

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

Judgment Reserved on: May 17, 2016

% *Judgment Delivered on: May 25, 2016*

+ **CRL.A 848/2014 && CrI.M.B.603/2016**

AMIT KUMAR

..... Appellant

Represented by: Mr.Sidharth Yadav, Mr.Arvind
Kumar, Mr.Ankit Aggarwal,
Advts.

versus

STATE

..... Respondent

Represented by: Mr.Ravi Nayak, APP for State
with SI Sonu Ram PS Vijay
Vihar.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. By the instant appeal, the appellant challenges the judgment dated 20th May, 2014 convicting him for the offences punishable under Sections 376/506 IPC in FIR No.302/2011 registered at PS Vijay Vihar and the order on sentence dated 23rd May, 2014 directing him to undergo Rigorous Imprisonment for a period of ten years and to pay a fine of ₹20,000/- in default whereof to undergo rigorous imprisonment for two years for offence punishable under Section 376 IPC and rigorous imprisonment for a period of three years and to pay a fine of ₹10,000/- in default whereof to undergo rigorous imprisonment for six months for offence punishable under Section 506 IPC.

2. The brief facts of prosecution case is that on 4th August, 2011 Kamal Dass, PW-5 went to the police station Vijay Vihar with his

daughter/prosecutrix and made a complaint that their neighbour Amit and three other boys committed rape on his daughter. On the basis of this complaint DD No.35A was recorded and handed over to SI G.R. Tanwar, PW-13 who thereafter recorded statement of the prosecutrix, her mother Smt. Raj, PW-4 and her father Kamal Das, PW-5.

3. The prosecutrix stated that she lived with her parents and was studying in class 8th. On 2nd August, 2011, her mother PW-4 had gone to MAX hospital, Pitam Pura to see her father PW-5 who was admitted in the ICU. She was alone at home. Around 2.00 PM when she was sleeping, Amit who resides at House No.C-66, J.J. Colony, Sector-24, Rohini came to her room after opening the gate to which she objected by saying that “*bhaiya kahan aa rahe ho, mai ghar me akeli hoon*” but he did not listen. Thereafter Amit slapped her a number of times and tied her hands, mouth and eyes with chunni. He removed her clothes and raped her. She further stated that Amit was drunk at that time. Thereafter Amit went out and called three more boys. Those three boys also committed rape on her. She did not know those boys. She further stated that her father, PW-5 was discharged on the same day. When her parents came back home, she did not tell them anything because Amit had threatened to kill her if she disclosed about the incident to anyone. Next day when she felt unwell and had vomiting, she told her mother about the incident whereafter her parents brought her to the police station, where she narrated the whole incident and prayed for legal action against those persons. The prosecutrix was taken to BSA Hospital for medical examination which was conducted by Dr.Deepika Jagga, PW-3 who prepared the MLC Ex.PW-2/A. On the basis of the statement of the prosecutrix and MLC, FIR under sections 376(G)/506 IPC was registered.

Amit was apprehended and his medical examination was conducted vide MLC Ex.PW-3/A. After charge sheet was filed against Amit, charge for offences punishable under Sections 376/506 IPC was framed against him.

4. Learned counsel for the appellant contends that the allegations of the prosecutrix are not supported by her MLC. There are material contradictions in so far as in her statement before the Police she stated that she was raped first by Amit and thereafter by three boys whereas in the Court she deposed that Amit raped her four times in one hour. Though the prosecutrix claimed that she was tied with separate chunnis on her hand, mouth and eyes, however the MLC does not show any marks. The prosecutrix was living in one room tenement with houses close-by and even as per her version the opposite house was at a distance of 5-6 feet. The place of incident being a crowded locality and the time of alleged incident being 2.00-3.00 PM it was not possible that nobody witnessed Amit or the other boys entering or leaving the house of the prosecutrix. In examination-in-chief, the prosecutrix also names wife of Amit which does not find mention in the rukka. The Trial Court wrongly came to the conclusion that the prosecutrix was aged 14 years at the time of incident on the basis of birth certificate when the mother of the prosecutrix admitted that she had undergone tubectomy surgery on November 28, 1994 which document, the mother had handed over to the investigating officer. Thus the prosecutrix was in any case born before November 28, 1994 and was above 17 years of age. The mother of the prosecutrix admitted that a loan of ₹65,000/- was taken from the appellant's mother at the time of marriage of her elder daughter. Thus the motive to falsely implicate has been clearly established. The FSL report does not support that the offence of rape has been committed

on the prosecutrix. Statement under Section 164 Cr.P.C. of the prosecutrix was recorded belatedly after a period of 26 days and the investigating officer concocted a false explanation stating that the prosecutrix was unwell and that she had been threatened, however the prosecutrix does not say that she was threatened. The MLC of Amit conducted on August 06, 2011 immediately after arrest shows that he was suffering from pustular lesions on the penis and thus he could not have committed sexual intercourse particularly four times in one hour.

5. Learned APP on the other hand contends that the age of the prosecutrix was rightly held to be 14 years 6 months at the time of incident on the basis of school leaving certificate. Even if Amit was drunk he was not incapable of performing sexual intercourse four times in one hour. The prosecutrix has explained the delay in lodging the FIR stating that her father was admitted in ICU and she had been threatened by the appellant. Though the incident took place on August 02, 2011 between 2.00 and 3.00 PM she informed her parents at 7.30 PM on August 03, 2011 where after they took her to the Police station on the next day i.e. August 04, 2011, got lodged the FIR and medically examined the prosecutrix. The MLC of the prosecutrix shows that hymen was torn but she was not habitual of sexual intercourse. It was highly improbable that for recovering the loan of ₹65,000/- the parents and girl would stigmatize her by leveling allegations of rape. The offence of rape having been committed inside the house even though it is one room tenement, no public witness would be available. Conviction has rightly been based on the testimony of the prosecutrix by the learned Trial Court.

6. PW-4 Smt. Raj, mother of the prosecutrix deposed that on 2nd August, 2011 around 5.30 PM she returned home along with her husband who was

discharged from the MAX hospital. The prosecutrix did not inform anything about the incident on that day. On next day around 7.00 PM the prosecutrix abruptly started weeping and narrated the whole incident. Thereafter she along with her husband, brother and brother-in-law went to the police station. She also stated that the age of the prosecutrix was about 16 years at the time of incident. During cross-examination she admitted that they had taken a loan of ₹65,000/- from the mother of the appellant during the marriage of her elder daughter after mortgaging their property papers. She denied the suggestion that a false case has been registered against the appellant when he demanded the money back.

7. PW-5 Kamal Dass, father of the prosecutrix, corroborated the testimony of PW-4. During cross-examination he further stated that prior to the incident in question no altercation ever took place between the appellant and him.

8. PW-2 Dr.Deepika Jagga, Sr.Gynae, BSA Hospital examined the prosecutrix on 4th August, 2011 at about 10.00 PM. On examination she found that her vitals were stable and there was 3 cm nail scratch mark on the left arm. She opined that as per vaginal examination two fingers were easily introduced (painful). Hymen was torn and there was no bleeding per vaginal. The uterus was of normal size, firm, mobile and regular and there was no rectal injury. With respect to the nail scratch marks, she stated that since the scratch marks were healed, the duration/age of injury cannot be ascertained. She also stated that it is unlikely that the prosecutrix was habitual of sexual intercourse. In the MLC the alleged history was that four times sexual intercourse was performed.

9. PW-3, Dr.Kuldeep Singh, CMO, BSA Hospital who was deputed to

depose stated that Dr.Florence Almeida conducted the medical examination of Amit on 6th August, 2011 at about 9.00 PM vide the MLC Ex.PW-3/A. As per the MLC there were no fresh injuries and the sexual organs were well developed. PW-3 stated that the concerned doctor was of the opinion that there was no evidence to suggest that the patient could not perform sexual intercourse. As per the MLC there were pustular lesions on lateral aspect of penis on right side with discharge (pus and serum).

10. PW-13 SI G.R. Tanwar, the Investigating Officer stated during his cross-examination that the statement of the prosecutrix under Section 164 Cr.P.C. was recorded after 26 days of the reporting of the matter as she was not keeping fit. He collected the document with respect to the date of birth of the prosecutrix from the school (Ex.PW-13/DA).

11. PW-16 Mrs.Chanchal, TGT, RPSKV, Rithala stated that as per the school record, the date of birth of the prosecutrix was 5th February, 1997. The copy of the admission register, copy of admission form and copy of the SLC of the previous school were proved as Ex.PW-16/A to 16/C respectively.

12. Having noted the statements of the relevant witnesses it would be appropriate to consider the testimony of the prosecutrix and the contentions raised by learned counsel for the appellant. Though delay in lodging the FIR or getting the statement recorded under Section 164 Cr.P.C. in a case of rape ordinarily may not cast a doubt on the veracity of the version of the prosecutrix, however coupled with other circumstances, same may have bearing on whether reliance should be placed on the version of the prosecutrix or not. In the present case though in the rukka prosecutrix stated that she was first raped by Amit and thereafter by three other persons, in her

statement under Section 164 Cr.P.C. she stated that she was raped by Amit and she could not say that she was raped by three four boys, and when she was examined before Court she stated that she was raped three four times by Amit. Further PW-1 the prosecutrix stated that her father was admitted in the ICU at MAX Hospital and her mother was with him. While she was taking rest in the house at about 2.00 PM Amit came to her house and she knew him as he was residing in the neighbourhood. She told Amit that her parents were not at home and asked him as to why he had come on which he slapped her number of times. She cried, however he tied chunni on her mouth. He took off her clothes and tied her hands from the back side with the chunni and committed rape on her. Thus in the statement before the Court prosecutrix does not state that a chunni was tied on her eyes as well. When she was confronted with her previous statement wherein she had stated that after Amit committed rape he also called three of his other associates who also committed rape upon her, her explanation in the Court was that she had seen Amit alone and since he raped four times she was under the impression that four persons raped her. On a leading question put by the learned APP she again stated that after Amit committed rape he called three of his associates who also committed rape on her but she could not identify the three other associates. Thus there is a clear vacillation in the stand of the prosecutrix as noted above. The prosecutrix admitted that on one side of her house one Bindeshwari uncle lived and the house opposite was at a distance of 5-6 feet. She also stated that immediately after Amit left she met Neeru Didi wife of Amit whom she complained to, who also beat her. This is contrary to her version that after Amit left he got three more boys who raped her. As noted above mother of the prosecutrix

admitted that they had taken ₹65,000/- in the marriage of their elder daughter from Amit who had brought the same from his family after mortgaging the documents.

13. There is yet another material aspect to be noted in the MLC of Amit i.e. his suffering from pustular lesions on lateral aspect of penis on right side with discharge (pus and serum). Though the same does not affect the virility of Amit which has been discussed in-extenso by the learned Trial Court, however as per medical jurisprudence the same is a painful condition and would not permit Amit to commit rape on the prosecutrix four times within one hour. Though the claim of the prosecutrix was that the clothes she was wearing were not washed, however on examination no semen was detected on the clothes. The nail marks noted in the MLC of the prosecutrix were also opined to be old and not of fresh duration.

14. Supreme Court in the decision reported as (2012) 7 SCC 171 Narender Kumar Vs. State (NCT of Delhi) held-

“28. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character.

29. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. 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 witnesses have falsely implicated the accused. The 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. (Vide Tukaram v. State of Maharashtra [(1979) 2 SCC 143 : 1979 SCC (Cri) 381 : AIR 1979 SC 185] and Uday v. State of Karnataka [(2003) 4 SCC 46 : 2003 SCC (Cri) 775 : AIR 2003 SC 1639] .)

30. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. The conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of the prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected.”

15. In view of the fact that the version of the prosecutrix is not reliable, this Court need not go into the controversy as to the date of birth of prosecutrix being February 05, 1997 as noted in the school record or that she was born prior to November 28, 1994 when admittedly her mother underwent tubectomy surgery. For the discussion aforesaid, Amit Kumar is entitled to the benefit of doubt. He is acquitted of the charges. Superintendent Tihar Jail is directed to release him forthwith if not required in any other case.

16. Appeal and application are disposed of.

17. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

18. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 25, 2016
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