

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

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Judgment reserved on :10.07.2015
Judgment delivered on :15.07.2015

Crl. Appeal No. 211/2012

PAHLAD

.....Appellant

Through: Mr. V.P. Katiyar, Adv.

versus

STATE

.....Respondent

Through: Ms. Kusum Dhalla, APP for the State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The complainant before this Court is the 75 years old prosecutrix examined as PW-13. Her version was that she used to sleep in the public park outside with 3-4 other persons. She used to spend the day as also the night there. On the fateful night, the appellant Pahlad came and sat near her. On her asking, he told her to accompany him. He took her inside the jungle where with a long stick, he tried to commit galat kaam upon her. The victim was in great pain. She was taken to the hospital.

2 The statement of the victim (Ex.PW-13/A) was recorded under

Section 161 of the Cr.PC which had formed the basis of the FIR. Her MLC was proved as Ex.PW-6/A. On the basis of her oral testimony and the medical evidence which was noted to be corroborative of her oral version, the appellant stood convicted.

3 The appellant was convicted vide separate judgment and order on sentence dated 17.01.2012 and 31.01.2012 respectively vide which he had been convicted under Sections 366/367/377/307 of the IPC and had been sentenced to undergo a maximum period of RI 10 years for the offence under Sections 367/377 of the IPC besides fine for each of the separate offences. The nominal roll of the appellant reflects that as on date, the appellant has completed five years of incarceration including remission.

4 At the outset, learned counsel for the appellants submits that his argument is twofold. His first submission is that the version of PW-13 is inconsistent and contrary; her statement recorded under Section 161 of the Cr.PC is in conflict with her version recorded before the Magistrate under Section 164 of the Cr.PC (Ex.PW-13/A) which is still contrary to her version recorded on oath in Court. The second submission of the learned counsel for the appellant is that the identity of the appellant has

not been established and although at the first point of time, the victim had stated that she does not know the appellant but later on she had named Pahlad i.e. as the person who had committed the offence. Her varying version on this count entitles the accused to the benefit of doubt.

5 Arguments have been refuted. Learned Public Prosecutor points out that there is no reason whatsoever for the victim to have falsely implicated the accused. It is also not the case of the appellant that the victim was inimical towards him. There was no reason for any false implication. The impugned judgment suffers from no infirmity and calls for no interference.

6 PW-13 was the star witness of the prosecution. She was a 75 years old lady. She had children i.e. both sons and daughter but she was not living with any of them. She used to live in a park both in the day time and at night. This is her categorical version. The Court had noted that she was a frail lady and unable to move without assistance.

7 In her statement under Section 161 of the Cr.PC (recorded on 21.05.2011- incident is dated 20.05.2011), she had stated that on the fateful day, when she had gone to sleep at 02:00 am morning, she saw a dark complexion man sitting by her side. He was not tall but he was well

built. He forcibly lifted her and took her to the bushes where he inserted a wooden stick in her vagina. She cried with pain. She could identify him if he was produced before her. Admittedly the appellant was not named in this statement.

8 In her statement under Section 164 of the Cr.PC recorded before the learned MM (dated 30.05.2011), she has reiterated that she had identified the man in the hospital as the person who had done the wrong act upon her.

9 Before adverting to the version of the victim on oath in Court, the MLC of the victim prepared on the same day i.e. 20.05.2011 becomes relevant. The patient was noted to be conscious and oriented. She had disclosed to the doctor that sexual assault had been committed upon her by an unknown person at night in the park where she resides. This version as recorded in Ex.PW-2/A was reiterated by the doctor who had come into the witness box namely Dr. Priyanka (PW-6) who had on oath deposed that the victim who was conscious and oriented had disclosed to her that an unknown person had committed assault upon her.

10 On oath in Court, the victim has reiterated the version as stated by her in her statements under Section 161 & 164 of the Cr.PC. She

admitted that the TIP proceedings were held in the hospital and she had recognized Pahlad as the person who had committed untoward act upon her. In her cross-examination, on a specific query put to PW-13 as to on which serial number the appellant was standing i.e. at serial number 1, 2 or 3, the witness replied that she was not in her senses at that time and as such it would not have been possible for her to say on which number the appellant was standing. She admitted that the person who had asked her to accompany him to bushes was Pahlad and she had recognized him; at that time, he had not tied the cloth upon his face. In another part of her cross-examination, she had stated that the appellant had tied cloth upon his face when he committed rape upon her and as such she could not see his face. Ex.PW-10/C was the memo of TIP proceedings which had been conducted in the hospital by the doctor. The Investigating Officer SI Urmil Sharma (PW-23) has admitted that no permission was taken from Area Magistrate or SDM for taking TIP of the accused in the hospital. TIP memo is Ex.PW-10/A. This memo describes that six persons have been produced before the victim in the ICU ward for the purposes of identification. This was on 22.05.2011. Out of six persons, the victim had identified at serial number 4 as the person who had

committed the wrong act upon her.

11 Learned defence counsel vehemently argued that this document Ex.PW-10/A when read along with the cross-examination of PW-13 clearly establishes that the victim was in senseless state of mind at the time when she was admitted in the hospital and even on a specific query put to her by the learned defence counsel as to on which serial number the appellant was standing, she had stated that she was not in her senses and as such she could not identify the serial number on which the appellant was standing. This submission of the learned counsel for the appellant carries strength. That apart, the statement of the victim in the inceptive stage i.e. in her MLC, her statement under Section 161 of the Cr.PC and her statement under Section 164 of the Cr.PC was to the effect that she did not know the name of the accused. Advancing the line of argument propounded by the learned public prosecutor, even if the victim did not know the name of the accused and presuming that she could otherwise recognize him from his features and she did so during the TIP conducted in the ICU ward (in terms of Ex.PW-10A on 22.05.2011), her categorical assertion on oath in Court that since she was in a senseless condition she could not know the serial number on

which the appellant was standing. This part of her version on the identity of the accused has thus been demolished. The sanctity of the TIP held without permission of the Area Magistrate and in the presence of the concerned doctor but in the ICU ward of the hospital by the Investigating Officer is also suspected.

12 Learned defence counsel has also drawn attention of this Court to the judgment wherein the Court had noted that on 22.05.2011, although the appellant had been identified by the victim but since the investigating team was not satisfied about the built of the accused, he had been let off and his custody has been handed over to his mother. Submission being that the investigating team was also not sure about the structure of the accused and in fact the Investigating Officer was asked to again thoroughly reinvestigate the circumstances. Learned defence counsel has also drawn attention of this Court to that part of the judgment where the trial Judge had noted that on an earlier day i.e. prior to her cross-examination on 01.11.2011 i.e. on 19.10.2011, the prosecutrix had come into the Court with two other persons namely Renu and her daughter Shakuntla. She appeared to be a frail lady. An amicus-curiae was appointed for her benefit. The Court has recorded

that the victim appears to be under threat in not identifying the accused and this was brought to the notice of the Judge by the Ahlmad. The prosecutrix was then sent to Nari Niketan and lady Renu who had accompanied the prosecutrix was sent to the Court of the ACMM for appropriate action. On the following date i.e. on 01.11.2011 when the victim was produced from Nari Niketan her statement was recorded which as per the Presiding Officer on that day appeared to be free from all coercion.

13 On this score, learned defence counsel points out that the Judge had in fact tried to over win the witness and the witness not being able to recognize the accused on that day (19.10.2011) but the Judge did not appear to be satisfied and she had in these circumstances threatened the witness Renu and had sent her to the Court of the ACMM for proceedings and had without any reason sent the prosecutrix to Nari Niketan. A complaint to this effect had also been lodged before the Chief Justice of this Court. Attention has been drawn to the said complaint dated 21.10.2011 as also to the transfer petition filed by the learned defence counsel before the concerned District Judge seeking transfer of the case to some other Court. Submission being that the

Officer in question has a negative attitude and whenever she feels that the accused is not being identified for reasons best known to herself, she makes all efforts to see that the case ends in a conviction. It was the same Judge, who had compelled the witness on a later date i.e. on 01.11.2011 to wrongly identify the accused.

14 This Court need not delve into the greater detail on this aspect of the matter but the recording of the proceedings dated 19.10.2011 in the judgment by the trial Judge does spell out something. It indicates that the witness had come to the Court with two other persons. It was for the victim to have decided as to who were the persons to accompany her. It was not for the Judge who had taken it upon herself to hold an uncalled for inquiry and send the victim to Nari Niketan. The Judge did not examine the prosecutrix on 19.10.2011. There is no explanation for that. It was the incumbent duty of the Judge to have examined the witness on that date and noted the demeanor of the witness and the statement of the witness; whether she would have identified the accused or not could only have come in her testimony which was not permitted to be carried out.

15 The version of PW-13 is vacillating. At the cost of repetition, at
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the initial stage, she had stated that she could not identify the accused; he was an unknown man. She had neither in her FIR and nor in the MLC stated that she could recognize the man if he was brought before her. In her statement under Section 164 of the Cr.PC (recorded eight days later on 30.05.2011), she had made a statement that she could recognize him if he is brought before her. This was after the TIP proceedings which were conducted by the Investigating Officer on 22.05.2011. The sanctity of the TIP has also been discussed supra.

16 Apart from the fact that a TIP can be conducted only by a Magistrate/SDM (as is the mandate of law), what was the hurry for the Investigating Officer to have got the TIP conducted has also not been explained. The Investigating Officer (PW-23) admitted that he had not taken permission from the Area Magistrate or SDM to get the TIP conducted. The cross-examination of PW-13 on this score is also relevant. PW-13 has stated that she was in senseless condition at the time when she was in ICU i.e. when the TIP was being conducted and as such she could not recognize as to at which serial number the accused was standing.

17 The Apex Court in 1999 8 SCC 428 Ranesh Govind Jagesha Vs.

State of Maharashtra while dealing with the infirmities in a TIP proceeding had noted that where the TIP had not been conducted properly, a benefit of doubt had to be given to the appellant on that score.

18 In the instant case, PW-23 had admitted that although six persons had been put to TIP proceedings they had all been let off as the guilt of the accused (in spite of the fact that the victim had identified him) still did not stand established. PW-23 has further admitted that although the accused was residing in a house near the park (where the alleged offence had taken place), she did not examine any person regarding the presence of the accused on the fateful night. Admittedly no permission of the SDM had also been taken for conducting these TIP proceedings. The urgency in holding the TIP by the Investigating Officer herself again throws doubt upon the credibility of the proceedings. In this context, the observation of the Apex Court are relevant and are noted herein as under:-

“It is also not disputed that at the time of identification parade, the appellant was not having a bread and long hair as mentioned at the time of lodging of FIR. It is also not disputed that no person with a bread and long hair was included in the parade. The witnesses are alleged to have identified Accused 2 at first sight despite the fact that he had removed the long hair and bread. What prevented the Magistrate from associating one or two persons having resemblance with the

persons named in the FIR is a mystery shrouded with doubts and not cleared by the prosecution.”

19 Another relevant fact in this connection is the version of PW-10 Dr. Ashish Sharma who was also present at the time when the TIP was conducted in the hospital. He has on oath deposed that he was inside the ICU at the time when the police produced some boys for Shanti to identify. He had deposed that the victim had identified the second boy who was brought inside. This again washes away the version of the prosecution because as per prosecution it was the fourth boy who was the accused not the second boy. PW-14, the daughter of the accused who has also signed the TIP memo (Ex.PW-10/A) had also in her cross-examination admitted that she does not remember the number on which Pahlad standing.

20 At the cost of repetition, PW-13 in a part of her deposition stated that the face of the accused was covered with a cloth when the appellant had committed dastardly act upon her. In another part of her deposition she stated that she could see his face at the time when the accused committed this wrong act upon her. In the FIR she has stated that the person who had come to sit next to her near the park on the fateful day

was well built and dark complexioned. This Court in its endeavor to unearth the truth had summoned the appellant on production warrants. He had appeared in Court. He did not appear to be stocky or well built. He was also not dark complexioned. He was of a medium height. Thus the statement of the victim (under Section 161 Cr.P.C.) that the person who had committed offence upon her in the park was dark complexioned and well built does not match the description of the appellant.

21 The version of the prosecution casts a serious doubt in the mind of the Court. The rule of criminal jurisprudence is consistent and unless and until the prosecution has been able to prove its case to the hilt a conviction cannot follow. The accused being deemed to be innocent only proven to be guilty, this Court is of the view that the identity of the accused has not been established and he is entitled to benefit of doubt on this score.

22 In this regard observations made in 1997 (2) CC. Cases 291 (HC) Raj Kumar Vs. State are also relevant. A Bench of this Court while evaluating the testimony of a rape victim had noted that where the version of an eye witness is inconsistent and changes stands from time

to time, she cannot be held to be a reliable and trustworthy testimony.

Relevant extract reads herein as under:-

“It may be seen that P.W.5 has been absolutely inconsistent and has been changing his stand from time to time. In our opinion P.W.5 cannot be regarded as reliable and trustworthy witness to the occurrence and it cannot be said considering his evidence as a whole that he supports the prosecution as far as the main occurrence is concerned. In our opinion, no reliance can be placed on the evidence of P.W.5.”

23 This Court is of the view that the appellant is entitled to a benefit of doubt. He is accordingly acquitted. He be released forthwith if not required in any other case.

24 Appeal disposed of.

25 A copy of this order be sent to the Jail Superintendent for information and compliance.

INDERMEET KAUR, J

JULY 15, 2015

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