

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

% *Judgment reserved on :06.07.2015.*
Judgment delivered on :10.07.2015

+ CRL.A. 284/2013

SURINDER KUMAR BABBAR Appellant

Through Mr. K.K. Manan, Mr. Nipun
Bhardwaj, Mr. Ankush Narang
and Mr. Kartik Gandotra, Advs.

Versus

STATE GOVT. OF NCT OF DELHI Respondent

Through Ms. Kusum Dhalla, APP for the
State.

+ CRL.A. 382/2013

YOGESH KUMAR Appellant

Through Mr. Rakesh Wadhwa and Mr.
Amit Alok, Advs.

versus

STATE Respondent

Through Ms. Kusum Dhalla, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 There are two appellants before this Court Surinder Kumar

Babbar and Yogesh Kumar. They have both been convicted and sentenced vide judgment and order on sentence dated 23.01.2013 and 29.01.2013 respectively wherein the first appellant has been convicted for the offence punishable under Sections 376/366/509/506 of the IPC; the second appellant has been convicted for the offence punishable under Sections 376/366/506 all of which are read along with Section 109 of the IPC. The appellant Surinder has been sentenced to undergo a maximum period of 10 years for the gravest offence which was punishable under Section 376 of the IPC along with fine for each of his separate convictions. The maximum sentenced awarded to appellant Yogesh Kumar was RI 7 years along with separate fines for the separate offences. The impugned judgment had however noted that the sentences were to run one after the other although benefit of Section 428 of the Cr.PC had been granted to the convicts.

2 The prosecutrix (PW-6) had made a complaint on 12.11.2010 in Police Station Najafgarh which was to the effect that 15 days prior to when she was returning home from her tuition classes, the two appellants picked her upon their motorcycle. The motorcycle was driven by Yogesh Kumar. She was taken to a shop at Khera Mod. Appellant

Surinder committed rape upon her and co-accused had filmed this act of rape. The victim was continuously threatened that in case she disclosed this incident to anyone, her nude CD would be shown to her relations and friends; she was told that appellant Surinder's maternal uncle was employed in the police department and nothing would happen to them. The victim was terrified. She did not recite the incident to her parents.

3 The statement of the victim was recorded both under Section 161 and Section 164 of the Cr.PC and her latter statement recorded by the learned MM (PW-20) was proved as Ex.PW-20/A.

4 In the evening her father (PW-10) noted injury marks on her body and took her to a local doctor. PW-6 did not go to school for the next 5-6 days. About 10-15 days after this incident when PW-6 was found crying by her mother (PW-2) and on her persuasion she disclosed the incident to her mother, who in turn related it to PW-10. Thereafter, complaint Ex.PW-6/A was lodged. Apart from the statement of PW-6, the statement of PW-10 (father) and PW-2 (mother) was recorded. The victim was stated to be 15 years of age on the date of the incident. Her date of birth was proved from her school certificate evidencing as 29.11.1995. The witnesses relating to this evidence were examined as

CrI. Appeals No. 284/2013 & 382/2013

PW-12, PW-15, PW-16 (Sub-Registrar from Najafgarh Zone) as also PW-22. The version of the prosecution is that the victim was a minor on the date of the offence. The medical examination of the victim was conducted on 12.11.2010 by Dr. Alok Kumar, a Sr. Resident from DDU Hospital (PW-4) who had proved the prosecutrix's MLC as Ex.PW-4/A. The victim was referred to the Gynae department where she was examined By Dr. Nakul Avasthy (PW-7); her medical examination revealed that her hymen was absent. This report was proved as Ex.PW-7/A. The scientific evidence adduced by the prosecution included the CFSL report (Ex.PW-18/G); human semen was detected on the underwear of the victim as also that of the appellant Surinder.

5 The statement of the accused persons was recorded separately under Section 313 of the Cr.PC; both of them pleaded innocence. The defence set up by Surinder was that he has been falsely implicated in the present case as the victim was pressurizing him to marry her but he was not inclined to do so. The defence of innocence was also adopted by the second appellant.

6 In defence, two witnesses were examined. DW-1 was a witness who had an adjoining shop, deposed that on the fateful day i.e. on
Crl. Appeals No. 284/2013 & 382/2013

27.10.2010, he was in his shop and he had not seen appellant Surinder bring any person to the adjoining shop. DW-2 was the Nodal Officer from Tala Telecom Services. He had brought the record of three mobile numbers i.e. 9278635722, 9210666765 and 9213449905 proved collectively as Ex.DW-2/B to Ex.DW-2/H. The defence being that out of these three mobiles, one belonged to Naresh Kumar, the father of the victim and the other two belonged to Ram Kumar, the father of appellant Surinder, from which continuous calls were exchanged between the appellant and the victim evidencing that both of them used to talk to one another and this was a voluntary act on the part of the victim who wanted to join the company of the appellant; he was not pressurizing her; she was an adult and fully conscious of what she was doing; she wished to marry Surinder but this proposal was not acceptable to Surinder which had led PW-6 to malign him in this false case and that is also the reason why there is an unjustifiable delay of 15 days in lodging the present FIR.

7 On behalf of the prosecution, the learned Public Prosecutor points out that the victim was a minor and this has been established by unassailable evidence. She was being troubled by Surinder and appellant

CrI. Appeals No. 284/2013 & 382/2013 Page 5 of 21

Yogesh was in active connivance with his friend in this act. The testimony of PW-6 on all quarters is un-impeachable. Her version has been corroborated by the version of her parents i.e. PW-2 and PW-10 as also the medical and scientific evidence. The conviction calls for no interference.

8 On behalf of appellant Surinder, arguments have been addressed by senior counsel Mr. K.K. Manan. On behalf of the second appellant Yogesh, arguments have been addressed by counsel Mr. Rakesh Wadhwa. The foremost submission of the learned counsel for the appellant is that the testimony of PW-6 suffers from inherent contradictions and no reliance can be placed upon her version. Attention has been drawn to her statements under Sections 161 and 164 of the Cr.PC as also her version on oath in Court. It is pointed out that there is no explanation as to why the date of the incident has not been disclosed by the victim till date. The delay in lodging the FIR which, was after a period of 15 days, is also wholly unjustifiable. It is difficult to believe that the victim (as per her own version) was depressed and crying in this intervening period of 15 days and was not accosted by her parents earlier; she had also stopped going to school for the following 5-6 days;

this is a clear case of concoction where a deliberate attempt has been made to falsely implicate the accused, Surinder as he was not ready to marry the victim. Reliance has been placed upon (2007) 2 SCC 170 Ramdas and Others Vs. State of Maharashtra and 2012 (1) JCC 688 Ram Saran and Anr. Vs. State NCT of Delhi to support a submission that where the information about commission of an offence suffers from an inordinate delay, such a version is unacceptable. Reliance has also been placed upon 2012 (3) JCC 1147 State Vs. Vicky and Others as also a judgment of this Court reported as Virender Vs. The State of NCT of Delhi in Crl. Appeal No.121/2008 to substantiate the argument that contradictions in the version of the prosecutrix i.e. in her statement recorded under Sections 161 and 164 of the Cr.PC and her version on oath in Court have gaps and therefore cannot be relied upon to base the conviction of the appellants. Submission being that such a testimony would be unreliable. On the aspect of age, learned senior counsel for appellant Surinder has placed reliance upon a judgment of the Apex Court reported as State of Madhya Pradesh Vs. Anoop Singh in Crl. Appeal No. 442/2010 to argue that the date of birth relied upon by the prosecution is necessarily to be ignored as in terms of Rule 7 (3) of Crl. Appeals No. 284/2013 & 382/2013

Juvenile Justice (Care and Protection of Children) Rules, 2007, the first and foremost piece of evidence is the matriculation or equivalent certificate which should be made available, in the absence of which the date of birth from the school first attended has to be obtained. The evidence relied upon by the prosecution does not relate to date of birth given by the first school attended by the victim. Attention has also been drawn to the version of PW-6 wherein she has admitted that her brother was elder to her by 1½ years; she had passed her 10th standard at the age of 13½ ; submission being that it is difficult to believe that a person can pass the 10th standard at the age of 13 plus. The evidence on this score is fabricated. The victim was an adult. It has lastly been submitted that there is no reason as to why Sarita and Aashima, close friends of the victim and who had all along accompanied her have not been examined. Dr. Dass who was the first local doctor who had examined the victim on 27.10.2010 has also not been arrayed as a witness. On all counts, the version of the prosecution suffers from infirmities.

9 Arguments have been heard. Record has been perused.

10 PW-6, the prosecutrix is the star witness of the prosecution. She had in detail described the incident in the manner in which it had

Crl. Appeals No. 284/2013 & 382/2013 Page 8 of 21

occurred. On oath, she has deposed that in July, 2010, at the time when she was studying in the Government Girls Senior Secondary School, accused Surinder used to follow her on his motorcycle. He wanted to be friends with her but she refused the offer. In August, 2010, she was again followed by Surinder who used to trouble her. PW-6 was accompanied by her friends Sarita and Aashima. After about 15 days, Surinder came on a motorcycle, PW-6 was alone at that time, he snatched her phone and slapped her. Thereafter, 15 days prior to the date of registration of the FIR, when PW-6 was returning home with her friend Aashima, accused Surinder and Yogesh came on a motorcycle and stopped her way. Surinder got down from the motorcycle and when Aashima objected, he threatened her. PW-6 asked Aashima to go ahead. Thereupon, Surinder forcibly lifted the victim on the motorcycle which was being driven by Yogesh. He took her to a shop where he slapped her three times, closed the door and committed rape upon her. The music had been put on full volume. During the occurrence of this incident, Yogesh also slapped her and he filmed the incident of rape which was being committed upon her by Surinder. He also clicked photographs of the same. Then Yogesh also beat her with a wooden

stick and both of the accused persons threatened PW6. She did not disclose the incident to anyone as she was under pressure that her obscene CD recorded by Yogesh would be revealed to her family and friends. However, in the evening her father saw some injury marks on her body and he took her to a local doctor. About 10-15 days after this incident, PW-6 was found crying by her mother (PW-2) and upon her persuasion, PW-6 narrated the incident to her who in turn informed her father (PW-10).

11 The vehement submission of the learned counsel for the appellant is that there are deep contradictions in the version of PW-6 on oath qua her version recorded under Section 161 of the Cr.PC as also her statement recorded under Section 164 of the Cr.PC. This submission is unfounded and in fact the learned defence counsel has not been able to bring out any such material contradiction which can detract from the otherwise cogent and coherent testimony of the prosecutrix. Even in her lengthy cross-examination, she stuck to her stand. Whether the Sim-card was removed for the purposes of noting down the mobile number or not or whether the prosecutrix did not categorically state that she did not want to be friends with Surinder or whether Yogesh had beaten her with

CrI. Appeals No. 284/2013 & 382/2013 Page 10 of 21

a wooden stick or not, would not be material as, needless to state, that it is the witness which has to be read in its entirety to determine its strength. The wholesome reading of the version of PW-6 coupled with her cross-examination as also her versions recorded before the Police and the learned Metropolitan Magistrate clearly establish that these insignificant discrepancies which have been pointed out by the learned defence counsel are not material to the gist of the main offence i.e. the offence of the unwilling act of rape having been committed by Surinder upon the victim and which was filmed by his friend Yogesh.

12 In this context, the Apex Court in 1996 (20) ACR 220 (SC) State of Punjab Vs. Gurmit Singh and Others had laid down certain guidelines for evaluating the testimony of a rape victim. These observations read herein as under:-

“The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self respecting woman would come forward in a court just to make a humiliating” statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence

and is found to be reliable.”

13 The defence set up by the learned counsel for the appellant is the heavy reliance upon Ex.DW-2/A to Ex. DW-2/H to evidence that phone calls were exchanged between Surinder and the victim; this was reflective of their friendship. In this context, PW-6 has admitted that at the time of the incident, she was using the mobile number 9210666765. This number, as per record, belongs to the father of the victim. PW-2, the mother of the prosecutrix has also admitted that her daughter used to carry the phone of her husband which was mobile number 9278635722. The record of the third mobile number 9213449905 is also a part of the Court record. This belongs to the father of the accused. A perusal of Ex.DW-2/A to Ex. DW-2/H reflects that between 06.09.2010 up to 09.11.2010 calls were exchanged on these mobile numbers and the learned defence counsel has drawn attention of the Court to the duration which in some cases was as long as 10-15 minutes. Most of these calls show that they had been made from mobile number 9213449905 (being used by the accused) to the victim and although PW-2 had admitted that outgoing calls were barred on the phone of her husband, those would only relate to mobile number 9278635722 and not to the second mobile

number (9210666765) which was also being used by the victim. A perusal of this documentary evidence (Ex.DW-2/A to Ex. DW-2/H) reflects that in almost all calls were received by the victim; some calls were even as short as a duration of 50 seconds, meaning thereby, that the phone calls were made and then dropped. These were all consecutive calls made one after the other leading this Court to believe that it was probably the accused who was troubling the victim and was repeatedly making calls on her number but she was not responding to them.

14 However, even otherwise accepting this submission of the learned defence counsel that the parties were known to each other and the fact that they were speaking on the phone sometimes for almost as long as 10-15 minutes which may point to a friendship but even then the consent of the victim would not really be material as the evidence collected qua the age of the victim shows that she was a minor. This has been cogently established by the testimonies of PW-12, PW-15, PW-16 and PW-22. They had produced the official records from their respective departments. This was in addition to the oral statements of the parents of the victim as also of the victim stating that she was less than 16 years of age on the date of the offence.

15 PW-22, Kulbhushan Singh, office superintendent of Mata Kasturi Devi Public School, Najafgarh had brought the summoned record pertaining to the admission of the prosecutrix in class Vth on 11.04.2003. The copy of the admission form reflected her date of birth as 29.11.1995. The affidavit (Ex.PW-22/B) filed by the father of the victim had been brought on record. Admittedly this affidavit had been filed much prior to the date of the incident and thus cannot in any manner support the submission of the learned defence counsel that this could be a fabricated document; the family of the victim was unaware that such an incident was likely to occur; this document having seen the light of the day much prior to the date of the incident appears to be a fully authenticated document. PW-12, the Vice Principal of the Government Girls Senior Secondary School, Jharodha Kalan had brought the admission register of her school dated 03.07.2003 up to 25.07.2011 reflecting the date of birth of the victim as 29.11.1995. As per this record, the victim had taken a readmission in class 11th on 13.08.2009. The entries in the relevant register have been proved as Ex.PW-12/A to Ex.PW-12/C. PW-15 had also produced the record of Jharodha Kalan Government Senior Secondary School reiterating the fact that the

Crl. Appeals No. 284/2013 & 382/2013 Page 14 of 21

admission register Ex.PW-15/A showed the date of birth of the victim as 29.11.1995. PW-16 was the Assistant Public Health Inspector, Najafgarh Zone and as per his record (with the MCD), the date of birth of the victim was 29.11.1995. Nothing has come up in the cross-examination of any of these witnesses to detract from their testimonies. Moreover, all these aforementioned witnesses have produced the official record from their respective departments. There was no reason to disbelieve them.

16 The judgment relied upon by the learned defence counsel, in this context, is inapplicable. In this judgment of Anoop Singh (supra), the Apex Court has in fact reiterated that to determine the age of a victim of rape {to which Rule 12 (3) of the Juvenile Justice (Care and Protection of Children) Rules is applicable}, the matriculation or equivalent certificate, if available should be first obtained to be followed by the date of birth from the school first attended and thereafter the birth certificate issued by the Panchayat or Municipal Corporation. It is only if these parameters are not fulfilled, may a Medical Board be constituted to determine the age of the victim through an ossification test. The record, as discussed supra, fulfills the criteria in the first category and

Crl. Appeals No. 284/2013 & 382/2013 Page 15 of 21

the trial Judge had thus rightly declined the ossification test to be carried out of the victim, of which an application had been filed by the accused belatedly. Even against the dismissal of the application, no appeal or revision had been filed; therefore, that order has also become final.

17 The medical evidence also advances the version of the prosecution. Ex.PW-7/A had reflected that the hymen of the victim was absent.

18 The evidence discussed supra thus establishes that the victim has passed this test on the anvil of being a 'sterling witness'. The submission of the learned defence counsel that the victim and Surinder shared a friendship is answered in the negative. PW-6 has described the fact that Surinder was keen to be friends with the victim and he started this in July, 2010 followed by his efforts again in August. The incident is dated 15 days prior to the registration of the FIR i.e. around 27.10.2010. The detailed evidence of the victim establishes that inspite of efforts made by Surinder to be friends with her, she was not keen on this friendship and was all along declining his requests and warding him off; his persuasion continued and this was probably the reason as to why so many calls were exchanged by him on the mobile numbers of the

Crl. Appeals No. 284/2013 & 382/2013 Page 16 of 21

victim. The calls after 27.10.2010 reflects that they were half minute calls repeatedly made by the accused to the victim; there were certain calls made by the victim also to the accused but this is corroborative of her version that she did not disclose this incident for 15 days to her mother as she was under continuous threats by Surinder and Yogesh that the nude filming that they had done of the victim would be revealed to her family and friends.

19 This version of PW-6 (as noted supra) thus explains the delay in registration of the FIR. Although the FIR being a first information record must be filed as early as possible and this is to obviate the possibility or probability of any suspicion that may be cast upon the version of the complainant, but in this case, the victim has cogently explained the reason why she did not disclose this incident prior in time.

20 The Supreme Court in this context in 2011 CrI. L.J. 2330 Ashok Surajilal Ulke Vs. State of Maharashtra while dealing with an offence of rape had noted herein as under:-

“We have considered the arguments of the learned Counsel. We are of the opinion that in a case of rape the fact that the FIR had been lodged after a little delay is of very little significance. There can be no doubt that an allegation of rape, and that too of a young child 15 years of age, is a matter of shame for the entire family and in many such cases the parents or even the prosecutrix are reluctant to go to the police to lodge a report and it is only when a situation particularly

unpleasant arises for the prosecutrix that an FIR is lodged.”

21 Each case has to be viewed in its own factual matrix. The duration of delay in this case thus loses its significance as the prosecutrix has satisfactorily been able to explain this delay. The credibility of the witnesses of the prosecution remains untarnished.

22 There is yet another aspect in the matter. There was no reason whatsoever for the victim to have implicated the accused. Even presuming that the defence of the accused, that the victim was threatening him to marry her and he wanted to ward her off on this and this being the reason why he has been falsely implicated, this defence admittedly did not find mention in the cross-examination of the witnesses of the prosecution. It emanated only for the first time in the statement of the accused recorded under Section 313 of the Cr.PC. That apart, even if this was the case, there was also no reason as to why the co-accused Yogesh would have been implicated in case he had not committed the crime.

23 The submission of the learned defence counsel for accused Yogesh, that no recovery has been effected from him and his mobile phone did not contain any material relating to the statement of the victim

that her nude photographs were taken on his mobile and filming of an untoward incident was done, is answered by the fact that Yogesh was not arrested till after about six months from the date of the incident. He had surrendered in Court on 09.03.2011 and this was after the Court had taken coercive steps against him i.e. by issuing Non Bailable Warrants. In this intervening period, there was ample time with Yogesh to have get rid of the mobile record.

24 Non-examination of Sarita and Aashima, the friends of the victim is answered by the statement of the victim corroborated by the Investigating Officer that the complete addresses of Sarita and Aashima were not known to the victim and that is why they could not be traced. The submission of the learned defence counsel that the local doctor (Dr. Dass) who had first examined the victim was also not examined is answered by the fact that PW-10 (the father of the victim) had disclosed the name of Dr. Dass only in the cross-examination and this did not find mention in his statement made to the Police.

25 On all counts, the prosecution has been able to prove its case. Appellant Surinder rightly convicted under Sections 376/366 of the IPC.

His friend Yogesh was the abettor of the offence and Section 109 of the CrI. Appeals No. 284/2013 & 382/2013

IPC which deals with an abetment, clearly states that an abettor is liable for the same punishment which is inflicted upon the principal offender if the act of abetment has been proved.

26 This Court notes that besides the fact that Surinder was accompanied by Yogesh on the fateful day, even prior thereto, the victim had stated that Surinder used to be in company of Yogesh. On 27.10.2010 while accused Yogesh was driving the motorcycle, Surinder was the pillion rider and they both had forcibly made her sit on the motorcycle from where she was taken to a room and rape was committed upon her by Surinder. Yogesh was also present there. He had filmed the incident on his mobile, and had also taken pictures on the same. As per the victim, Yogesh had also beaten her with wooden stick and had threatened her. The active participation of Yogesh is evident in the crime.

27 The conviction of the appellants thus calls for no interference.

28 The sentence of Surinder is reduced from RI 10 years to RI 7 years which is the minimum sentence for a conviction under Section 376 of the IPC. The sentence of co-accused Yogesh remains unaltered.

29 The trial Judge while sentencing the accused persons had directed

that all the sentences were to run consecutively i.e. one after the other.
This is modified. The sentences of both the appellants will run concurrently.

30 Appeals disposed of in the above terms.

INDERMEET KAUR, J

JULY 10, 2015

A