

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

% Reserved on: 1st July, 2014
Decided on: 8th July, 2014

+ **CRL.A. 179/2010**

SURINDER SINGH @ RAJA Appellant
Through: Mr. Sidharth Yadav, Adv.

versus

STATE Respondent
Through: Mr. Neeraj Kr. Singh, APP with SI
Abhishek Kumar, PS Prasad Nagar.

+ **CRL.A. 211/2010 & Crl.M.B. 1715/2013**

DHARAMBIR @ BUNTY @ BOXER Appellant
Through: Mr. Haneef Mohammad, Mohd.
Mustafa, Adv.

versus

STATE OF DELHI Respondent
Through: Mr. Neeraj Kr. Singh, APP with SI
Abhishek Kumar, PS Prasad Nagar.

+ **CRL.A. 212/2010 & Crl.M.B. 1382/2012, Crl.M.A. 10005/2013**

MANOJ KUMAR @ BOMB Appellant
Through: Mr. K.K. Jha, adv

versus

STATE OF DELHI Respondent
Through: Mr. Neeraj Kr. Singh, APP with SI
Abhishek Kumar, PS Prasad Nagar.

+ **CRL.A. 210/2010**

KAPIL KUMAR

..... Appellant

Through: Mr. I.L. Kapoor, Mr. Satya Narayan
Vashisht, Mr. Arjun, Advs.

versus

STATE OF DELHI

..... Respondent

Through: Mr. Neeraj Kr. Singh, APP with SI
Abhishek Kumar, PS Prasad Nagar.

+ **CRL.A. 213/2010 & CrI.M.B. 545/2014**

PREM @ KALIA

..... Appellant

Through: Mr. Mayank Mikhail Mukherjee, Adv.

versus

STATE OF DELHI

..... Respondent

Through: Mr. Neeraj Kr. Singh, APP with SI
Abhishek Kumar, PS Prasad Nagar.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By these appeals the Appellants challenge the common impugned judgment dated 25th January, 2010 whereby they have been convicted for offence under Section 376 (g) IPC and the order on sentence dated 30th January, 2010 directing them to undergo rigorous imprisonment for a period of 8 years each for offence punishable under Section 376(g) IPC and fine of Rs. 3000/- each and in default of payment of fine to undergo Simple Imprisonment of 3 months each.

2. Learned counsel for the Appellant Dharambir @ Bunty contends that despite the prosecutrix not knowing the Appellants she has named them in the FIR. It is highly unnatural that without knowing the Appellants the

prosecutrix accompanied them for 3 hours and then went to the place of alleged incident. The MLC of the prosecutrix does not support her version. Prosecutrix has stated that she was administered liquor, however the MLC is silent about her being intoxicated. The MLC shows that the prosecutrix was habitual of intercourse, though in her statement she stated that she had no intercourse prior to the alleged incident. Neither the medical evidence in the MLC nor the report of the FSL support the allegation of the prosecutrix that rape took place. The condoms recovered from the spot had no blood stains. The Test Identification Parade of the Appellants ought to have been conducted as they were not known to the prosecutrix prior to the alleged incident. Statement of the friend of the prosecutrix and the landlord in whose house the prosecutrix was staying has not been recorded and hence material witnesses have not been produced by the prosecution. Though the prosecutrix states that she was called for an interview for job, however she was not carrying her certificates. It is the admitted case of the prosecution that being Sunday number of offices were closed at the alleged place of occurrence and hence it was not possible that the guard would have permitted entry to the accused persons or the prosecutrix. The testimony of the prosecutrix is full of improvements and contradictions. The prosecutrix herself in her cross-examination admits that she did not use any force against the Appellants at the time of sexual intercourse which clearly shows that she was a consenting party. Hence the appeals be allowed and the Appellants be acquitted.

3. Learned counsel for the Appellant Surinder Singh contends that the Appellant Surinder Singh is a Sikh, however there is no mention in either the

FIR or before the Court that there was a Sikh person amongst the accused persons. The Appellant has not been named by the prosecutrix in her statement under Section 164 Cr.P.C. and has been for the first time named before the Trial Court. Though it is the case of the prosecution that bottles, glasses and other materials were found at the spot, however they were not seized and sent for finger print analysis. No witness of arrest of the Appellant has been examined. The Appellant has stated in his statement under Section 313 Cr.P.C. that he was picked up from his house and framed in the present case. Though PW5 H.C. Ashok Kumar has stated that after the arrest of the first accused search was made for Appellant Surinder Singh and he was arrested from Tank Road, however the other witnesses have stated that the Appellant was found standing and thus he was arrested. Though the prosecutrix did not state in her initial statement that any money was demanded by the Appellants, however this improvement was made in her statement before the Court. Reliance is placed on *Lalliram and Anr. Vs. State of M.P. (2008) 10 SCC 69* and *Pratap Misra and Ors. Vs. State of Orissa (1977) 3 SCC 41*. Though the prosecutrix in her statement stated that she never consumed alcohol, however vide order dated 30th April, 2005 the father of the prosecutrix appeared and showed that the prosecutrix was undergoing psychological treatment and had alcohol dependence. The finding of the learned Trial Court are based on assumptions. Though the Trial Court held that there was improvement in the testimony of the prosecutrix qua accused Anil, however it did not consider the improvements qua the other accused persons. It is well-settled that in the case of a circumstantial evidence, circumstances should be clearly proved and in case there is a doubt then the benefit has to go to the accused. Reliance is placed

on *Jaharlal Das Vs. State of Orissa AIR 1991 SC 1388*. The injuries on the Appellants have not been proved to be connected with the offence and hence no conviction can be based thereon. Thus, the Appellant be acquitted of the charge framed.

4. Learned counsel for the Appellants Manoj, Prem and Kapil while adopting the arguments made on behalf of the Appellants Dharambir and Surinder Singh have further contended that the circumstances proved by the prosecution clearly indicate that the prosecutrix was a consenting party. The finding of the learned Trial Court that a women cannot have committed sexual intercourse with 6 men is based on assumptions. The scratch marks on the body of the Appellants were marks of passion and not protest. The prosecutrix admitted that she did not use force against the Appellants. The judgment of the Trial Court is not based on facts but on moral grounds. Reliance is placed on *Raju and Ors. Vs. State of M.P. (2008) 15 SCC 133*.

5. Learned APP for the State on the other hand contends that the Appellants have taken contrary stands in the suggestions to the prosecutrix. On the one hand it is stated that sexual intercourse was with consent. However, in the statement under Section 313 Cr.P.C. the defence is that the Appellants were not present at the spot. The MLC of the prosecutrix and the accused persons corroborate the version of the prosecutrix that she was subjected to forcible intercourse. The argument that Surinder Singh was not named in the FIR is incorrect, as Surinder Singh has been named as Raja in the FIR. Reliance is placed on *State Vs. Chottey Lal AIR 2011 SCC 697*.

6. The case of the prosecution is based on the statement of the prosecutrix who deposed before the Court that after completing her post-

graduation she came to Delhi alone. Initially she stayed with a friend for a week with whom she had studied and thereafter she took a house on rent at Tank Road and started living alone. Subsequently, she changed the rented accommodation to Laxmi Nagar. Two days prior to the incident she had gone to meet her friend at Tank Road and while she was returning back at 10 P.M. she met one Ghanshyam, who was the neighbor of her friend. Ghanshyam stated to her that it was not safe for her to go to her house as it was night time and Pramod would drop her at her house on his bike. On the way while she was speaking to Pramod, she requested him to arrange for some job for her. On this Pramod took her mobile number. Pramod dropped her at the bus stop at Khalsa College, from where she went to her home. After two days she received a telephone from Bunty and Kapil at about noon time. She was told that they had arranged a job for her and for this purpose she had to appear in an interview. She was called at Khalsa College for appearing in the interview. She reached there at about 2.00 PM, when she again received a call from the accused Bunty and Kapil and they described the cloth they were wearing so that she could identify them. Both Bunty and Kapil introduced themselves to the prosecutrix and from the bus stop at Khalsa College she was taken to Padma Tower, Rajindra Place on a bike. Before going to Padma Tower, they took her around Karol Bagh area and they reached Padma Tower at about 6.00 PM. There Kameshwar was standing as a guard. He took them to the 13th floor of the building and the prosecutrix was made to sit on one chair which was kept outside the office, which was locked. That office was opened by the guard and she was told to sit outside, as it was hot inside the office. In the meantime, the accused persons called their other friends at that place i.e. Prem, Anil and one more

person and Pramod. All these persons forced her to drink two glass of liquor. She tried to go downstairs, however she was taken to one room which was having scrap items (Kabara). When the prosecutrix objected, the accused persons stated that she could go only if they were willing. Accused Prem gave her two slaps and forced her to obey his commands. The accused persons thereafter gave threats to her and stated that she could raise the alarm in whatever volume she wanted, as nobody was there to hear her cries. They snatched her mobile phone also. From her mobile phone they deleted their numbers. They also snatched her gold chain. She offered them to take the money but let her go, however they did not hear. Thereafter all the accused persons committed rape upon her one by one against her will except accused Kameshwar. When accused Kameshwar tried to commit rape, she rebuked him and he was not successful. She wore her clothes, came downstairs on the ground floor of the building, straightway reached Police Station, Prasad Nagar at about 8.00 PM and lodged the report Ex.PW1/A on the basis of which FIR was registered.

7. The contention of learned counsel for the Appellants that no TIP was conducted is wholly unfounded. The Appellants have been named in the FIR. The prosecutrix had sufficient time to identify the accused persons. The prosecutrix has clarified that she came to know the names of these persons as they were calling themselves with these names. The contention of the learned counsel for the Appellant Surinder Singh that name of Surinder Singh is not mentioned in the FIR is also incorrect, as FIR notes the name of the Appellant Surinder as Surinder alias Raja. The Appellants

having been named in the FIR, there was no requirement of Test Identification Parade.

8. The contention of learned counsel for the Appellants that the MLC does not support the version of the prosecutrix is also incorrect. The MLC of the prosecutrix Ex.PW11/A though notes that the hymen was torn old and there was no bruising/ contusion present, however on examination the doctor notes that the prosecutrix seems to had numerous episodes of sexual intercourse and possibility of recent intercourse cannot be ruled out. This is the allegation of the prosecutrix that she was subjected to sexual intercourse by number of Appellants. Further as per the MLC there was bruise marks on the medial side of the right thigh. The MLC of Appellant Anil besides showing old nail scratch marks also show few scratch marks on right forearm. Even Surinder alias Raja had red erythematous lesions on the right thigh and multiple red scratch marks on right buttock. The MLC of Prem alias Kalia Ex.PW7/B also notes fresh nail mark present over inner aspect of left thigh. Learned counsel for the Appellants have strenuously argued that these nail marks are marks of passion, however the doctor has opined specifically in the case of MLC of Surinder alias Raja that rape cannot be ruled out. Referring to the FSL report, learned counsels for the Appellants have stressed that blood could not be detected on the condoms which were recovered and thus the same falsifies the version of the prosecutrix, as her MLC shows that she was menstruating at the time of alleged incident. The absence of detection of blood on the condoms Ex.8a to Ex.8d do not rule out the version of the prosecutrix. As per the FSL report Ex.PW19/A human semen was detected in 8a, 8b & 8d i.e. three of the condoms recovered from

the spot at the instance of the Appellants. Further, human semen was detected in the vaginal swabs and the underwear of the prosecutrix, which corroborates her version that she was subjected to sexual intercourse. The version of the prosecutrix that she had no intercourse prior to the incident cannot be said to be incorrect in view of the MLC which finds hymen torn. The hymen can be torn for number of reasons. The prosecutrix having been subjected to repeated sexual intercourse by the Appellants has also been noted by the doctor in the MLC.

9. It is stated that since it was Sunday and all offices were closed, the accused persons not being the owner of the building or the flats could not have attained entry into the blocks. The prosecution has proved that Kameshwar was posted as Chowkidar at the Padama Tower, Rajendra Place at the relevant time and he was on duty. The presence of Kameshwar has been proved by the prosecutrix and he being the guard would certainly be in a position to give access to the Appellants.

10. The main plank of argument of learned counsel for the Appellants is that admittedly as per the prosecutrix she did not force against the Appellants and thus she was a consenting party. The prosecutrix in her testimony has stated that there was nobody in and around and even if she had shouted there was no help. The prosecutrix has further stated that she objected to the Appellants committing rape on her, however appellant Prem slapped her and forced her to obey their commands. The appellants also extended threats and stated that she could raise as much alarm in whatever volume she wanted, however there was nobody to hear her cries. The mobile phone of the prosecutrix was also snatched and the call details were deleted. Even her

request for taking her money was declined by them. The prosecutrix even tried to go downstairs but she was not permitted. Further resistance by the prosecutrix is also apparent from nail marks on the bodies of some of the Appellants. The protest of the prosecutrix is also evident from her statement that when Kameshwar tried to commit rape upon her she rebuked him and he did not do anything and left her. It is thus apparent that the prosecutrix was rendered helpless and forcible rape was committed by the 6 Appellants one after the other. Merely because the prosecutrix stated that she did not use any force against any of the accused persons at the time of committing rape upon her would not lead to the inference that she was a consenting party when she had protested in all available manner.

11. The version of the prosecutrix is also corroborated from the fact that at the place of occurrence, liquor bottles, empty glasses and snacks were recovered. Merely because the MLC does not note the presence of liquor in the prosecutrix though she has stated that she was administered the same would not belie her version. Further the reliance of the learned counsels for the appellants on the medical certificate produced by the father of the prosecutrix to state that she has alcohol dependence is also misconceived. When the prosecutrix was summoned as a witness her father appeared informing that she was suffering from acute psychosis (Manic type)? Schizoaffective with h/o alcohol and other intoxicants. On verification it was found that she was suffering from acute psychosis and her treatment was likely to take some time. Thus, all the accused were granted bail by the learned ASJ vide order dated 27th May, 2005. Subsequently, on 3rd August 2005 the prosecutrix appeared before the Court and deposed as noted above.

Even if subsequent history showed her suffering from acute psychosis and alcohol dependence that does not discredit the version of the prosecutrix. She could have suffered the ailment in view of the traumatic incident she underwent.

12. Learned counsels for the Appellants have also tried to assail the prosecution case on the ground that neither the friend of the prosecutrix where she lived earlier nor the landlord of the premises where she was living presently have been examined. These two witnesses were not relevant witnesses for the prosecution case, hence their non-examination does not affect the prosecution case.

13. It is contended that no witnesses have been associated with the arrest and there are discrepancies with regard to the arrest of the Appellants. In his statement under Section 313 Cr.P.C. Appellant Surinder Singh has taken the plea that he was picked up from his house, however he has led no evidence in this regard. Though no public witness has been associated during the arrest, however the same does not belie the testimony of either the prosecutrix or Police officers who arrested the Appellants. In the present case the prosecutrix after the incident went directly to the Police Station where after she was examined and FIR was lodged. The Police acted with due dispatch and on the same night itself the Appellant Surinder @ Raja was arrested. Even the other accused were arrested on the next day.

14. Though during arguments it was urged that the incident was consensual, however no such plea has been taken by the appellants in their statements recorded under Section 313 Cr.P.C. Learned counsel for the Appellants have assailed the impugned judgment on the ground that the

learned Trial Court based its findings on the assumption that a lady cannot consent to having sexual intercourse with 6 men at one point of time. The same cannot be said to be a mere assumption; no women would consent to having sexual intercourse with number of people at such a secluded place in an odd position like this during menstruation. The recovery of unused condoms, sanitary pad from the spot and used condoms at the instance of the four appellants further corroborate the version of the prosecutrix.

15. In view of the aforesaid discussion I find no infirmity in the impugned judgment convicting the Appellants for the offence under Section 376(g) IPC.

16. Learned counsel for the Appellants in the alternative have also prayed that they have been awarded a sentence of rigorous imprisonment for a period of 8 years and a fine of Rs. 3000/- each and the sentence be reduced to the minimum period of 7 years. The minimum sentence prescribed for offence punishable under Section 376(g) IPC is rigorous imprisonment for a period of 10 years and it is only if there are special circumstances warranted that the Court may grant a lesser sentence. In the present case considering the young age of the Appellants, the Trial Court has already taken a lenient view and awarded sentence of rigorous imprisonment for a period of 8 years. I find no reason to reduce the sentence any further. Thus the order on sentence dated 30th January, 2010 is also upheld.

17. Appeals and applications are accordingly dismissed.

(MUKTA GUPTA)
JUDGE

JULY 08, 2014/‘ga’