

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
R-218 & 218A

+ **CRL.A. 1124 of 2010**

AJAY KUMAR & ANR. Appellants

Through: Mr. Rakesh Dudeja and Mr. Raj
Kumar Tomar, Advocates for A-1

Mr. Mohammad Faraz, Amicus Curiae
for A-2

versus

STATE (NCT OF DELHI) Respondent

Through: Mr. Rajat Katyal, APP

WITH

CRL.A. 71 of 2012

STATE (GOVT OF NCT DELHI) Appellant

Through: Mr. Rajat Katyal, APP

versus

BANTI & ANR. Respondents

Through: Mr. Mohammad Faraz, Amicus Curiae
for R-1.

Mr. Rakesh Dudeja and Mr. Raj Kumar
Tomar, Advocates for R-2

CORAM: JUSTICE S. MURALIDHAR

ORDER

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23.12.2014

1. Criminal Appeal (Crl. A.) No. 1124 of 2010 is by Ajay Kumar

(Appellant No.1) (Accused No.2) and Banti (Appellant No.2) (Accused No.1) against the judgment dated 28th July 2010 passed by the learned Additional Sessions Judge in SC No.139 of 2007 convicting both the Appellants for the offences under Sections 323/341 and 363/34 of the Indian Penal Code ('IPC') and the order on sentence dated 4th August 2010 sentencing them to undergo five years rigorous imprisonment ('RI') and to pay a fine of Rs.3,000/- each and in default to undergo three months further RI for the offence under Section 363/34 IPC; to undergo RI for nine months' for the offence under Section 323/34 IPC and to undergo one month's RI for the offence under Section 341/34 IPC. All the sentences were directed to run concurrently.

2. The State has filed Crl. A. No.71 of 2012 against the same judgment of the trial Court in so far as the two accused have been acquitted of the offences under Sections 366/328/368 IPC.

3. The genesis of the case is Daily Diary ('DD') entry No. 30A (mark X) recorded at the Police Station ('PS') Shahdara at the behest of Babita, the sister of the prosecutrix L (PW-2) on 21st October 2005 to

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the effect that PW-2 had gone missing since 10th October 2005 from her house at Naveen Shahdara, Delhi. The said DD was marked to Sub-Inspector ('SI') Dinesh Kumar for investigation. It appears that no FIR was immediately registered. Subsequently, on 29th October 2005, Kaluat Ram (PW-3) the father of PW-2 got a complaint registered and on that basis FIR No. 524 of 2005 was registered. According to Ramesh Kumar (PW-11) on 11th November 2005 he received a telephonic message from PW-2 from Agra stating that she was present there in a critical stage. According to PW-11 he proceeded to Agra in a private vehicle with 8-10 persons of the locality. They searched for PW-2 in Agra throughout the day. PW-11 claimed that PW-2 was found behind Taj Mahal surrounded by 8-10 boys, who on noticing PW-11 and the others, ran away leaving PW-2 behind. They brought back PW-2 to Delhi and took her straightway to PS Shahdara.

4. PW-1, the IO, stated that Babita, the sister of PW-2, and her husband (PW-11) came to the PS along with PW-2. According to PW-1, PW-2 had informed her parents that she had been kidnapped by Banti (A-1), Alia, Ajay (A-2), Umar Daraj, Reshma, Salma and

Kayyum. In her statement to the police under Section 161 of the Code of Criminal Procedure ('Cr PC') recorded on 11th November 2005, PW-2 stated that on 7th October 2005 while she was returning home after buying vegetables, she was intercepted by five boys viz., Banti (A-1), Vikas, Ajay (A-2), Umar Daraj and Alia who took her to a godown. They had her confined there. According to PW-2, the godown keeper called the police but no one came for help. Meanwhile, A-1 took her forcibly from there and others also caught hold of her. She was forced to inhale something intoxicating after which she fell unconscious. When she became conscious, PW-2 found herself in Firozabad. She noticed that A-1, A-2 and Vikas had left. Only Umar Daraj and Alia remained there. She alleged that Umar Daraj and Alia subjected to rape her continuously thereafter for several days. On one occasion she was able to call her family and tell them that she was in Agra in dire states. PW-2 was then rescued by them and brought back to Delhi.

5. PW-2 was medically examined in Guru Teg Bahadur (GTB) Hospital. Her Medico Legal Certificate ('MLC') shows that she was brought there at around 3.35 pm on 12th November 2005. The history

of the case was recorded therein as: “being kidnapped by 5 people on 7th October 2005 at 4.30 pm, from Shahadra near Raju Cinema. H/O rape by 2 people (Ali and Vardraj) daily since then”. Her age has been shown as 15 years in the MLC. The MLC was prepared by Dr. Rajni Gill (PW-9). PW-9 confirmed that the hymen was found ruptured and the pregnancy test was found negative. No external marks of injury were found on PW-2. Ultra sound, HIV and VDRL were advised. It appears that the bone test of PW-2 was also got conducted by Dr. A. Tandon who issued a report dated 16th November 2005 stating “bone age is above 20 years” as on that date.

6. On 21st November 2005 an application was filed before the learned Metropolitan Magistrate (‘MM’) for recording of the statement of PW-2 under Section 164 Cr PC. Her statement (Ex.PW7/A) was recorded by the learned MM on 22nd November 2005. In the said statement she more or less stuck to the version given by her to the police on 11th November 2005, stating that five boys had forcibly abducted her and taken her to a godown. Even while the godown keeper dialled the police and their arrival was awaited, A-1 Banti forcibly took PW-2 away from there and took her to a place where the

other four boys were present. They all started misbehaving with her. Her face was covered with the cloth with something intoxicating and she became unconscious. PW-2 stated that when she regained consciousness she found that A-1, A-2 and Vikas had already left that place and only 'Varadaraj' and Alia remained. PW-2 reiterated that Alia and Varadaraj then repeatedly subjected to rape her for several days thereafter till she was rescued by her family.

7. According to PW-1, A-1 was arrested on 15th December 2005 at the instance of PW-2 and A-2 on 21st March 2006. Learned APP informs that non-bailable warrants were issued in respect of both the said accused. However, it is not in dispute that both A-1 and A-2 lived in the same area as PW-2. A-2 obtained anticipatory bail and surrendered to the police. A-1 was arrested at his residence.

8. As regards the remaining persons who were named by PW-2, the police was unable to trace them and they were declared proclaimed offenders ('PO'). Only A-1 and A-2 were sent up for trial. By order dated 21st August 2007 charges were framed against both the accused under Sections 363/366/34 IPC, 323/341/34 IPC and 328/368/34 IPC.

9. The prosecution examined eleven witnesses. Both the accused denied the evidence in their statements under Section 313 Cr PC and claimed to have been falsely implicated.

10. The prosecution case hinges on the evidence of PW-2. She was examined in-chief on 12th March 2010. She stuck to her version under Sections 161 and 164 Cr PC as far as the present Appellants i.e. A-1 and A-2 were concerned. In other words, she stated that A-1 and A-2 were involved upto the stage of abduction and taking her to Firozabad and when she regained consciousness A-1 and A-2 and Vikas had fled the spot. However, she stated that A-1 and A-2 did not commit rape upon her but had sold her to Vardraj and Alia who repeatedly subjected her to rape.

11. The cross-examination of PW-2 did not take place on the same day i.e. 12th March 2010. The record of the proceedings of that day shows that PW-2 was then discharged. The examination-in-chief of her father Kaluat Ram was deferred at the request of learned APP since his statement to the police under Section 161 Cr PC could not be traced. The next date for his examination-in-chief was fixed for 27th April 2010. However, on the next date it appears that Kaluat Ram was

not present. For the next few dates the other prosecution witnesses were examined. On 17th May 2010 an application was filed by counsel for the accused under Section 311 Cr PC for recalling both PWs 1 and 2 and the said application was allowed. Their cross-examination was slated for 21st May 2010.

12. In her cross-examination on 21st May 2010 PW-2 stated that she left studies about 15 years ago. “My marriage took place about 4/5 years ago. I am having two children”. She recollected that when she regained consciousness in Firozabad, Uttar Pradesh she found two ladies and four male persons inside the room. She could not name any of them. She stated that she remained confined in the room for 10-12 days. She was then taken to Agra. Her *jija* (brother-in-law), uncle and aunt then took her back from Agra. She then stated “Accused persons today present in Court had not committed any rape upon me. Accused persons today present in court are not involved in my kidnapping. It is correct that the real culprits are not arrested by the police”.

13. In view of the above statement, learned APP requested that he may be permitted to cross-examine PW-2. With the permission of the Court he proceeded to cross-examine her. She now stated that she had

named the two Appellants in her examination-in-chief recorded on 12th March 2010 “on the asking of police as they terrorized me that if I will not make such statement I will be put behind bars”. She was unable to name the police official who terrorized her because he was not wearing any police uniform. She also claimed to having made the statement before the learned MM at the time of recording her statement under Section 164 Cr PC at the behest of the police. She denied telling the MM that she was making the statement without any fear and pressure and on her own free will. She maintained “It is wrong to suggest that accused persons Ajay and Banti today present in court are involved in the incident of kidnapping”.

14. Although Kaluat Ram (PW-3) the father of PW-2 was examined briefly on 12th March 2010, he was unable to be brought before the Court for his further examination-in-chief or cross-examination.

15. The godown keeper Sandeep Khurana (PW-6) also turned hostile. He stated in his examination-in-chief on 12th May 2010 that he noticed 3-4 boys and one girl concealing themselves behind the door of the godown. PW-6 further stated that after the boys ran away and the girl remained there he asked her why she had come here and she informed

PW-6 that those boys were teasing her. After saying that she was residing in the same locality she also left the godown. He resiled from his previous statement to the police.

16. PW-11, the uncle of PW-2 stated that after rescuing PW-2 from Agra they took her to PS Shahdara. Thereafter he along with PW-2 and his maternal aunt and some police officials of PS Shahdara went to Firozabad in a private vehicle. The police raided the premises of the boys involved in the incident but they ran away from the house. He claimed that the mother and sister of one of the boys met them and they took the police party to Sabzi Mandi. The brother-in-law of one of the boys was apprehended there who then took the police team to a hotel. Thereafter one boy Taj was apprehended from Firozabad and brought to Agra.

17. PW-11 claimed that the police officials went to an STD shop from where PW-2 had made a call to PW-11. Though the police stated to have recorded the statement of the shop owner, incidentally there is no record of movement of police with PW-11 from Firozabad to Agra to apprehend the accused. The statement of the owner of the STD shop from where PW-2 made the call is not on record. Though the police

was stated to have recorded the statement of an employee of the hotel where PW-2 was purportedly raped, that statement is also not on record. According to PW-11, Taj was released by the police at Agra itself. The mother and sister of one of the boys stated to be taken into custody in Firozabad were also released by the police. He stated that the accused present in Court i.e. A-1 and A-2 were not the boys that were apprehended by the police.

18. Although PW-2 did not support the prosecution in her cross-examination the trial Court proceeded to convict the Appellants for the offence under Sections 323/34, 341/34 and 363/34 IPC. The trial Court in its impugned order referred to the decision of the Supreme Court in *Khujji @ Surendra Tiwari v. State of M.P., AIR 1991 SC 1853* to hold that since PW-2 has turned hostile after a gap of more than two months after her examination-in-chief, her version in the examination-in-chief could be relied upon to convict the Appellants. It was apparent that PW-2 had been won over by the accused persons whereas her version before the police under Section 161 and before the learned MM under Section 164 Cr PC was consistent. The trial Court also referred to her statement under Section 164 Cr PC to

conclude that she was in fact 15 years of age on the date of incident. When she gave her statement in Court on 12th March 2010, she stated that she was 20 years old, therefore, she was 15 years at the time of the incident. However, the trial Court found that the prosecution had not proved that PW-2 had been made to inhale any intoxicating substance and therefore the offence under Sections 366/328/368/34 IPC was not attracted. The trial Court sentenced the Appellants in the manner indicated hereinabove.

19. This Court has heard the submissions of Mr. Mohammad Faraz and Mr. Rakesh Dudeja, learned counsel for the Appellants and Mr. Rajat Katyal, learned APP for the State.

20. The evidence of PW-2 is relied upon heavily by the prosecution to prove the guilt of the two Appellants before the Court. Her statements before the police and the learned MM have been examined carefully by the Court with the help of learned counsel for the parties. The fact that she turned hostile in her cross-examination makes it all the more necessary for her evidence to be scrutinized carefully to ascertain as to whether she was a truthful and reliable witness.

21. As regards the date of the incident there itself appears to be inconsistency. In her statements to the police under Section 161 Cr PC and before the learned MM under Section 164 Cr PC, PW-2 stated that she had been abducted on 7th October 2005 while she was returning home after buying vegetables. However, the first DD entry recorded by the police at the instance of PW-2's sister Babita was that she went missing on 10th October 2005 at around 4 pm. There is indeed no explanation as to why no case was registered on the said report and in fact no member of the family of PW-2 followed up the matter till 21st October 2005. Even thereafter no steps were taken for eight more days. Kaluat Ram the father of PW-2 again made a complaint on 29th October 2005. The FIR registered on the basis of the said complaint again. It gives the date of the abduction as 10th October 2005. This anomaly has not been explained by the prosecution.

22. On the aspect of her age the evidence on record does not conclusively prove that PW-2 was 15 years of age at the time of her abduction. In her evidence recorded in the Court and her examination-in-chief on 12th March 2010 she stated that at the time of the incident that occurred five years earlier she was 15 years old. On 21st May

2010 she stated that she had left studies about 15 years ago and her marriage took place about 4-5 years ago and that she had two children. As already noticed, the bone test of PW-2 conducted by doctor A. Tandon (who incidentally was not examined) placed her age as on 16th November 2005 to be 20 years.

23. All the above factors show that there is a considerable doubt whether PW-2 was in fact 15 years on the date of the incident. In order to prove the municipal records Rakesh Saxena (PW-10) record clerk from the office of Sub-Registrar (Birth and Death), MCD was examined. He, however, brought the wrong record relating to birth of a male child. Consequently, the prosecution was unable to conclusively prove that PW-2 was minor on the date of the incident. Nonetheless, the trial Court appears to have gone by the deposition of PW-2 herself in this regard overlooking the bone test conducted by doctor A. Tandon and the other inconsistencies in her own statements which put serious question marks as to whether she was minor on the date of the incident.

24. This Court is also therefore not satisfied that the essential ingredients of Section 363 IPC has been proved. That the prosecutrix

was minor on the date of the incident has not been conclusively proved by the prosecution and therefore the guilt of the Appellants for the offence under Section 363 IPC cannot be held to have been proved beyond reasonable doubt.

25. One more factor which raises doubts about the veracity of the evidence of PW-2 is the application made to the learned MM by the IO for recording the statement of PW-2 under Section 164 Cr PC. It is a one-page hand written application which states that in her statement to the police PW-2 had stated that she had been taken away by one Varadaraj and repeatedly raped by him at several places in Delhi and thereafter at Firozabad. There is no mention in this application of PW-2 having been abducted by five boys. If PW-2 had disclosed the name of all the boys, why this was not mentioned is not clear. In fact the MLC notes that PW-2 named the two boys who raped her. Yet this application only mentions one of those boys, Varadaraj. It may also be observed that the name of Varadaraj itself figured for the first time in the statement of PW-2 under Section 164 Cr PC whereas in her statement to the police under Section 161 Cr PC she gives the names of other accused Umar Daraj. Be that as it may, as far as the

Appellants are concerned, the role attributed to them by PW-2 in her statements under Sections 161 and 164 is that they along with Vikas and the other two accused had abducted her while was returning home after buying vegetables on 7th October 2005. In her cross-examination, as already noticed, she completely resiled from the above position and repeatedly stated that the two Appellants had not been involved in her abduction. The prosecution has not been able to explain why efforts were not made to trace the two Appellants immediately after the above disclosure of PW-2, particularly, since both the Appellants are residing in the same area as PW-2. If indeed NBWs were issued it is very unlikely that both the Appellants would be arrested more than one month and four months later respectively from the same area where PW-2 lives.

26. The evidence of PW-11 also creates serious doubt on the veracity of the statement of PW-2. He states that they found her with 8-10 boys behind Taj Mahal in Agra and they rescued her and brought her back to Delhi. When they went back again with the police to Firozabad and Agra the police is stated to have recorded the statement of the owner of the shop where the STD facility was available and from where PW-

2 was supposed to have made a call. The said statement is not on record. The statement of the employee of the hotel where PW-2 was made to stay in Agra purportedly recorded by the police is not also produced. All this should have happened at the instance of PW-2 itself, yet it is not clear that these statements do not form part of the record and the persons have not been examined as witnesses.

27. There are many elements in the prosecution case that remained unproved. This coupled with the fact that in her cross-examination PW-2 states that she was forced to sign on blank papers and was threatened by the police makes her evidence even more unreliable. It is not surprising that the trial Court itself found the investigation in the case to be unsatisfactory. Towards the end of the impugned judgment, the trial Court directed the DCP to look into the matter and regulate the investigation process to prevent such lapses. Action was also initiated against PW-10 for bringing an irrelevant record to the Court.

28. The Court finds that in the above background it would be unsafe to place reliance only on the testimony of PW-2 to return a finding of guilt against the two Appellants. A more than reasonable doubt has been created regarding the truthfulness of her versions and there is no

independent corroboration of her evidence by the other witnesses. Consequently, this Court is persuaded to grant both the Appellants benefit of doubt and acquit them of the offences under Sections 363/323/341/34 IPC. CrI. A. No. 1124 of 2010 is allowed. The bail bond and the surety bond of the two Appellants shall remain in force for a period of six months in terms of Section 437A Cr PC.

29. The Court finds no merits in the appeal of the State (CrI.A.71 of 2012) and dismisses the said appeal.

30. The fees of the *amicus curiae* be paid to him forthwith as per the schedule of the Delhi High Court Legal Services Committee.

31. The trial Court record along with a certified copy of this order be sent to the trial Court forthwith.

S. MURALIDHAR, J.

DECEMBER 23, 2014

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