

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

% *Date of judgment: 09.7.2015*

Crl. Appeal No. 910/2013

NASHRULLA @ BABBLAAppellant

Through: Mr.S.B.Dandapani, Advocate.

Versus

STATE (NCT OF DELHI)Respondent

Through: Mr.Pramod Saxena, APP for the State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J. (oral)

1. This appeal is directed against the impugned judgment and order of sentence dated 26.7.2011 and 02.8.2011 respectively wherein the appellant stands convicted under Sections 363 and 376 of the IPC. The maximum sentence awarded to him is RI 10 years besides fine for each of the two offences. The sentences were to run concurrently.

2. On the complaint of Niranjana Shah (PW-6) the present FIR was registered. He was the father of the prosecutrix. The victim was examined as PW-4. Her brother was examined as PW-5. The mother of

the victim was examined as PW-3. The doctors who had medically examined the victim and proved her MLC were examined as PW-2 and PW-8. MLC of the victim was proved as Ex.PW-2/A by PW-2. The victim was examined by Dr. Ekta Mathur, Senior Resident, DDU Hospital (PW-8). The accused was arrested 25 days after the date of the incident i.e. on 10.10.2009. The Investigating Officer was examined as PW-16. Charge sheet was filed by the next Investigating Officer i.e. PW-15.

3. In the statement of the accused recorded under Section 313 Cr.P.C. he pleaded that he was innocent and he had been falsely implicated. No evidence was led in defence.

4. In view of the statement of the victim, her brother, her parents as also the medical record, the accused was convicted and had been sentenced as aforenoted.

5. On behalf of the appellant arguments have been addressed by learned Amicus Curiae Mr.Dadapani. It is pointed out that even presuming that the untoward act of rape had been committed upon the victim yet the identity of the victim not having been established by the

prosecution the accused is entitled to a benefit of doubt in this score and a consequent acquittal. This is the main thrust of the argument which have been addressed before this Court.

6. Submissions and counter submissions of the parties have been noted.

7. Admittedly, the incident occurred on 14.9.2009. This is clear from the version of the complainant who was the father of the victim. Surprisingly, the Investigating Officer did not care to record the statement of the victim under Section 161 Cr.P.C. till 10.10.2009 which is 25 days after the date of incident. No statement of the victim under Section 164 Cr.P.C. was also recorded. These are serious lacuna. It has rightly been pointed out by the learned public prosecutor that defects in investigation should however not sway in favour of the accused and the accused cannot be entitled to benefit for lapses in investigation.

8. Be that as it may, the rule of criminal jurisprudence is clear. The prosecution must stand on its own legs and it has to prove its case to the hilt. The identity of the accused has to be fully established. An innocent cannot be convicted for an offence which might have taken

place for which he was not the offender. There is no doubt about this proposition.

9. The accused was a stranger to the victim. This is clear from the version of the prosecution. He was not known either to the victim or to her family. As per the version of PW-4 (aged about 5 years), after the preliminary round of questions, she had on oath stated that the accused had committed galat kaam upon her. This was at the time when she was accompanied by her brother Suraj (PW-5). They were playing with their friends when the accused on the pretext of a toffee tempted PW-4 and took her to jungle. After leaving her brother the accused did “galat kaam” upon her. Injuries had been sustained on her body. When the accused was doing “galat kaam” upon her she had bit him on his arm. The biting by the victim on the arm of the accused was most relevant factor which has been taken into account by the Session Judge to hold that the identity of the accused stands established as the MLC of the accused conducted on 11.10.2010 by Dr.Bhavna (PW-1) had noted an oval bruise over the lateral aspect of right arm of the accused which was probably caused by a human bite.

10. In this context, before advertent to the testimony of brother of the victim (who had also accompanied PW-4 was an eye-witness to the accused) learned Amicus Curiae has drawn attention of this Court to the arrest memo of the accused. The arrest memo (Ex.PW-4/A) shows that the arrest of the accused was made on 10.10.2009. The MLC of the accused was conducted on 11.10.2009 in the afternoon at 1.40 p.m. Oval bruise over the lateral aspect of right arm of the accused was noted by the doctor who also opined that this was probably due to a tooth bite. Testimony of PW-10 is also relevant. He has joined investigation along with Investigating Officer (PW-16) at the time when the arrest of the accused took place. PW-10 has on oath deposed that he along with PW-16, prosecutrix and her parents went near a pond, Bindapur where on the pointing out of the prosecutrix the accused was identified and was arrested. ASI Saroj (PW-16) also deposed that on 11.10.2009 the father of the prosecutrix inform him about the presence of the accused near his house. She along with the staff went to the house of the complainant and arrested the accused from there. There is a discrepancy in the version of PW-16. She has given the date of arrest of accused as 11.10.2009 which is not the date of arrest as per the arrest memo.

Memo of arrest shows the date of arrest as 10.10.2009 which is also the version of PW-10.

11. The testimony of PW-5 is also relevant on this score. He is the brother of the victim. He was also the so-called eye-witness, along with PW-4, who had seen the accused taking away his sister. It was admittedly a winter month at about 8.00 p.m. when the incident had taken place; it was dark. The description of the accused has not been given by PW-5. No description has been given by PW-4. In fact no statements of PW-4 or PW-5 was recorded by the Investigating Officer under Section 161 Cr.P.C. right up to 10.10.2009. They had not given any description or detail about the accused. As noted supra no statement of the victim was recorded at all under Section 164 Cr.P.C. The accused was a stranger to both PW-4 and PW-5.

12. PW-5 had stated that he had seen the accused roaming in the Talabwala Park which information he had given to his father who in turn informed the police and the accused was arrested. This is not the version of PW-10. His version is contrary on this score. His deposition is to the effect that he along with the Investigating Officer and the

family of the victim had gone to the pond where on the pointing out of the victim the accused was arrested. PW-4 had given a still different version. She had on oath deposed that she had seen the accused later on with the police and identified him as the person who had done “galat kaam” with her. She had not stated that at her pointing out the accused was arrested which is the version of PW-10.

13. The object of holding a test identification parade (TIP) is twofold. Firstly, it is to enable the witnesses to satisfy themselves that the accused whom they suspect is the real one who had committed the crime. Secondly, it is to satisfy the Investigating Authority that the suspect is the real person whom the witnesses had seen the connected with the crime. A test identification parade assumes much greater importance when the accused is not known to the victim or the other witnesses as was so in the present case. Admittedly, no test identification parade was held.

14. The relevance of test identification parade was discussed by a Bench of this Court reported in MANU/DE/3020/2010 Lalit Kumar @ Sonu Vs. State of NCT of Delhi . In this context it was noted as under:

“It is true that the normal rule is that testimony of a witness, who does not know an accused form before and identifies him for the first time in the court as a person who had participated in the commission of the crime, without holding a previous identification parade does not carry much weight. The substantive evidence of a witness is the statement in court but as a rule of prudence, earlier identification proceedings are held in order to corroborate the testimony of a witness given in court as regards the identity of the accused who is not known to him from before.”

15. Admittedly, in this case PW-4 and PW-5 had seen the accused who was a stranger to them only on the fateful day which was on 14.9.2009 at around 7.00 – 8.00 p.m. on a winter night. The victim had been subjected to rape. Brother of the victim PW-5, however, saw the accused only for a fleeting moment and the victim had been enticed away by the accused and PW-5 had however left the scene.

16. At the cost of repetition, it is noted that no general description or features of the accused were given by either PW-4 or PW-5. In fact statement of PW-4 (victim) and PW-5 was not recorded under Section 161 Cr.PC up to 10.10.2009. Statement of the victim or her brother aged (7 years) was not recorded under Section 164 Cr.P.C at all. The accused was arrested 25 days late. The date of arrest is discrepant. The

Investigating Officer had given the date of arrest as 11.10.2009 whereas
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as per the version of PW-10 the accused was arrested on 10.10.2009. The only connecting circumstance which the trial judge had observed of the accused with the crime was the version of PW-4 is that she had bitten the accused on his right arm and the MLC of the accused evidenced an oval bruise over lateral aspect of his right arm.

17. Relevant would it be to reiterate that the statement of the victim was not recorded by the investigating officer right up to 10.10.2009; in this statement under Section 161 Cr.P.C. there is no mention whatsoever that at the time of incident the victim had bitten the accused over his right forearm. The appellant was examined by the doctor on 11.10.2010. An oval bruise on his right forearm had been noted by the doctor. The Trial Judge in para 13 of the judgment has relied upon this as a connecting circumstance noting that the victim had in her statement recorded under Section 161 Cr.P.C. had stated that she had bitten accused on his right forearm. However, this does not find mention anywhere in the statement of the victim. She has stated that only in her statement on oath in Court. This is vital improvement. Thus the submission of the learned counsel for the appellant that there was

nothing to connect the appellant with the crime carries strength.

18. All along the defence of the accused is that this is a case of unestablished identity and he is a stranger and in no manner the accused cannot be connected with the crime.

19. In this background the accused is entitled to benefit of doubt as the prosecution has failed to establish the identity of the accused. Benefit of doubt is given to the accused and consequently he is acquitted.

20. Appellant be released forthwith, if he is not required in any other case.

21. Appeal disposed of.

22. A copy of this order be sent to the Jail Superintendent for intimation and compliance.

INDERMEET KAUR, J

JULY 9, 2015

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