

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

RESERVED ON : 18th MARCH, 2015

DECIDED ON : 27th MARCH, 2015

+ CRL.A. 185/2012
SACHIN Appellant
Through : Ms.Anu Narula, Advocate with
Mr.Kunal Aurora, Advocate.

versus

STATE (GOVT. OF NCT) OF DELHI Respondent
Through : Mr.Navin K.Jha, APP.

AND

+ CRL.A. 838/2010
KRISHAN KUMAR Appellant
Through : Ms.Anu Narula, Advocate with
Mr.Kunal Aurora, Advocate.

versus

STATE GOVT. OF NCT OF DELHI Respondent
Through : Mr.Navin K.Jha, APP.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellants – Sachin (A-1) and Krishan Kumar (A-2) impugn a judgment dated 05.10.2009 of learned Addl. Sessions Judge in Sessions Case No.65/08 emanating from FIR No.212/08 PS Kashmiri

Gate, by which they were held guilty for committing offences punishable under Sections 363/366A/34 IPC read with Section 376 (2)(g) IPC. By an order dated 07.10.2009, they were sentenced to undergo RI for three years with fine ₹ 100/- each under Sections 363/34 IPC; RI for five years with fine ₹ 500/- each under Sections 366A/34 IPC and RI for ten years with fine ₹ 500/- each under Section 376(2)(g) IPC. All the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 21.07.2008 at around 01.30 P.M. at jhuggi near 'Kura Ghar', opposite Madras Road, Jamuna Bazar, the appellants in furtherance of common intention kidnapped 'X' (assumed name) aged 12 / 13 years and sexually assaulted her. When one of the appellants was in the process of committing rape upon 'X', her brother Mohd.Irshad arrived at the spot and apprehended him (A-1) then and there. The other individual (A-2) succeeded to flee the spot. The occurrence was reported to the police promptly. The Investigating Officer, after recording victim's statement (Ex.PW-5/A), lodged First Information Report. 'X' was medically examined; she recorded her statement under Section 164 Cr.P.C. A-1 was also taken for medical examination. Subsequently, A-2 was arrested and application for conducting Test Identification Proceedings was moved but

he declined to participate. Statements of the witnesses conversant with facts were recorded and after completion of investigation, a charge-sheet was filed against both the appellants. The prosecution examined sixteen witnesses to substantiate its case. In 313 Cr.P.C. statements, the appellants denied their involvement in the crime and pleaded false implication due to a previous quarrel with X's relatives. They did not examine any defence witness. The trial resulted in their conviction as aforesaid. Feeling aggrieved and dissatisfied, they have preferred the instant appeals.

3. Appellants' counsel vehemently urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of interested witnesses without independent corroboration. The Trial Court overlooked glaring inconsistencies and contradictions in the testimonies of the prosecution witnesses. She pointed out that there was no indication of forcible rape upon the prosecutrix and no external injuries were found on her body. Prosecution witnesses have given divergent and conflicting versions as to when and where the occurrence took place. The prosecutrix has narrated different versions in her statements recorded under Section 161 Cr.P.C. before the police, 164 Cr.P.C. before the Metropolitan Magistrate and the one given before the Court. From the MLC, it can be inferred that the

hymen was ruptured but the rupture was 'old' indicating that 'X' was habituated to sexual intercourse. The prosecution was unable to furnish cogent document to ascertain if 'X' was below sixteen years of age. At the most, it can be taken as a case of 'sexual assault' and not 'rape'. Learned Addl. Public Prosecutor urged that there are no sound reasons to disbelieve the testimony of the minor prosecutrix. She has implicated the appellants with certainty.

4. Admitted position is that A-1 was arrested from the spot. His name finds mention in the victim's statement (Ex.PW-5/A) recorded soon after the incident. The occurrence took place at around 01.30 P.M. Daily Diary (DD) No.21-A (Ex.PW-14/A) was recorded at 13.57 hours at PS Kashmiri Gate on getting intimation of the incident of rape near 'Kura Ghar', Nigam Bodh Ghat. The investigation was assigned to SI Ram Singh who with Lady Const.Raj Rani rushed to the spot. 'X' was taken for medical examination at Aruna Asaf Ali Govt. Hospital at 03.45 P.M. In the alleged history recorded therein (Ex.PW-4/B), there is mention of commission of rape at about 02.00 P.M. behind Hanuman Mandir in Jamuna Bazar. Rukka was sent promptly at 04.45 P.M. In her statement (Ex.PW-5/A), the prosecutrix gave graphic detail of the incident and named two individuals including A-1 to have committed rape turn by turn

upon her. She also identified the other assailant known as 'Chavanni' who fled the spot. Since the FIR was lodged quickly without any delay, there was least possibility of the prosecutrix to fabricate a false story in such a short interval. In her 164 Cr.P.C. statement (Ex.PW-13/A) also, she attributed specific role to each of the appellants. She informed the learned Metropolitan Magistrate that she was raped by two 'unknown' boys when she was in a state of semi-sleep after taking lunch. Both of them took her to a jhuggi near 'Kura Ghar', Jamuna Bazar and took turns to rape her. Her brother Mohd. Irshad arrived at the spot per chance and caught hold of one of the rapists whose name was ascertained Sachin (A-1). Mohd.Irshad made a telephone call at 100. In her Court statement also she identified with certainty both the appellants to be the perpetrators of the crime. She deposed that when she was picking rags, near Hanuman Mandir at about 02.00 P.M., two boys met her when she was going to Hanuman Mandir to have food. The said two boys offered good food and she accompanied them. They took her towards 'Kura Ghar' where there was a temporary shanty. She was raped by an individual while the other stood outside to guard the spot. In the meantime, her brother Mohd.Irshad came for her search and at that time, A-1 was committing rape upon her.

In the cross-examination, she denied herself to be a tutored witness. She

revealed that she used to go to Hanuman Mandir for food many a times. The day of occurrence was Monday. She denied if there was enmity between her brother and A-2. Apparently, no material discrepancies or infirmities could be extracted in her cross-examination. Her version throughout is consistent. No ulterior motive was assigned to her to falsely implicated the appellants with whom she was not acquainted with before the incident and did not nurture any ill-will. The appellants had enticed a poor innocent girl aged about 12/ 13 years on the pretext to provide her good food. Thereafter, they established physical relations with her against her wishes. No sound reasons exist to suspect her testimony.

5. PW-7 (Mohd.Irshad) another crucial witness has corroborated the testimony of the prosecutrix on all material and relevant circumstances. The factum of his arrival at the spot is recorded in the statement (Ex.PW-5/A) given to the police at the first instance. He also deposed that when he arrived in Jamuna Bazar at Hanuman Mandir at about 01.00 P.M. in search of her cousin 'X' and enquired from two or three persons about her, he was informed that a girl had gone with two boys towards 'Kura Ghar'. When he reached there, he saw a boy having sexual intercourse with 'X' on a cot. He caught hold of the boy and slapped him. A-1 was the individual identified by him who was caught red

handed. He also named another individual known 'Chavanni' who fled the spot. In the cross-examination, he stated to have reached Hanuman Mandir between 01.30 P.M. to 02.00 P.M. He was unable to disclose as to what type of clothes the appellants were wearing that time. He denied that a quarrel had taken place between him and A-2 over parking of a Rehri. Again, testimony of PW-7 (Mohd.Irshad) remained unchallenged on material facts. A-1 did not deny his apprehension at the spot by him. No suggestion was put by A-2 as to where else he was present at the time of occurrence.

6. Ocular testimonies of PW-5 and PW-7 are in consonance with medical evidence. PW-4 (Dr.Rajesh Prasad), CMO, Aruna Asaf Ali Govt. Hospital, proved the MLC (Ex.PW-4/B). PW-16 (Dr.Alka Goel), SR, Aruna Asaf Ali Govt. Hospital, deposed that on medical examination, she found hymen ruptured; multiple pustular lesion present on vulva. She disclosed in the cross-examination that hymen ruptured could have been old or fresh as well. There is, thus, no conflict or variance between ocular and medical evidence.

7. 'X' categorically emphasized that sexual intercourse was against her wishes. Nothing was suggested by the appellants in her cross-examination if she was a consenting party. No such plea of consent was

taken. Under Section 114-A of the Evidence Act which was inserted by way of amendment in the year 1988, there is a clear and specific provision that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. In the instant case there is complete denial of any such sexual act performed by the appellants with the prosecutrix. In these circumstances, her age is of little relevance. Nonetheless, the prosecutrix and her close relatives claimed that she was of 12 / 13 years of age. Her ossification test was also conducted to ascertain her age and as per ossification report, she was between 12 - 14 years. Being a little girl, she was not expected even to consent for sexual intercourse with both the appellants one by one during day time. Absence of injuries on her private parts cannot be construed as evidence of consent. The plea that 'X' was habituated to sexual intercourse is devoid of force. In '*State of U.P. vs. Pappu @ Yunus & Anr.*', AIR 2005 SC 1248, it was held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that

particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the Court to absolve the accused.

8. Adverse inference is to be drawn against A-2 for not participating in TIP Proceedings. Moreover, he was identified with certainty in the Court by 'X' and PW-7 during evidence. Certain discrepancies, exaggerations, improvements and omissions on trivial matters highlighted by appellants' counsel are not material to throw away the prosecution evidence overboard. It is to be remembered that PW-5 'X' was an illiterate girl who earned her livelihood by picking rags from roads. She was not expected to remember all the minute details of the incident. She was, however, certain and clear that both the appellants had established physical relations with her one by one against her wishes. She has not deviated from her firm stand at any stage. Other discrepancies can be overlooked safely. In '*Dimple Gupta vs. Rajiv Gupta*', 2008 (1) SCC (Cri) 567, Supreme Court held that a person coming from altogether different background and having no education may not be able to give a precise account of the incident. However, that cannot be a ground to reject his testimony. The Court observed that in a case like rape, "it is impossible to lay down with precision the chain of events, more particularly when illiterate villagers with no sense of time are involved".

9. It is significant to note that when charge was framed and it was read over and explained to the appellants, A-1 pleaded guilty to it. However, the Trial Court to get cogent evidence in this regard did not accept the plea of guilt and proceeded to dispose of the case on merits. Plea of guilt by A-1 lends credence to the statement of the prosecutrix and confirms his participation in the crime.

10. The appellants did not give plausible explanation to the incriminating circumstances proved against them. No worthwhile evidence has appeared to infer if any quarrel had taken place on any occasion between them and X's relatives prompting them to falsely implicate them in this heinous offence. No particulars of such quarrel have emerged on record. No complaint about any such quarrel was lodged with the police. Moreover, for a petty quarrel (if any), the prosecutrix is not imagined to level serious allegations against the appellants. Unless an offence has really been committed, a little girl of 12 or 13 years would be extremely reluctant to level such serious allegations which are likely to reflect on her chastity. Apparently, she being a helpless, poor and hungry girl was abused on the pretext to provide her food by the appellants to satisfy their lust.

11. The Trial Court has dealt with all the relevant contentions and the conclusion arrived at by it is based upon proper and fair appreciation of the evidence. It needs no intervention.

12. In the light of above discussion, the appeals lack merits and are dismissed. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

MARCH 27, 2015 / *tr*