

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

% Reserved on: 18th January, 2017
Decided on: 19th May, 2017

+ CRL.A. 73/2016

SHARWAN

..... Appellant

Represented by: Mr. Yogendra Verma, Adv.

Versus

STATE

..... Respondent

Represented by: Mr. Hirein Sharma, APP with
SI Santosh PS Tilak Nagar.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. Sharwan challenges the impugned judgment dated 21st December, 2015 convicting him for offences punishable under Section 363/366/376 IPC and the order on sentence dated 22nd December, 2015 directing him to undergo rigorous imprisonment for a period of three years and to pay a fine of ₹1,000/- for offence punishable under Section 363 IPC, rigorous imprisonment for a period of three years and to pay a fine of ₹2,000/- for offence punishable under Section 366 IPC and rigorous imprisonment for a period of seven years and to pay a fine of ₹5,000/- for the offence punishable under Section 376 IPC.

2. Assailing the conviction, learned counsel for the appellant submits that initially the complaint was of molestation only, however, later on, allegations of rape were leveled which are clearly afterthought. He further added that the prosecutrix had herself stated in her deposition in Court that

she resided in a thickly populated area and if anyone raises alarm, it can be easily heard. Thus, it is highly improbable that despite her shouting to save nobody came to her rescue. Further, despite identifying the car and its driver, she stated that she cannot give the number of the car as she was illiterate. During her cross-examination, she could not state whether Sharwan or someone else was driving the car. As per the MLC of the prosecutrix, her version of forcefully taking her and committing rape upon her is not fortified as there was no external injury. Lastly, it is contended that the appellant has been falsely implicated in the present case due to dispute over the jhuggi. Placing reliance on the decision reported as (2012) 7 SCC 171 Narender Kumar v. State (NCT of Delhi), it is submitted that it is not the duty of the defence to explain how and why the accused has been falsely implicated, rather the prosecution case has to stand on its own legs and cannot take support from the weakness of the defence. Statement of the prosecutrix has to be read with the other evidence in totality and when the story projected by the prosecutrix is highly improbable, it should not be believed. Referring to the decision reported as (2010) 4 SCC 115 Jai Krishna Mandal V. State of Jharkhand wherein the appellant was falsely implicated due to deep enmity between the family of the prosecutrix and appellants and there was ample opportunity for the prosecutrix to raise hue and cry but she did not attempt to do so and there was no injury on the prosecutrix, learned counsel contends that the appellant be acquitted.

3. Learned APP for the State on the other hand submits that as per the testimony of PW-6 Devender Kaur, the car was used by Sharwan which was further fortified by the fact that the keys of the car were given by PW-5 Munni Devi, mother of Sharwan. Age of the prosecutrix has been proved by

the testimony of Dr. Akansha who opined the same to be between 15 to 17 years. Version of the prosecutrix is corroborated by the testimony of Dr. Komila, who found that the hymen of the prosecutrix was freshly torn. Lastly, with respect to the dispute over the jhuggis, no question was put to the prosecutrix in her cross examination.

4. Process of law was set into motion on 30th July, 2011 around 12:56 A.M. on receipt of a PCR call stating that "*Indira Colony, Tilak Nagar ek ladke ladki ke saath cherkhani ki hai*" which was recorded vide DD No. 6A and assigned to PW- 11 HC Vijender Singh who along with Constable Sunil went to the spot and met PW-1 the prosecutrix and her aunt PW-4 who informed that Sharwan had raped the prosecutrix in Indica car. The case was handed over to PW-20 W/SI Rishali Yadav for investigation. W/SI Rishali Yadav recorded the statement of the prosecutrix wherein she stated that she lived with her parents at WZ- 143/12 Indira Colony, Tilak Nagar, New Delhi. Her parents were in Aligarh, Uttar Pradesh for the past four months. On 29th July, 2011, around 9:00 P.M., when she was going to the shop to buy to some article, Sharwan, who stayed in the neighbourhood and whom she knew well, came in Indica car bearing number DL-3CAF-9038 and forcibly pushed her into the car. He took her towards Chowkhandi and forcibly did '*galat kaam*' with her in the car against her will by making physical relations with her. Thereafter, he left her near the drain. After reaching home, she narrated the entire incident to her aunt. She stated that they did not call at 100 number for some time due to their honour. However, after some time they called up at 100 number around 1:00 A.M. Sharwan's car, in which he raped her, was parked outside his jhuggi.

5. On the aforesaid statement of the prosecutrix Ex. PW-1/A, FIR No.

245/2011 was registered at PS Tilak Nagar under Section 376 IPC. The prosecutrix was taken to DDU Hospital for her medical examination. Thereafter, W/SI Rishali Yadav along with the prosecutrix and her aunt went to the spot and found the Indica car parked outside the jhuggi of Sharwan and on pointing out by the prosecutrix, it was seized vide seizure memo Ex. PW-1/B. She also prepared the site plan Ex. PW-20/C at the instance of the prosecutrix. The prosecutrix was produced before the learned Metropolitan Magistrate for recording of her statement under Section 164 Cr.P.C. On 31st July, 2011, Sharwan was arrested from Subhash Nagar Metro Station vide arrest memo Ex. PW-1/D. He was also taken to DDU Hospital for his medical examination. On 6th August, 2011, Smt. Munni Devi, mother of Sharwan, produced the keys of the Indica car which were seized vide memo Ex. PW-5/A. Car was inspected, photographs were taken and chance finger prints were lifted. After filing of the charge sheet, charge for offences punishable under Sections 363/366/376 IPC was framed against Sharwan vide order dated 2nd February, 2012.

6. Prosecutrix deposed before the Court in sync with her statement made to the police. She further added that her parents had gone to Aligarh 4-5 days prior to the incident. She shouted in loud voice to save herself when Sharwan had pushed her inside the car, however, nobody listened to her voice as the glasses of the doors of car were closed at that time. During her cross examination, she could not tell the number of the car in which she was raped. She was confronted with her statement Ex.PW-1/A wherein it was not so recorded that she was living in the house with her two brothers and sister at the time of incident. She was also confronted with her statement Ex.PW-1/A wherein it was not so recorded that her three aunts (mausis) were also

living in the same house on the day of incident. She was further confronted with her statement Ex.PW-1/A wherein it was not so recorded that a long shining car passed through her and Sharwan was sitting on the back seat of the car. She was confronted with her statement PW-1/A wherein it was not so recorded that she shouted in loud voice to save herself but nobody listened to her. She admitted that her residence was situated in a thickly populated area and that if somebody raises his or her voice then it would be heard by the persons in the neighbouring jhuggis. She added that she cannot say whether Sharwan was driving the vehicle or not. Someone was driving the vehicle and she cannot identify him. She admitted that she was not aware of the contents of her statement recorded by the police officials as she is illiterate and the same was also not read over to her.

7. PW-4, aunt of the prosecutrix, deposed that on 29th July, 2011 around 9:00 P.M., the prosecutrix went out of the house for recharging her mobile phone and returned back at about 12:30 A.M. When the prosecutrix came back, she stated that she was taken by Sharwan in the car and raped. The clothes of prosecutrix were stained with blood. During her cross examination, she denied the suggestion that she made a call at 100 number by saying that one girl has been molested by one boy. She had stated to police at 100 number that the prosecutrix had been lifted and raped. She denied the suggestion that there was a dispute between family members of prosecutrix and Sharwan for the jhuggi. She denied the suggestion that she was intending to grab the jhuggi of Sharwan and for that reason, she had falsely implicated him in connivance with the prosecutrix.

8. Smt Munni Devi, mother of Sharwan, stated that she had handed over the keys of the car to the police, The car and the keys had been left at the

jhuggi by Sharwan. During her cross examination, she stated that aunt of prosecutrix wanted to grab her jhuggi and had falsely implicated Sharwan in the present case in order to grab her jhuggi.

9. PW-6 Devender Kaur stated that she owned vehicle no. DL-3C-AF-9038 Indica car. On 27th July, 2011, Sharwan, who is the friend of her son Deepak, had taken the car. Sharwan did not turn up to return the car. When she made enquiry from his house, she came to know that Sharwan had been arrested in a rape case and the incident took place in the aforesaid car.

10. PW-10 Dr. Kumar Narender Mohan, Medical Officer, DDU Hospital, deposed that on 30th July, 2011, the prosecutrix was examined by Dr. Deep Shikha under his supervision. Dr. Deep Shikha was on maternity leave and he had seen her signing and writing during the ordinary course of her duties. As per the MLC Ex.PW10/A, on local examination of the prosecutrix, mild swelling with mild tenderness was found over right knee. Sharwan was examined by Dr. Alok who had left the services of the hospital. As per the MLC of Sharwan Ex. PW-10/B, there was no visible fresh external injury and on local examination, smegma was found absent and there was nothing to suggest that Sharwan could not perform sexual act.

11. PW-8 Dr. Komila stated that on 30th July, 2011, she was posted as Senior Resident Gynae in DDU Hospital and had examined prosecutrix who was referred by Casualty Medical Officer Dr. Deep Shikha. Her salwar and undergarments were soiled with blood and were handed to police. On local examination, fresh hymen tear was present but no active bleeding was noted at that time nor any external injury marks were seen. On per vaginal examination, one finger was easily admitted. Vaginal smear and high vaginal swab were taken, the cervix was forwards and uterus was

retroverted, size not made out as the prosecutrix was keeping very tight, bilateral fornices were free and non tender. She exhibited the MLC prepared by her as Ex. PW-8/A. During her cross examination, she stated that fresh hymen tear was possible by way of any injury and added that one of the major causes of hymen tear was sexual act.

12. PW-12 Dr. Akansha, SR, DDU Hospital, stated that on 9th August, 2011, prosecutrix was brought to the hospital for her assessment of age. She had examined her X-ray plates and found as per X-ray plates that she was of age between 15 to 17 years. She exhibited the report as Ex. PW-12/A. Final opinion as to the age of the prosecutrix was given by Dr. Sunil Kakkar, Chairman of the Board, who vide report Ex. PW-12/B opined that prosecutrix was above 15 years and below 17 years.

13. DW-1 Amit stated that on 29th July, 2011, around 5:00 P.M., Sharwan had gone along with him to his house for attending 'Kheer Puri Ceremony at Kanwar' and Sharwan remained with him till 4:00 A.M. and thereafter he returned. Though DW-1 has set up a plea of alibi of Sharwan stating that he was with him at the relevant time, no such plea was taken in the statement under Section 313 Cr.P.C. nor was the same put to the witnesses. Not being put to the prosecution witnesses, the plea of alibi is thus clearly an afterthought.

14. Sharwan in his statement under Section 313 Cr.P.C. stated that he had been falsely implicated in the present case by the prosecutrix as there was a dispute regarding his jhuggi where the prosecutrix was residing with her mother as a tenant. They were not paying rent for the jhuggi and when the mother of Sharwan demanded the arrears of rent, the prosecutrix and her mother threatened to falsely implicate him. Prosecutrix along with her

parents was still residing in his jhuggi and not paying any rent.

15. As noted above, Devender Kaur stated that the car was with Sharwan. In his statement under Section 313 Cr.P.C. Sharwan admitted that he was working as a driver on the car of Devender Kaur, thus, fortifying the version of the prosecution that car was in possession of Sharwan at the relevant time further corroborated by the fact that the mother of Sharwan handed over the keys of car to the investigating officer. From the evidence of Devender Kaur and the fact that the keys of the car were handed over later to the police officer by the mother of Sharwan, the non-availability of chance print/finger print of Sharwan on the vehicle do not absolve him of the offence.

16. Though the plea of the appellant is of false implication as family of the prosecutrix intended to grab the jhuggi. This suggestion was given to PW-4 aunt of the prosecutrix who denied the same. The appellant led no evidence to show that his mother was the owner of the jhuggi in which the prosecutrix and her aunt were residing. Thus, Sharwan has not even probabalized his case of false implication, Mother of Sharwan appeared in the witness box as PW-5 in respect of handing over the keys of the car to the police which was seized vide seizure memo Ex.PW-5/A. Even this witness in her examination-in-chief did not state that the family of the prosecutrix wanted to grab the jhuggi which was sought to be elicited by learned counsel for the appellant in the cross-examination.

17. Learned counsel for the appellant has strenuously argued that despite the fact that the prosecutrix had occasion to shout which would have been heard by the neighbouring people as it was a thickly populated area. This contention is negated by the cross-examination of prosecutrix wherein she stated that though she shouted however in view of the glasses of the vehicle

rolled up nobody could hear her voice. The prosecutrix was a minor at the time of the commission of offence as proved by the deposition of Dr. Akansha and the opinion Ex.PW12/B. Her testimony is duly corroborated by her medical evidence which shows mild swelling with mild tenderness over right knee thereby showing that she was dragged, injury on the private part which is more likely by forceful sexual intercourse and the blood stained clothes of the prosecutrix recovered by the police officer which blood was of human origin as opined vide Ex.PW20/E.

18. Considering the evidence led by the prosecution, it can be safely held that the prosecution has proved beyond reason doubt commission of offences punishable under Sections 363/366/376 IPC against the appellant. The impugned judgment of conviction and order on sentence are upheld.

19. The appeal is dismissed.

20. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

21. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 19, 2017
‘v mittal’