

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A No.77/2015**

Date of Reserve: 01.12.2015

Date of Decision: 04.12.2015

SHAMSHAD

..... Appellant

Through: Mr.Harsh Prabhakar, Advocate
for DHCLSC alongwith
Mr.Anirudh & Mr.Dhruv
Chaudhary, Advocates.

versus

STATE

..... Respondent

Through: Ms. Rajni Gupta, APP.
SI Brij Mohan PS Welcome.

CORAM:
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

ASHUTOSH KUMAR, J.

1. Shamshad stands convicted under Sections 367/377/506 IPC and Section 27 of the Arms Act by judgment dated 15.10.2014 passed by the learned Additional Sessions Judge, North East, Karkardooma Courts in S.C No.38(1)/2012 arising out of FIR No.220/2012 (P.S.Welcome).

2. By order dated 16.10.2014, appellant Shamshad has been sentenced to undergo RI for three years, fine of Rs.5000/- and in default of payment, SI for two months for the offence under Section 367 IPC; RI for four years, fine of Rs.15,000/- and in the event of default of payment of fine SI for six months for the offence under Section 377 IPC; RI for two years, fine of Rs.5000/- and in default of

payment SI for two months for the offence under Section 506 IPC and RI for three years, fine of Rs.5000/- and in the event of default of payment of fine SI for two months for the offence under Section 27 of the Arms Act. The sentences have been ordered to run concurrently with the benefit of Section 428 of the Code of Criminal Procedure. The fine of Rs.25,000/-, on realisation from the appellant, has been directed to be paid to the complainant as compensation.

3. The appellant is said to have ravished Mohd.Zareef (PW-6). His statement (Ex.PW-6/A) discloses that on 13.07.2012 while he was returning to his house from Jheel Park, one person came on a motorcycle at about 7 p.m and asked him to accompany him. On such request, PW-6 sat on the motorcycle. The motorcyclist disclosed his name as Salim. When some of the boys who were walking in the Jheel park called him by the name Shamshad, Mohd.Zareef (PW-6) became suspicious and asked him to stop the motorcycle. Mohd.Zareef is then alleged to have been taken to a secluded place where, on point of knife, the appellant had carnal intercourse with him.

4. During trial though PW-6 has supported the prosecution version but has substantially improved upon his original version. He has testified before the Court that on the day of the occurrence i.e. 13.07.2012 he was going to offer prayers when the appellant offered him to come to the mosque on his motorcycle. PW-6 refused the offer initially, but on insistence, sat on the motorcycle of the appellant. For about 15 minutes, he rode along with the appellant but since he was getting late for his prayers, he wanted to get down from the motorcycle. At that point, it has been deposed by PW-6, that the

appellant threatened him and told him that there are many people who would kill him. PW-6 has further deposed that the appellant dragged him by holding his collar. An effort by PW-6 to free himself from the clutches of the appellant led to injuries on his legs. PW-6 was thereafter caught by the appellant and on point of knife, was ravished. The underwear of PW-6 became wet with semen. He was also threatened about his being subjected to the same act of sodomy by other friends of the appellant. He was divested of his money also. PW-6 was thereafter assaulted by means of fists and legs, whereafter the appellant fled away. PW-6 threw his underwear in the park as it had become wet and came to the factory which is located at H-490, Janta Colony, under the territorial jurisdiction of Welcome police station at around 8.30 p.m. He met the factory owner Pappu (PW-5) and apprised him of the incident. Thereafter he made a call at 100 number. It was on his call that the police came at the factory and recorded his statement (Ex.PW-6/A). PW-6 was thereafter taken to the police station from where to the GTB Hospital for medical examination. The MLC which was prepared (Ex.PW-3/B) bears his thumb impression. His medical card also was prepared (Ex.PW-3/A) which also bears his thumb impression. The site plan was prepared in the morning of the occurrence at his instance.

5. During cross examination, he has categorically stated that when the appellant stopped his motorcycle near the bushes, some public persons were roaming in the area but they were at some distance. He has also, in his cross examination, changed his version and has stated that his employer, Pappu (PW-5) had called the police. PW-6 has

denied the suggestion that no such incident had taken place and he had falsely implicated the appellant.

6. Thus from the deposition of PW-6, the victim, it would appear that he has made improvements in his version. In his first information report, he does not state the colour of the motorcycle which was being driven by the appellant. However, in his deposition before the Court he speaks about the motorcycle being of red colour. The story of PW-6 going to offer prayers in a mosque on the day of occurrence is also something new which was not there in the FIR. The version of PW-6 before the Court that he was threatened that other persons also would ravish him and that he tried to run away from the clutches of the appellant and injured his legs are also new facts which were introduced only at the trial.

7. It appears to be rather strange that PW-6 would accede to the request of an unknown person to accompany him on a motorcycle, more so when he was going to offer prayers in a mosque which is situated nearby. There is no statement of the informant/PW-6 which would suggest that the appellant also was going to the mosque to offer his prayers. Thus the story put forth by the prosecution does not appear to be trustworthy. Apart from this, there are certain material contradictions which go to the root of the matter.

8. The deposition of PW-6, in juxtaposition to the deposition of PW-5, his employer, appears to be full of inconsistencies and contradictions.

9. Pappu (PW-5) has stated that he runs a jeans factory at Seelampur, Delhi. The victim hailed from his home town. He has

further deposed that in the night of 13.07.2012, PW-6 came to him weeping. His clothes were torn and there was a scratch mark of knife on his neck. On his asking PW-6, he was informed that the appellant met him at Jheel Park and committed carnal intercourse with him. Thereafter he called the police. When the police arrived, statement of PW-6 was recorded. During cross examination, PW-5 has changed his version and has stated that PW-6 himself informed the police about the occurrence. He has further admitted that he did not tell the police that there was scratch mark of knife on the neck of Zareef (PW-6). The statement of PW-5 was not recorded by the police.

10. In this context, it would be relevant to refer to DD No.28A dated 13.07.2012 which was recorded at P.S.Welcome (Ex.PW-11/A). The DD entry clearly refers to a male caller informing that he was raped.

11. Dr.Jitender Meena (PW-2), Senior Resident, Department of Surgery, GTB Hospital, Delhi has deposed that on 14.07.2012 i.e a day after the incident, the victim was examined by him. The patient was brought by Constable Trilok Singh (PW-7) with the alleged history of sodomy. On local examination, small tear of 0.5 cm was found at Perianal region posteriorly (only). No other visible injury was found. As per rectal examination, good anal tone was found. There was no presence of blood. In his presence rectal swab, pubic hair, oral swab and undergarments were sent for forensic examination. However, he has clearly stated that no definite opinion of sodomy could be given before the FSL report was perused. The examination note of PW-2 is Ex.PW-2/A which has been proved by him.

12. Dr.O.P.Jaiswal (PW-3) who had worked at GTB Hospital as a Junior Resident from November, 2011 to August, 2012 has deposed that on 14.07.2012, PW-6 was brought to the casualty by Constable Trilok Singh (PW-7) for medical examination for sodomy. The patient was found to be conscious and oriented and his vitals were found to be normal. On local examination, no external injury was seen. PW-6 was referred to Surgery Department for expert opinion and advice (the emergency slip has been exhibited as Ex.PW-3/A). The MLC of PW-6 was also prepared by him (Ex.PW-3/B).

13. Dr.Mohd.Parwez (PW-4) who also worked as Junior Resident in GTB Hospital from December, 2011 to December, 2012 has testified before the Court that the appellant was found to be conscious and oriented and his vitals were found normal. On local examination secondary sexual characters were found to be well developed. After examining PW-6, PW-4 had given an opinion that there was nothing to suggest that the appellant was incapable of performing sexual intercourse. Semen sample could not be collected because of environmental condition. The MLC of the appellant (Ex.PW-4/B) was prepared by him.

14. The FSL report (Ex.PW-11/F) discloses that exhibit 1d2 (Rectal Examination Smear) and exhibit 1e1 (oral swab) were analysed. No semen could be detected on them. Human semen was only detected on exhibit 2, a dirty underwear.

15. Dr.Chandermohan Sharma (PW-12), Senior Resident, Surgery Department, GTB Hospital, Delhi has stated that he had examined the expert opinion (Ex.PW-2/A) and had also examined the FSL report

(Ex.PW-11/E and 11/F). He had the occasion to see the MLC of the victim Ex.PW-3/B. He has clearly stated that on the basis of medical report and FSL reports his opinion regarding the tear found at perianal region was that it could be due to an act of sodomy. On the examination of FSL report also PW-12 has opined that it could be a case of sodomy. Thus no definitive finding could be given by PW-12.

16. Thus from the deposition of PWs.2, 3, 4 & 12 as well as the exhibits (MLC of PW-6, FSL report and the opinion of PW-12) it is not certain whether the victim was sodomised. The medical opinion belies the statement of the victim as no substantial injury was found on his person and vitals.

17. In his 313 statement, the appellant has completely denied of having any acquaintance with PW-6. When he was confronted with the question that he was made accused in cases of similar nature in the past, he has categorically stated that those cases were false and he has been acquitted in those cases. He has also stated that his personal record was available with the police and he was falsely implicated in those cases without there being any material against him. On the day when he was arrested, the appellant has stated that there was a secret informer with the police who knew him. The appellant was going to a milk diary situated at a distance of 10 minutes from his house when he was picked up by the police and taken to the police station. He has completely resiled from his disclosure statement (Ex.PW-6/C). He has, while expressing his ignorance, stated that he is a married person having three children and he does not have any alternative sexual preference.

18. Thus taking into consideration the facts (i) that the deposition of PW-6 is full of material contradictions and inconsistencies and are substantially different from his first statement; (ii) no probable reason for the appellant to have accepted the offer of the appellant to pillion ride his motorcycle; (iii) presence of many persons in the jheel park when the occurrence is said to have taken place; (iv) non production/examination of the underwear of the victim which he has claimed to have thrown in the bushes and (v) inconclusive medical opinion regarding PW-6 having been sodomised, this Court is of the opinion that the prosecution has not been able to prove the case beyond the shadow of reasonable doubt.

19. With reference to the nominal roll, learned APP has submitted that the appellant has remained in jail for about three years and five months but his conduct in jail has been unsatisfactory. He was punished in the year 2014 for his involvement in a sexual activity with other inmates whereas on two other occasions he was punished for the recovery of prohibited articles from his possession. This conduct of the petitioner in jail would not improve the case of the prosecution which has to stand on its own legs.

20. Thus in the wake of such inconsistent statements of PW-6 and inconclusive opinion of the doctors regarding the act of sodomy, the major charges against the appellant have not been proved beyond all reasonable doubts.

21. The conviction of the appellant, therefore, cannot be sustained in the eyes of law.

22. For the reasons aforesaid, the judgment and order of conviction and sentence dated 15.10.2014 and 16.10.2014 respectively are set aside. The appellant is directed to be released from jail forthwith if not wanted in any other case.

23. Trial Court record be returned.

24. Two copies of the judgment be sent to the Superintendent of the concerned jail for information, compliance and record.

Crl. M.B. No.111/2015

1. In view of the appeal having been allowed, this application becomes infructuous.

2. This application is disposed of accordingly.

ASHUTOSH KUMAR, J

DECEMBER 04, 2015
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