

\$~R-92 & R-93

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

% *Judgment reserved on : 01.12.2015*
Judgment delivered on : 04.12.2015

+ CRL.A. 962/2013 & CRL.M.(B) 8104/2015

SUNIL Appellant

Through Mr. Azhar Qayum, Advocate

versus

STATE (NCT OF DELHI) Respondent

Through Mr. Kewal Singh Ahuja, APP for
the State.

+ CRL.A. 963/2013

SANJEEV KUMAR @ KALA Appellant

Through Mr. Jivesh Tiwari, Advocate

versus

STATE (NCT OF DELHI) Respondent

Through Mr. Kewal Singh Ahuja, APP for
the State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 There are two appellants before this court namely Sunil and

Sanjeev Kumar @ Kala. Both of them are aggrieved by the impugned judgment and order on sentence dated 22.01.2013 and 28.01.2013 wherein each of them had been convicted for the offence under Section 376(2)(g) of the IPC. They have also been separately convicted under Sections 366/342 read with Section 34 of the IPC. The sentences awarded to each of them is RI 10 years for their conviction under Section 376(2)(g) of the IPC and to pay a fine of Rs.10,000/- in default of payment of fine to undergo RI for 2 years. For their conviction under Section 366 of the IPC they had been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.5000/- in default of payment of fine to undergo RI for 1 year. For their conviction under Section 342 of the IPC they had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.1000/- in default of payment of fine to undergo RI for a period of 3 months. Sentences were to run concurrently. Benefit of Section 428 Cr.P.C. had also been granted to the appellants.

2 Nominal roll of the appellant has been requisitioned. It reflects that as on date the appellants have undergone incarceration of 6 ½ years including remissions earned by them. Their jail conduct has been satisfactory.

3 The version of the prosecution has been unfolded in the testimony of the prosecutrix “SK” examined as PW-4. Her version was that she had come to live with her Tai in Delhi since last four months prior to the incident. She had come to Delhi for getting her handicap card prepared for the purpose of enabling her to obtain pension as a handicap person. While she was going to ease herself out of the house of her Tai, a person who was residing in the neighbourhood came from the back side and gagged her mouth with the help of a cloth and took her in a room where he was rearing pigs. Another person Meenu bolted the door from outside. Appellant Sanjeev and Sunil who were inside the room committed rape upon her. First Sanjeev committed rape upon her and this was followed by Sunil. On hearing her shrieks her Bhabhi Rinki (PW-1) and Tai Raj Rani (PW-2) opened the latch from outside and came inside the room and rescued her. Police was informed. Investigation was set into motion. The accused persons who were named in the FIR had been arrested. The victim was medically examined by Dr.Palavi Singh, Sr. Gynecologist and her MLC was proved as Ex.PW-5/A. Her vaginal swabs and her clothes were seized and were sent to the FSL for an examination. FSL reports were proved

Crl. Appeal Nos.962/2013 and 963/2013 Page 3 of 11

through the Senior Scientific Officer Ms.Poonam Sharma (PW-9) as Ex.PW-9/A and Ex.PW-9/B respectively.

4 In the statement of the accused persons recorded under Section 313 Cr.P.C. they pleaded innocence stating that they had been falsely implicated.

5 No evidence was led in defense.

6 On behalf of the respective appellants arguments have been addressed by the respective Amicus Curiae. It has firstly been argued that the trial before the Trial Judge was not conducted in a fair manner as the witnesses particularly PW-1 and PW-2 were not effectively cross-examined. The defense of the appellants all along has been that they have been falsely implicated in the present case because of enmity. This defense has not been construed in the correct manner. No injury had been suffered by the victim which supports the stand of the accused persons that this is a false implication. Attention has been drawn to the charge which had been framed against the accused persons where reference to the place of occurrence at D-337, Gupta Colony, Prahlad Vihar was made. Submission being that the version of the prosecution is otherwise. On all counts the appellants are entitled to a benefit of
Crl. Appeal Nos.962/2013 and 963/2013

doubt and consequent acquittal. Learned Amicus Curiae in support of his case has placed reliance upon 2008 CRI L.J. 2942 Suresh Govinda Nagdeve & Anr. Vs. State of Maharashtra and AIR 2004 SC 771 Kuldip Singh Vs. State of Delhi . The first judgment is on the aspect that if no injury is suffered by the victim, the appellant is entitled to a benefit of doubt. The second judgment has been relied upon to support his submission that incriminating circumstances not put to the accused in his statement under Section 313 Cr.P.C. are liable to be excluded from consideration.

7 Needless to state that these arguments have been refuted.

8 A large part of the version of the prosecution is based upon the version of PW-4. She is a cogent and coherent witness and had clearly stated that she is a handicapped person. She had come to Delhi to get her handicapped card prepared. She was living with her Tai in Delhi for about 3-4 months. On the fateful day when she had gone to ease herself at the bathroom located outside, one person in the neighbourhood came from the back and gagged her mouth; he took her to a room where he was rearing pigs. Another person namely Meenu bolted the door from outside. Sanjeev and Sunil who were inside the room committed rape

CrI. Appeal Nos.962/2013 and 963/2013

upon her one by one.

9 PW-4 was subjected to a lengthy cross-examination. She stated that there was no toilet/latrine in the house of her Tai and she had to go outside. She admitted that there was no light on the way. She had seen the accused persons as she was living in the neighbourhood since the last four months. She specifically named the assailants. She had raised alarm and her Tai (PW-2) and Bhabhi (PW-1) reached the spot. Relevant would it be to note that a suggestion has been given to PW-4 that the appellants had been falsely implicated because of the enmity between the family of PW-1, PW-2 and the appellants.

10 Version of PW-1 who is the Bhabhi of the victim has also been noted. She has fully corroborated the version of PW-4 stating that on the fateful day i.e. on 25.01.2010 her sister-in-law had gone to ease herself at the latrine near their house at about 10.00 p.m. On hearing the cries she went outside and her mother-in-law also joined her. The victim was lying on the floor and the appellant were also present in the room. The victim informed PW-1 that rape had been committed upon her by Sanjeev and Sunil. This witness was cross-examined but no suggestion has been given to her on the lines of the defense sought to be

Crl. Appeal Nos.962/2013 and 963/2013 Page 6 of 11

raised through the cross-examination of PW-4.

11 PW-2 (Tai of the victim) has also been examined. She had corroborated the version of PW-4. She stated that on hearing the shrieks of the victim she along with her daughter-in-law (PW-1) went to the spot. PW-4 was lying naked on the floor of the room. The victim had named the accused persons as her assailants. This witness was also subjected to a cross-examination but no defense on the lines now proposed in the cross-examination of PW-4 was put to her either.

12 The defense sought to be emanated through the cross-examination of PW-4 appears to be a dishonest defense because it firstly did not find mention in the cross-examination of PW-1 and PW-2 and secondly for the reason that even in the statement of the accused persons recorded under Section 313 Cr.P.C. this defense did not emanate. Had it been an honest defense it would have been consistent.

13 The testimony of PW-4 is fully coherent and cogent. Her statement was not recorded under Section 164 Cr.P.C. but it was her version which had become the basis of the FIR and which had set the investigation into motion and it was fully corroborated by PW-4 on oath in Court.

14 The law on the aspect of a rape victim is that if such a statement is credible it can become the sole basis of conviction and this is no longer *res integra*. If such a version is convincing and inspires credibility there is no reason as to why the Court should not rely upon it. It does not require corroboration.

15 In the instant case, the testimony of PW-4 is also corroborated by her medical evidence which had surfaced through her MLC (Ex.PW-5/A). The medical record of the victim revealed that she was medically examined in the midnight at 12.55 a.m. Lacerations were seen on both sides of her labia mejora and her hymen was ruptured. The history of sexual assault had also been noted in the MLC. This MLC further reflects that the victim had been brought to the Maharshi Balmiki Hospital by the PCR and the statement of H.C.Jaiveer (PW-11) evidences that at about 11.20 p.m. wireless message had been received in the local police station that a girl had been raped which was reduced into DD No.45A (Ex.PW-11/A). This medical evidence advances the version of the prosecution.

16 The scientific evidence which is the report of the FSL has been proved as Ex.PW-9/A. It evidenced human semen on the vaginal swabs

of the victim taken from the posterior vaginal area as also her vaginal washings. Human semen was also detected on the salwar of the victim. This piece of evidence also advances the version of the prosecution.

17 The defense of the appellants as already noted supra not being consistent could not be termed as an honest defense. The submission of the learned defense counsel that PW-1 and PW-2 were not effectively cross-examined is also negated as both PW-1 and PW-2 were cross-examined and the victim in fact was put to a lengthy cross-examination. She was examined as PW-4. The judgment of Suresh Givinda Nagdeve & Anr. (supra) relied upon by the learned counsel for the appellants in this background would not be applicable to the factual matrix of this case. The second judgment relied upon by the learned counsel for the appellant is also inapplicable for the reason that what incriminating circumstance has not been put to the appellant in his statement recorded under Section 313 Cr.P.C. has neither been stated nor argued.

18 The last submission of the learned counsel for the appellants is based on their conviction under Section 366 of the IPC. Submission being that the ingredients of aforementioned section are not fulfilled as even as per the version of the prosecution she had been taken to the room

CrI. Appeal Nos.962/2013 and 963/2013 Page 9 of 11

where rape had been committed upon her by another person (Meenu) and thereafter the alleged unholy act had been committed by the appellants.

19 This submission of the learned counsel for the appellants is without any merit.

20 Section 366 of the IPC pre-supposes a kidnapping or abduction of a woman for the purposes of an illicit act of inter-course. The version of the victim is that when she had gone to ease herself at the latrine outside the house of her Tai, her mouth was gagged by a person from behind her and thereafter she was taken to a room which was latched from outside by Meenu, where rape had been committed upon her by the appellants. It is not a case where the appellants alone were involved; the other two persons (role described supra) could not be arrested as they had managed to escape from the clutches of law. Nevertheless this was the act committed by the accused in complicity with the others and the aid of Section 34 of the IPC was thus rightly invoked for the conviction of the appellants which had followed under Sections 366/34 of the IPC. This conviction also calls for no interference.

21 The appellants have been granted the minimum sentence which

the sentence for 10 years for the offence of gang rape under Section 376 (2)(g) of the IPC. The sentence being minimum calls for no interference. Appeals are without any merit. Dismissed.

INDERMEET KAUR, J

DECEMBER 04, 2015
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