

R-8

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

% *Judgment reserved on : 20.7.2015*
Judgment delivered on : 30.7.2015

+ CRL.A. 564/2013

KASIF Petitioner

Through Mr.S.B.Dandapani, Amicus Curiae.

versus

STATE Respondent

Through Mr.O.P.Saxena, APP for the State along
with SI Vijay Singh.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. This appeal is directed against the impugned judgment and order of sentence dated 14.02.2013 and 16.02.2013 respectively wherein the appellant stood convicted under Section 366/376(2)(g) read with Section 34 of the IPC. For the offence punishable under Section 376(2)(g) of the IPC he had been sentenced to undergo RI for 10 years and to pay fine of Rs7000/- in default of payment of fine to undergo SI for 2 years; under Section 366/34 of the IPC he had been sentenced to

undergo RI for 10 years and to pay a fine of Rs.5000/- in default of payment of fine to undergo SI for 2 years. Sentences were to run concurrently.

2. The version of the prosecution was unfolded in the statement of the sister of the prosecutrix (PW-14). She had lodged a complaint on 07.10.2010 stating that her sister who was living with her was missing since 06.10.2010. On the same day i.e. 07.10.2010 the prosecutrix was traced. She was examined and her statement under Section 164 Cr.P.C. was recorded. She had deposed that she had left her home at about 7.00 a.m. on the fateful day. She boarded a bus for Seelampur. She got down from the bus at the bus station; she was taken to Jama Masjid by an unknown person. At Jama Masjid she lost her way. The appellant Kasif along with three other persons had taken her in a maruti car promising to drop her at her brother's house. She sat in the car; she was taken to a house where rape was committed upon her by the appellant and the three other persons.

3. The brother of the victim Sadiq was examined as PW-16. The MLC (Ex.PW-4/A) of the PW-1 was conducted by Dr.Sangita;

abrasions were found over her right shoulder. She was also examined by Dr.Solomi (PW-5) and was referred for a pregnancy test. PW-21 proved the signatures of Dr.Shifali who was the Gynecologist who had examined the victim. The pointing out memo (Ex.PW-7/A) of the place where the offence had occurred was proved through the version of Constable Sudesh (PW-7). The photographs of the place of occurrence were also taken and proved in the version of Constable Inderjeet (PW-11). The negatives were proved as Ex.PW-11/A and positives were proved as Ex.PW-11/B to Ex.PW-11/D. Investigation was first conducted by Inspector Rakesh Kumar (PW-19); it was thereafter handed over to WSI Dhoratiya (PW-23) through whom the challan was filed.

4. Apart from the present appellant accused Tohid was also arrested. Since he was a juvenile he was tried by the Juvenile Justice Board. On 06.5.2011 on a secret information having been received about the whereabouts of the present appellant he was arrested and taken into custody on 07.5.2011 vide arrest memo Ex.PW-6/B.

5. In the statement of the accused recorded under Section 313 Cr.P.C. he pleaded innocence and stated that he has been falsely impleaded in the instant case because of enmity brewing between the appellant and the brother of the victim.

6. The trial Judge, however, did not find favour with the defence sought to be set up by the accused. On the basis of the oral and documentary evidence adduced by the prosecution, the appellant stood convicted and sentenced as aforenoted.

7. On behalf of the appellant arguments have been addressed in detail by the learned Amicus Curiae. Attention has been drawn to the versions of PW-1, PW-14 and PW-16. Submission being that versions of these witnesses are full of contradictions and none of them can be relied upon. Version of the victim, being full of contradictions, is suspect. The conviction of the appellant is unfounded. He is entitled to an acquittal.

8. Needless to state that the State has opposed these submissions.

9. There is no doubt to the settled legal proposition that the

statement of a prosecutrix if cogent and credible is sufficient to nail an accused and a credible victim of rape does not even require corroboration. However, the prosecution has to stand on its own legs. This is also a cardinal rule of criminal jurisprudence.

10. The complaint was lodged by the sister of the victim. She was examined as PW-14. She had initiated these proceedings. She had on oath deposed that her sister was living with her. On 06.10.2010 in the morning she went to Khaiber Pass market but did not return back. A report Ex.PW-3/A was lodged at Police Post Majnu Ka Tilla on the same day. On the next date i.e. on 07.10.2010 PW-14 informed the police that she suspected a Nepali boy. Her statement Ex.PW-14/A was recorded. On the same day her sister was traced. She was medically examined.

11. The victim was examined as PW-1. Her statement under Section 164 Cr.P.C. (Ex.PW-1/A) was recorded on 11.10.2010. This was after four days of her having been recovered. She had been recovered on 07.10.2010.

12. In her statement under Section 164 Cr.P.C.(Ex.PW-1/A) she had given her age as 20 years. She stated that since the last two years she

was residing with her sister. On 06.10.2010 she willingly at 7.00 a.m. left for Seelampur. She often used to urinate on the bed. This was the reason for her leaving early in the morning. She had boarded the bus for Seelampur but got down at the bus stop. At the bus stop she met a person whom she did not know. He dropped her at Jama Masjid. From Jama Masjid she wanted to go to Hauz Qazi where her brother resides. At that point of time a white coloured car came in which four persons were seated whom she did not know; one of whom dragged her into the car. She was given a medicine to eat. She felt sleepy. When she woke up she found herself in a room where, after removing her clothes all the said persons committed rape upon her. At 5.00 p.m. they left her near her brother's house. She narrated the story to her brother and sister. Police complaint was accordingly lodged.

13. In her version on oath in Court PW-1 stated that about 7.00 a.m. on the fateful day she boarded the bus for Seelampur. She met one person at the bus stop who left her at Jama Masjid. She lost her way. She was inquiring about the way when four men came in a maruti car and stated that they would leave her at her brother's house. She sat in the maruti car. Appellant Kasif who was amongst the four persons

induced her to marry him. The accused took her to a house and on the way they purchased food and offered the same to her. She refused to take the food. She was given a capsule due to which she became giddy. The accused persons thereupon committed rape upon her. They were being called as Kasif ,Tohid and Mazhar.

14. In her cross-examination she admitted that she did not know the accused persons prior to the incident. She identified the accused/appellant when she was taken to the police station. She had seen the accused as he had asked her to marry her; he thereafter committed rape upon her. The car was being driven by Tohid. She was kept confined for about three hours. She did not know the address of her brother. The accused persons had left her at Kucha Pandit where her brother came to take her. She did not know the address of the place where the incident had occurred but she was taken to that place by the police and the appellant. She denied the suggestion that the accused had been falsely implicated at the instance of her brother.

15. Vehement submission of the learned counsel for the appellant is that there are glaring contradictions in the version of the prosecutrix in her statement under Section 164 Cr.P.C. (Ex.PW-1/A) qua her version

on oath in Court.

16. In her statement under Section 164 Cr.P.C. she had stated that when she was on the way to her brother's house at Hauz Qazi from Jama Masjid four persons had come in a car and one of them had dragged her into the car; they given her a medicine; thereafter they committed rape upon her. On oath PW-1 had stated that she had sat in the car of the accused (four in number) on her own as they promised to drop her at her brother's place. On oath she had stated that out of the said accused persons, the appellant Kasif had proposed to marry her. She had, however, refused; rape was then committed upon her.

17. In Ex.PW-1/A she had stated that she had been left near her brother's house at about 5.00 p.m. on the same day i.e. on 06.10.2010. Thereafter she had gone to her brother's house and then narrated the incident to her brother and sister and the matter was reported to the police. On oath in Court she had stated that she did not know her brother's address. Her brother had come to take her from where she had been left by the accused.

18. The version of the brother who had been examined as PW-16 is also relevant. He had deposed that his sister (PW-1) was residing with

his elder sister (PW-14); she was reported missing on 06.10.2010. PW-14 informed him. He reached the house of PW-14. They tried to trace her but their sister could not be traced. On the next morning i.e. on 07.10.2010 he was informed that his sister was sitting near Kuncha Pandit, Hauz Qazi and accordingly he went there and brought her back. In his cross-examination, he stated that he was informed by the chowkidar of the locality that his sister was sitting at the main road, Kuncha Pandit. His sister's (PW-14) house is at the distance of half an hour if one travels by metro. Police complaint was lodged in P.P. Majnu Ka Tilla. Their sister was medically examined.

19. This version of PW-16 is contrary to the version of the PW-1. PW-16 had stated that he had brought his sister back from the place where she had been left by the accused. This was not the version of PW-1. She had stated that she was left by the accused near her brother's house at 5.00 p.m; thereafter she had returned to her brother's house on her own. She further stated that then she narrated the incident to her brother and her sister. Meaning thereby that on 06.10.2010 itself at about 5 00 p.m. her sister and brother were aware of the woes of PW-1.

20. Complaint was lodged by PW-14 at P.P.Majnu Ka Tilla on
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07.10.2010. This was at 1.15 p.m. in the afternoon. Ex.PW-3/B and Ex.PW-12/A are clear on this time.

21. The victim had come back at 5.00 p.m. on 06.10.2010; why the complaint was lodged at 1.30 p.m. on the following day i.e. 7.10.2010 is not answered. That apart the contradictions in the version of the prosecutrix in her statement under Section 164 Cr.P.C.(Ex.PW-1/A) qua her statement on oath in Court are also glaring. In her version under Section 164 Cr.P.C. she had stated that she had been dragged into the car by four persons. On oath in Court she had stated that she had consented to travel in the maruti car as the four persons in the car had agreed to drop her at her brother's house. On oath she stated that Kasif (appellant) had given her a proposal to marry. This did not find any mention in her statement recorded under Section 164 Cr.P.C. It would also be difficult to believe that a person who is unknown to another (as is the case of the prosecution) and the appellant was proposing marriage to a stranger i.e. to PW-1. This version is quite unbelievable. The statement of PW-16 is also in contrast to the statement of PW-1 and PW-14.

22. PW-16 had stated that on 07.10.2010 he found his sister at

Kuncha Pandit. He brought his sister back and took her to the P.P. where a complaint was lodged. This is not the version of the victim. She stated that she had gone to her brother's house on her own. She had reached their at about 5.00 p.m. on 06.10.2010 where the incident was disclosed by her to PW-16 and PW-14. As per PW-14 her sister had been brought by PW-16 when the matter was reported to the police. Ex.PW-3/A which was the complaint lodged by PW-14 on 07.10.2010 also recites that PW-1 is mentally weak and a Nepali boy was suspected in this kidnapping of her sister.

23. This narration of PW-14 reflects upon the mental status of PW-1 who was also suffering from a history of epilepsy. This was recorded in her MLC Ex.PW-21/A. She often used to urinate, in the bed; this was the reason why she left her sister's house in the morning of 06.10.2010. This was the version of PW-1 in Ex.PW-1/A. PW-1 was a 20 year old girl. She did have a problem; both physical as also psychological.

24. Be that as it may, the scrutiny of her testimony has to be decided de hors these facts. Her testimony when tested on the anvil of a credible, cogent and coherent witness does not pass this test. PW-1 has been vacillating. In Ex. PW-1/A qua her version on oath in Court. Her

testimony also does not match the version of either PW-16 and PW-14. The different versions given by the aforementioned three persons of whom PW-14 and PW-16 are the closest members of the family of PW-1 and not being corroborative of one another does not inspire confidence.

25. In this context the observations of the Apex Court in the judgment of AIR 2012 SC 2281 Narender Kumar Vs. State are relevant and reproduced herein as under:

It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.

26. The medical evidence which is the MLC of the victim shows minor abrasions and scratches on her body. No other injuries were noted. She was medically examined on 07.10.2010 at 4.45 p.m. No

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injuries were noted on her body. If four persons had committed the forcible act of rape upon her some injuries would have been seen on her body.

27. The appellant was arrested on 07.5.2011 vide memo Ex. PW-6/B. This was pursuant to the disclosure statement of a co-accused Tohid. Tohid had disclosed the role of the present appellant. Relevant would it be to note that Tohid was a juvenile and he was tried by the Juvenile Court. Ex. PW-6/B shows that the appellant was arrested after almost about 6 months from the date of the incident. He was subjected to TIP but he refused the TIP vide memo Ex. PW-10/B (10.05.2011) on the ground that his photograph had been shown to the witness in the police station. In this context the testimony of PW-1 is also relevant. In her cross-examination PW-1 admitted that she was shown the accused and she identified him by pointing out at him.

28. The place of occurrence as per the prosecution was the house of Tohid. The pointing out memo was Ex. PW-7/A. As per PW-7 the place of incident was pointed by the prosecutrix from where Tohid was arrested and he had made his disclosure statement leading to the vital link with the present appellant. PW-1 in her cross-examination stated

that she did not know the address of the place of occurrence but she was taken to that place by the police. This part of the version of PW-1 clearly recites that the place of occurrence i.e. the house of Tohid was not known to her. She was taken to that place by the police. This destroys the version of the prosecution qua the document Ex.PW-7/A.

29. There are thus several loopholes in this case. They start with the version of (PW-1) on oath which is in conflict qua her statement (PW-1/A). Testimony of PW-1 is also in conflict with the version of PW-14 and PW-16. Her MLC is also not corroborative of her version. The entire gamut of the evidence collected by the prosecution persuades this Court to hold that the version of the prosecution has been successfully dented.

30. The defence of the accused all along was that he has been falsely implicated because of enmity between PW-16 and the appellant. He has been falsely roped in. This is his line of cross-examination right from inception i.e. in the form of the suggestions given to PW-1 and PW-16 and which is also his line of his defence in his statement under Section 313 Cr.P.C. when he had stated that he has been falsely implicated.

31. Rule of criminal jurisprudence is clear. It is for the prosecution to

prove its case to the hilt; the loopholes in this version must benefit the accused.

32. In the instant case, the testimony of the victim is full of contradictions. Learned Amicus Curiae who had conducted the trial in the Court below had also not done a good job. This was probably one of the reasons why the conviction had followed. An Amicus curiae who takes upon himself/herself the responsibility of defending an accused and especially in heinous cases where murder and rape charges are awarded must be conscious of the duty that they owe to their client. The result could otherwise be prejudicial to the right of the accused and would leave a wholesome scar on the conscience of the said Amicus Curiae.

33. Benefit of doubt has been created in this case. Appeal is allowed. Impugned judgment is set aside. Appellant be released forthwith, if not required in any other case.

INDERMEET KAUR, J

JULY 30, 2015

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