

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

RESERVED ON : 29th MARCH, 2016
DECIDED ON : 22nd APRIL, 2016

+ **CRL.A.519/2004**

BABU

..... Appellant

Through : Mr.Haneef Mohammad, Advocate
with Mr.Kamal, Advocate.

VERSUS

STATE (NCT OF DELHI)

..... Respondent

Through : Mr.Amit Gupta, APP.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

CRL.M.A.No.6183/2004 (Delay)

1. For the reasons mentioned in the application for condonation of delay in filing the appeal, the delay is condoned.
2. The application stands disposed of.

CRL.A.519/2004

1. The appellant – Babu impugns a judgment dated 25.05.2004 of learned Addl. Sessions Judge in Sessions Case No.129/2000 arising out of

FIR No.761/99 PS Mehrauli by which he was convicted under Section 376 IPC read with Section 511 IPC. By an order dated 26.05.2004, he was ordered to undergo RI for three years with fine ₹1,500/-.

2. Briefly stated, the allegations against the appellant as projected in the charge-sheet were that on 28.11.1999 at around 07.00 p.m. in the forest of village Satbari, he and his associates Munipal and Kabir in furtherance of common intention committed rape upon 'A' and 'R' (changed names). The incident was reported to the police and Daily Diary (DD) No.20A (Ex.PW-2/A) came into existence at 07.55 p.m. at PS Mehrauli. The Investigating Officer after recording victim - A's statement (Ex.PW-12/A) lodged First Information Report. Both the victims were medically examined. All the accused persons were arrested. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed under Sections 376(2)(g)/342/34 IPC against the appellant and his associates. In order to establish its case, the prosecution examined thirteen witnesses and relied upon various documents. In 313 Cr.P.C. statements, the accused persons denied their involvement in the crime and pleaded false implication. On appreciation of the evidence and after considering the rival contentions of the parties, the Trial Court, by the impugned judgment, acquitted both Munipal and Kabir of the charges. The appellant was convicted only under Section 376 IPC read with Section 511 IPC. It is pertinent to note that the State did not challenge their acquittal. Being aggrieved and dissatisfied, the instant appeal has been preferred by the appellant.

3. I have heard the learned counsel for the parties and have examined the file. Police machinery came into motion when incident was

reported and recorded vide Daily Diary (DD) No.20A (Ex.PW-2/A). It was informed to the police that two girls from Nagaland were sexually assaulted by the occupants of house belonging to Akbar Ali. The 'boys' were also from Nagaland. The investigation was assigned to PW-12 (SI Lokesh Sharma). When SI Lokesh reached the spot, he found both 'A' and 'R' present along with their friends Musilo and T.Joel. The incident of rape had not happened at that place. From the victims' statement, it was found that the rape was committed in the forest of village Satbari. It is unclear as to who was the informer.

4. It is relevant to note that the complainant 'A' did not opt to examine herself during trial. Allegations in the complaint were that she was sexually assaulted by Kabir and Munipal. The Trial Court was of the view that in the absence of her deposition, the prosecution was unable to prove commission of rape by Munipal and Kabir upon 'A'. Consequently both of them were acquitted. State did not challenge their acquittal.

5. It is apt to note that allegations against the appellant were that he committed rape upon 'R'. The prosecutrix / victim examined herself as PW-3 before the Court and accused the appellant to have committed rape upon her in the forest. Apparently, case of prosecution and that of the prosecutrix from the very inception was that she was ravished in the forest by the appellant. The Trial Court in the impugned judgment did not believe the prosecution and the prosecutrix. After examining FSL reports (Ex.PW-10/A and Ex.PW-10/D), the Court found that no semen was detected on R's underwear (Ex.PW-10/A). Similarly, semen could not be detected on the micro-slides having faint smear. MLC (Ex.PW-9/A) showed that 'R' had no injury marks on her external genitalia and there was no fresh hymen tear.

From the MLC of the prosecutrix and FSL reports, the Trial Court came to the conclusion that offence under Section 376 IPC could not be proved. The appellant was, however, held guilty for the offence of attempt to commit rape upon 'R'. This approach of the Trial Court cannot be accepted as the prosecutrix had categorically claimed to have been raped by the appellant and there were no allegations of mere attempt to commit rape.

6. PW-4 (T.Joel) did not support the prosecution on all material facts. He went to the extent of saying that he did not know 'A' and 'R'; the victims. He further stated that he along with his room-mate Musilo had not accompanied the two girls along with accused persons in the car on 28.11.1999 for sightseeing. He was cross-examined after seeking Court's permission by the learned Addl. Public Prosecutor. In the cross-examination, he admitted that in November, 1999, he and his friend Musilo used to live in village Chandan Hulla. He denied that on 27.11.1999 'A' along with her friend 'R' had come to their residence in the presence of T.Joel or that they all had made a programme for sightseeing or that next day accused Munipal brought the car and they travelled all in the said car for sightseeing. He further denied that on 28.11.1999 at about 06.00 p.m. they were taken in the car to a jungle where the victims were sexually assaulted and gang raped by the accused persons. Musilo, A's cousin to whom they had come to meet did not appear for examination. Adverse inference is to be drawn against the prosecution for withholding this material witness.

7. Major contradictions and discrepancies have emerged in the statements of the prosecution witnesses which are entirely inconsistent with complainant's statement (Ex.PW-12/A). Initially, the complainant 'A' had disclosed to the police that they had come to see her cousin Musilo at House

No.286, near Primary School, MCD, Chandan Hulla on 27.11.1999. Musilo's friend T.Joel also arrived there and they all made plan for sightseeing. Musilo called accused Munipal's car for that purpose. They agreed that all of them would go together in the maruti car bearing No.DL 6 CE 3954. First, they were taken to Lotus Temple and thereafter to 'quila' at Tughlakabad. Accused Munipal thereafter told them to see jungle and took them to Satbari jungle. When they were present there at around 06.00 p.m. he stopped the car and told that it was out of order. On the pretext to get it repaired, the accused took Musilo and T.Joel with them and confined them in a room. At the same time, accused Kabir and his associate came on Yamaha motorcycle. Firstly, Munipal committed rape on her at about 07.00 p.m.; thereafter Kabir committed rape on her. Kabir and Munipal caught hold of her and a third boy (the appellant) committed rape on her friend 'R'. Both Kabir and Babu fled the spot on the motorcycle. Munipal took her and 'R' in the car and they were dropped near village Chandan Hulla.

8. As observed above, 'A' did not appear to prove the version given by her to the police at the first instance. PW-3 'R' made vital improvements and deviated from the version given by 'A' to the police. In her Court statement 'R' deposed that on 28.11.1999 she and her friend 'A' had planned to visit Musilo - A's cousin in village Chandan Hulla. When they were on their way to the house of Musilo, Kabir and Babu met them and enquired as to where they were going. On being told that they were going to Musilo's house, they offered to drop them on their two wheeler scooter at his house. They took lift on the scooter. Instead of taking them to Chandan Hulla, they took them near a jungle and committed rape upon them. She was raped by the appellant whereas Kabir raped 'A'. Both of

them left them in the jungle. They came to Musilo's house on foot covering a distance of 2 – 3 k.m. She further deposed that accused Munipal did not commit rape with them.

9. The victim 'R' apparently gave clean chit to the accused Munipal and exonerated him completely. She denied if they had come to the house of Musilo on 27.11.1999 or had planned to go for sightseeing in car No.DL 6 CE 3954 belonging to accused Munipal on 28.11.1999. The prosecution has miserably failed to explain as to why there were vital inconsistencies in the two versions given by the victims.

10. Victim's statement does not inspire confidence. She was a college going student aged 22 years. No alarm was raised at any stage when she and her friend, 'A' were being taken on a different route on the scooter towards jungle. They travelled 2 – 3 k.m. after the incident but on the way did not raise hue and cry. No injuries were found on their bodies including private parts at the time of their medical examination. FSL reports (Ex.PW-10/A and Ex.PW-10/D) did not corroborate R's version. Registration number of the scooter / motorcycle used in the crime was not disclosed. No such scooter / motorcycle was recovered during investigation. As per the prosecution case, the victims along with their two friends and the accused Munipal had gone to the forest voluntarily in a car No.DL 6 CE 3954. No evidence emerged if the car had gone out of order or that both Musilo and T.Joel were confined in any room and in their absence both 'A' and 'R' were gang-raped. There are inherent contradictions and appellant's conviction under Section 376 IPC read with Section 511 IPC i.e. attempt to commit rape upon 'R', based upon the sole uncorroborated testimony of the prosecutrix 'R' cannot be sustained.

11. In the light of above discussion, the appeal is allowed. Conviction and sentence recorded by the Trial Court are set aside. Bail bond(s) and surety bond(s) of the appellant stand discharged. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

APRIL 22, 2016 / *tr*

