgment. While not disputing that there are some contradiction in the testimony of PW-2 and some improvements have also been made over the previous statement, she contended that in a case of rape on a young girl aged about 13 years, the child has to relive the trauma she passed through at the time of occurrence and in that circumstance, possibility of some contradictions or improvements cannot be ruled out but that itself is no ground to disbelieve her otherwise creditworthy statement. Learned APP for the State submitted that the parties in this case are illiterate, belonging to the poor strata of the society, while the child victim has gone to School only upto 2nd or 3rd Standard, her mother used to work as maid servant in different houses and father was a rickshaw puller and in these circumstances, the improvements and contradictions appearing in their testimony need to be ignored and the conviction and the sentence awarded to the Appellants may be maintained.

12. I have considered the rival contentions and also carefully gone through the record.

13. Now the only question that requires to be determined is whether on the basis of statement of the child victim or her mother, these two Appellants have been rightly convicted for committing the offence

punishable under Section 376(2)(g) IPC. Here, it is necessary to mention that though PW-2 'R' – the child victim was 13 years old and had gone to School, her statement under Section 164 CrPC was not got recorded by the IO for the reasons not recorded in the chargesheet.

14. From the various statements of PW-2 'R' – the child victim and PW-1 Smt. Maya – mother of the child victim, what has been brought on record is summarised here under:

First statement Ex.PW2/A made by PW-2 on the basis of which the FIR has been registered

- (i) On 27.03.2005 at about 7.30 pm, she came downstairs from her room on the third floor.
- (ii) She came downstairs to use the bathroom.
- (iii) All the three Appellants took her to a room on the third floor in the house of Tholu.
- (iv) After bolting the room from inside, while Appellants Tholu and Binder remained standing on one side in the room, rape was committed by Appellant Vicky.
- (v) When her mother came, while Appellant Vicky jumped from another door of the room, she opened the door and at that time, Appellant Tholu and Binder got the opportunity to flee from there.

Statement made by PW-2 – the child victim before the Court :

- (i) On 27.03.2005 at about 7.00 pm, as there was no electricity, she went downstairs for taking a candle.

- (ii) The three accused persons were present there and forcibly took her to the second floor of the house of Tholu.
- (iii) On reaching second floor, on knife point, she was taken to the third floor in a room through iron ladder.
- (iv) When she was pushed in the room, her head got hit at the gate of the room and she suffered injury.
- (v) All the three accused bolted the room from inside.
- (vi) First accused Vicky committed rape on her and thereafter the other accused also committed rape on her.
- (vii) On hearing her screams, her mother came there. At that time, accused Tholu and Binder came outside the room and locked the room from outside.
- (viii) Accused Vicky remained inside the room and pressed her mouth and when the room was locked, Vicky jumped outside the room.
- (ix) She opened the gate from inside.

Statement of PW-1 Smt. Maya recorded under Section 161 CrPC :

- (i) On 27.03.2005 at about 7.30 pm, when after finishing her work, she reached near her house, she heard the screams of her daughter coming from the house of Tholu from a room situated on the top floor.
- (ii) She rushed towards that room and saw the room being bolted from inside and heard cries of her daughter coming from inside.
- (iii) She knocked the door and called her daughter who opened the door and she was weeping at that time.
- (iv) When she was taking care of her daughter, Gurpal Singh became nervous and jumped down from the another door of the room.

- (v) On getting the opportunity, Tholu and Binder also fled from there.
- (vi) Her daughter narrated the incident to her and on hearing the noise, somebody informed the police.
- (vii) The police took them as well Gurpal to Baba Sahed Ambedkar Hospital where they were medically examined.

Statement made by PW-1 Smt. Maya before the Court

- (i) On the date of incident, at about 7.00 or 7.30 pm, she left her house for going to her work. She returned at 8.30 pm.
- (ii) She heard screams of her daughter coming from the third floor and ran towards that place.
- (iii) She saw accused Rajender and Bhupender standing outside the room and the room was bolted from inside and locked from outside.
- (iv) The two accused standing outside informed her that no one was there.
- (v) With the help of her husband and neighbour, who also reached the spot, the lock was broken open.
- (vi) The two accused standing outside, by that time fled away from the spot.
- (vii) Her daughter opened the door of the room.
- (viii) She saw that after pushing her daughter, Gurpal Singh fled from the second door of the room.

15. The MLC Ex.PW6/A of the child victim records the history as under :-

‘28/03

1.50 AM : Acc. to the girl ‘R’, she was forcible dragged by 3

males Vicky, Tholu and Binder at about 8 pm yesterday 28.03.05 and was raped by Vicky'

16. From the version made by the child victim in her statement Ex.PW2/A as well as the version recorded on her MLC, it is proved that none of these two Appellants Tholu and Binder had committed rape on the child victim and her deposition before the Court to this effect is liable to be rejected.

17. It may also be noted that there are material variations in the testimony of PW-2 – the child victim and PW-1 Smt. Maya – the mother of the child victim as to whether they were present inside the room when PW-1 happened to reach there or they were present inside the room after locking the room from outside as well as to when they escaped from the spot. It is the admitted case of the prosecution that the room where the offence was committed is accessible through an iron ladder. While filing the bail application, photographs of the place of occurrence were placed on record, which are at page Nos.183, 185, 187 and 189 of the Trial Court Record and reveal that the staircase which is made of bricks as well as the iron ladder are very narrow. During the course of hearing as well from the above photographs and testimony of prosecution witnesses, it has come on record that the staircase leading to the house of the child victim on third floor is not common. There is a gap of about 2-3 feet in between the houses. There is separate staircase leading to the house of Tholu and room on the third floor can be reached through an iron ladder. Thus, it was highly improbable for the Appellants Tholu and Binder to escape from there in the presence of PW-1 Smt. Maya, her husband PW-3 Sh.Vakil Singh and other neighbours who gathered there

on hearing the noise. Thus, at the most, the testimony of the child victim can be believed to the extent that both these Appellants namely Rajender @ Tholu and Bhupender @ Binder were with Appellant Gurpal @ Vicky when PW-2 was taken to the room by Vicky where the incident has taken place. The testimony of the child victim regarding rape being committed by any of the two Appellants namely Rajender @ Tholu and Bhupender @ Binder being already disbelieved by this Court, I am of the considered view that on the basis of testimony of the child victim, the Appellant Rajender @ Tholu and Bhupender @ Binder have been rightly convicted for committing the offence punishable under Section 366/34 IPC. But their conviction for committing the offence punishable under Section 376(2)(g) is liable to be set aside.

18. So far as Criminal Appeal No.151/2009 filed by Appellant Gurpal @ Vicky is concerned, the report received from the Jail on the production warrant sent for his production in the Court is to the effect that after undergoing his sentence in this case, he has been released from Jail. After his release, he has not appeared either in person or through counsel to pursue the appeal.

19. So far as conviction of the Appellant Gurpal @ Vicky for committing the offence punishable under Section 366/34 IPC is concerned, it has been observed that from the testimony of the child victim, it is proved that the Appellants Rajender @ Tholu and Bhupender @ Binder were with Appellant Gurpal @ Vicky when PW-2 'R' was taken to the room by Appellant Vicky where the incident has taken place, hence the conviction of the Appellant Gurpal @ Vicky for committing the offence punishable under Section 366/34 IPC is maintained.

20. So far as the conviction of the Appellant Gurpal @ Vicky for committing the rape, is concerned, the child victim, aged about 13 years alongwith Appellant Gurpal @ Vicky was taken to the hospital for medical examination at the same time. From her testimony, it is proved that when her mother happened to reach the spot, with a view to escape from the scene of occurrence, the Appellant Gurpal @ Vicky jumped from the height and in the process, he suffered injuries. From the MLC Ex.PW9/A of the Appellant Gurpal, it is proved that he was brought to the hospital by PCR with alleged history of fall from height as well history of rape being committed by him. The testimony of PW-2 'R' – the child victim and PW-2 Smt. Maya – mother of the child victim as well as from the MLC Ex.PW6/A of PW-2 'R', it is proved that she was raped by Appellant Gurpal @ Vicky in a room on the third floor in the house of Appellant Tholu. Thus, not only from the testimony of PW-2 'R' but also from her MLC Ex.PW6/A, it is proved beyond reasonable doubt that she was raped by Appellant Gurpal @ Vicky who was apprehended from the spot itself after he jumped from height and fell down and thereafter removed to Baba Saheb Ambedkar Hospital.

21. Thus, believing the testimony of PW-2 'R' – the child victim, which is supported and corroborated by her mother PW-1 Smt. Maya as well as by the medical evidence, I find that learned Trial Court has rightly convicted the Appellant Gupta @ Vicky for kidnapping her alongwith other two Appellants and committing the rape on 'R' by him (Appellant Gurpal @ Vicky). Since the charge under Section 376(2)(g) against Appellants Tholu and Binder is not proved beyond reasonable doubt, the conviction of the Appellant Gurpal @ Vicky is altered from

under Section 376(2)(g) IPC to under Section 376 IPC. As the Appellant Gurpal @ Vicky has already undergone the sentence awarded to him in this case, no further direction is required in the matter.

22. In view of the above discussion, Criminal Appeal Nos.91/2009 and 142/2009 are partly allowed and the Appellants Rajender @ Tholu and Bhupender @ Binder are acquitted of the offence punishable under Section 376(2)(g) IPC, however, their conviction under Section 366/34 IPC and sentence awarded to them to undergo RI for four years with fine of Rs.5000/- each and in default, to undergo SI for three months, are maintained.

23. Perusal of the record reveals that substantive sentence of the Appellants Rajender @ Tholu and Bhupender @ Binder was suspended vide order dated 03.11.2009. Both the Appellants Rajender @ Tholu and Bhupender @ Binder are present in person with their counsel and on being specifically questioned about the deposit of fine imposed on them in this case, they stated that they are not aware if fine was deposited on their behalf. In the circumstances, it is directed that the Appellants Rajender @ Tholu and Bhupender @ Binder shall deposit the fine with the Trial Court within four weeks, if the same has not been already deposited. The Appellants Rajender @ Tholu and Bhupender @ Binder shall appear before the Trial Court on or before 30.10.2014 either with proof of deposit of fine or for depositing the fine amount. On their failure to deposit the fine amount by due date i.e. 30.10.2014, the Appellants Rajender @ Tholu and Bhupender @ Binder shall be committed to custody to undergo the sentence in default of payment of fine.

24. CrI.A. No.151/2009 filed by the Appellant Gurpal @ Vicky is dismissed.
25. TCR be sent back alongwith the copy of this order.
26. A Copy of the order be sent to the concerned Jail Superintendent for information and also be given dasti to the Appellants under the signature of Court Master for compliance.

(PRATIBHA RANI)
JUDGE

SEPTEMBER 30, 2014
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