

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

Judgment Reserved on: August 03, 2017

% *Judgment Delivered on: August 16, 2017*

+ **CRL.A. No.451/2017**

DINESH CHAND YADAV Appellant
Through: Mr.Sitab Ali Chaudhary,
Advocate.

versus

STATE Respondent
Through: Ms.Kusum Dhalla, APP for the
State with W/SI Gunjan, PS
Pandav Nagar.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

1. The appellant Dinesh Chand Yadav has preferred this appeal against the judgment dated 21st November, 2016 and order on sentence dated 9th December, 2016 whereby he has been convicted for committing the offence punishable under Section 328/376/392/411 IPC and sentenced as under:

- (i) U/S 328 IPC : to undergo RI for one year and to pay a fine of ₹1000/- and in default of payment of fine to undergo SI for 15 days.
- (ii) U/S 376 IPC : to undergo RI for ten years and

to pay a fine of ₹5000/- and in default of payment of fine to undergo SI for three months.

(iii) U/S 392 IPC : to undergo RI for two years and to pay a fine of ₹1000/- and in default of payment of fine to undergo SI for 15 days.

(iv) U/S 411 IPC : to undergo RI for two years.

All the sentences were ordered to run concurrently with benefit of Section 428 Cr.P.C.

2. Law was set in motion on a Police Control Room on 29th December, 2013 at about 2:10 am being informed by the PCR van as under:-

*“AKSHARDHAM PULL KE UPPAR EK LADY JO ROO
RAHI HAI PARESHAN HAI YAHAN PAR BAITHI HUI
HAI”*

3. The information was received vide DD No.3A at PS Pandav Nagar, SI Sachin Tomar (PW-10) alongwith W/Ct.Geeta reached the spot in ERV-12 (gypsy) and found the complainant ‘A’ (name withheld to conceal her identity) sitting there in drowsy condition. She was taken to LBS Hospital where her MLC No.21328 was prepared and at that time she was ‘Unfit for statement’. At about 8.00 am, she was declared ‘Fit for statement’. Her statement was recorded wherein she stated that she was forced to consume alcohol by the appellant/convict and thereafter she was raped by him and his friend namely Dharmender @ Parvesh and also robbed of her jewellery, cash

and mobile. On the basis of statement made by the complainant, FIR No.629/2013 under Section 328/392/411/376 IPC was registered at PS Pandav Nagar.

4. During investigation, Dharmender @ Parvesh friend of the appellant could not be traced, hence chargesheet was filed only against the appellant.

5. The appellant was charged for committing the offence punishable under Sections 328/392/411/376-D IPC to which he pleaded not guilty and claimed trial.

6. To bring home the charge, the prosecution has examined 30 witnesses. Although initially, the appellant suggested to the complainant (PW-2) that he had physical relation with the complainant (PW-2) with her consent but during his examination under Section 313 Cr.PC, it was a case of total denial.

7. Learned Trial Court held the appellant guilty for the offences punishable under Section 328/392/376/411 IPC and sentenced in the manner stated above.

8. The appellant is challenging his conviction inter-alia on the following grounds:-

- (i) All the witnesses in this case are police officials or the doctors and there is no eye witness to the occurrence.
- (ii) The wife of the appellant was not examined by the prosecution to ascertain where he was on that night.
- (iii) There is discrepancy in the statement of complainant as to whether the liquor was purchased by the appellant or was brought by his friend namely Dharmender @ Parvesh.

(iv) The solitary statement of the complainant was not sufficient to convict him especially when she has admitted that she was having friendly relations with the appellant and they used to talk frequently on phone and she had met him earlier also.

(v) The learned Trial Court failed to consider the material contradictions in her deposition that initially the complainant stated that she consumed alcohol willingly thinking it to be a cold drink but subsequently, she stated that she was forced to consume alcohol by the appellant.

9. Ms.Kusum Dhalla, learned APP for the State has submitted that in a case of rape and that too of a married lady, no lady would put her married life to risk by making such type of statement and her solitary statement is sufficient to base the conviction. Learned APP for the State has submitted that on 29th December, 2013 at 2.10 am she was seen sitting on the flyover in the cold winter night. When she was taken to the hospital she was 'unfit for statement' which is sufficient to prove that the complainant was not a consenting party and that the appellant has rightly been convicted for the aforesaid offences.

10. I have considered the rival contentions and carefully perused the Trial Court Record.

11. During the course of hearing of this appeal, learned counsel for the appellant has contended that the physical relation with the prosecutrix (PW-2) was a consensual relationship which is established from their Call Detail Records as well her admission that she had earlier also met the appellant/convict and had accompanied him on the date of occurrence on her own sweet will. Therefore, it is necessary to

refer to the documentary evidence as well the testimony of PW-2 the prosecutrix at different stages i.e. while getting the FIR registered, making statement under Section 164 Cr.PC and her deposition in the Court. It is not in dispute that the prosecutrix herein is a married lady having two grown-up children and that on the night intervening 28th/29th December, 2013 she was present with the appellant in his vehicle and accompanied him on her own sweet will. The entire controversy revolves around the issue as to whether the appellant had physical relations with the prosecutrix with her consent or she was subjected to forcible sexual intercourse.

12. DD No.3A at 2:10 am was recorded at PS Pandav Nagar on the basis of the information received from the Police Control Room reporting about the lady present on the flyover on 29th December, 2013 and her condition, W/Ct. Geeta had to accompany him to render necessary assistance to the lady victim. As per MLC Ex.PW7/A, prepared at 3.10 am by PW-2 Dr.Virender Kumar who found the complainant to be in a drowsy state with alcohol smell positive and slurring speech. She was 'Unfit for statement' at that time. It is also recorded on the MLC that at 8.00 am she was declared 'Fit for statement' by the doctor at LBS Hospital. Thereafter her statement Ex.PW2/A was recorded which formed basis for registration of FIR No.629/2013, PS Pandav Nagar wherein she narrated the following facts:-

(i) She was aged about 31 years and got married 12 years ago. Her daughter was aged 11 years and son was aged 7 years at that time. Her husband was running a garments factory.

(ii) About one month prior to this occurrence, she received a call on her mobile No.88xxxxx642 (number withheld) from mobile No.9654193234 which was a wrong number. But thereafter she started receiving calls frequently from the same number and the caller disclosed his name as Dinesh Yadav employed as Cab Driver with a Call Centre.

(iii) The caller used to insist for meeting for which initially she declined.

(iv) A day before 29th December, 2013, he again called on her mobile to meet him as he was in Kamla Nagar near her house. She left home to meet him and accompanied him in his vehicle which was of white colour.

(v) They continued roaming here and there for about two hours and thereafter he called one of his friend asking him to bring two bottles as there was someone with him.

(vi) Dharmender (friend of convict) was made to sit into the vehicle who was carrying two bottles of alcohol and glasses and she was forcibly made to drink alcohol saying that it was cold drink.

(vii) When she was under the influence of alcohol and was losing her consciousness, she was raped by the appellant as well his friend in the moving vehicle and thereafter she was dropped near the flyover.

(viii) Before dropping her they also took the golden chain weighing 2.5 tolas, ear kundals, diamond nose pin, purse containing ₹20,000/- and mobile phone. (Ex.PW-2/A).

13. In her statement (Ex.PW2/K) under Section 164 CrPC, the prosecutrix 'A' has stated that she was married to Mohd. Sharif about

12 years ago and had two children. She started knowing the convict one month prior to this incident when she received a call from unknown number informing that company was selling affordable phone for which she refused. Same day she received a call from the convict informing her that the person who called from the company had given him her mobile number and he started insisting her for which she refused. When he repeatedly insisted for meeting and asking about her problem, as she was passing through a disturbed matrimonial life, she went to meet him on 4th December, 2013 at ISBT treating him as his brother. When she was going on rickshaw he called on her mobile and projected himself to be her friend and requested her to give him some money as he was in need. She helped him as a friend by giving him ₹1500. She treated the appellant as her friend. But the appellant was insisting her to marry him at all costs despite being informed that she was already married. He wanted her to elope with him with ornaments and money and also to give him some money to arrange their Court marriage for which once he had taken ₹12,000/- from her purse. She again received a call about 6-7 days prior to her making the statement (statement under Section 164 Cr.PC was recorded on 6th January, 2014) and she again went to meet the convict who was alone in the vehicle. The appellant purchased liquor from a *theka* and forced her to consume the same. She started feeling giddy. He also called one of his friend Dharmender @ Parvesh. Both of them committed rape on her after removing her salwar and she was also given beating. The convict Dinesh also removed her chain, *kundal*, *pendal*, nose pin as well as her mobile.

14. When the prosecutrix was examined during trial as PW-2, she stated that though she was married and having two children, she was having some dispute with her husband. The appellant started calling her frequently and insisted on marrying him despite knowing her marital status. He also projected himself to be unmarried. She admitted having met the appellant first time in December, 2013 near ISBT. She also stated that on the intervening night of 28/29th December, 2013, she was called by the appellant at Ghanta Ghar, Subzi Mandi and then she was taken by him in his white car and on the way, he purchased liquor and forced her to consume. He also called his friend. She was raped by them and the ornaments which she was wearing at that time and her other articles were robbed.

15. During her cross examination, she denied the suggestion that she was deposing against the appellant under pressure of her husband. **She also denied the suggestion that she made physical relations with the appellant of her free will and consent.**

16. The appellant has tried to establish the plea of consent in having physical relationship with PW-2 mainly on the basis of the following admissions by PW-2:-

- (i) She was frequently in contact with the appellant as is established from the Call Detail Records of their mobile.
- (ii) She herself left the home on the evening of 28th December, 2013, to join the appellant in his car.
- (iii) Prior to that date also she had been frequently talking to the appellant and had been meeting him.

(iv) On the date of occurrence also she left her home voluntarily to join the company of the appellant and the appellant had no reason to have forcible sexual intercourse with the prosecutrix who was a married lady with two grown-up children and was providing the money to the appellant to arrange for their Court marriage.

17. Consent for the purpose of Section 375 IPC has been dealt with by the Supreme Court in the case Roop Singh vs. State of Madhya Pradesh (2013) 7 SCC 89, it was held as under:-

“9. In State of U.P. vs. Chhotey Lal MANU/SC/0053/2011 : (2011) 2 SCC 550, the following passage from the judgment of a three-Judge Bench of this Court in State of H.P. v. Mango Ram on the meaning of “consent” for the purpose of the offence of rape as defined in Section 375 IPC, is quoted: (Chhotey Lal MANU/SC/0053/2011 : (2011) 2 SCC 550, SCC p. 560, para 20)

“20..... ‘13.....Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercise the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. (Mango Ram case MANU/SC/0527/2000 @2000) 7 SCC 224, SCC 230-31, para 13)”

18. It is a case where the complainant does not dispute that she used to talk very frequently on the mobile with the appellant and had even

paid money to him to arrange for the Court marriage. Thus, the contention raised on behalf of the appellant to the extent that the complainant had accompanied the appellant from her house voluntarily is not in dispute. Their frequent talks, meetings, feelings for each other are admitted facts. The fact which the prosecution was required to prove to base the conviction of the appellant was that the physical relation by the appellant with her on the night intervening 28/29th December, 2013 was without her consent. While noting that during his examination under Section 313 Cr.PC the appellant has totally denied the incident despite suggestion to PW-2 during her cross-examination that he had physical relations with her only with her consent, the plea of consent even at this stage fails for the following reasons:-

- (i) Had the complainant been a consenting party to the physical relation, she would not have been left on Akshardham Flyover by the appellant past midnight and that too after depriving her of her woollens. Her cap and shawl were recovered from his car and seized vide seizure memo Ex.PW2/D.
- (ii) During the last week of December in Delhi, the winter is at its peak. The physical and mental condition of the complainant when she was found sitting at the flyover was such that her speech was slurring and she was crying. She had neither the woollen clothes over her body to protect herself from the cold nor the mobile phone to seek any help by calling the police or friends/relations. Had she been a consenting party, she could not have been left there in a chilly winter night in that condition.

(iii) Had there been a consent by the complainant to have physical relations with the appellant, he would not have taken away her jewellery, mobile and cash and leave her far away from her house to suffer in that winter night in drowsing condition.

(iv) The recovery of mobile phone and ornaments of the complainant from the possession of the appellant and seized vide seizure memo Ex.PW2/H and Ex.PW2/J respectively further prove beyond any doubt that it was not a case of having physical relations on the consent. She accompanied the appellant in his car voluntarily and thereafter she was made to consume alcohol. While she was under the influence of alcohol, not only she was raped but was also deprived of all her belongings including mobile and left at the flyover where there was no help in sight for her at/after midnight on 28/29th December, 2013. But for the intimation given by Police Control Room to the concerned Police Station informing about her location and condition she would have remained there throughout the night. All these facts negate the plea of consent.

19. It has already been noted that during cross examination of PW-2 'A' – the complainant, the appellant has specifically taken a plea of having the physical relations with her on that night with consent but during his statement under Section 313 Cr.PC, it was a case of total denial.

20. In the case Munna Kumar Upadhyay vs. State of Andhra Pradesh (2012) 6 SCC 174 it was held as under:-

'It is settled law that the statement under Section 313 Code of Criminal Procedure is to serve a dual purpose, firstly, to afford to the Accused an opportunity to explain his conduct and secondly to use denials of established facts as incriminating evidence against him.'

21. The contention of the appellant that his wife was not questioned by the police as to where he was during that night is of no relevance when the entire recovery has been effected from his car/house at his behest. The appellant has failed to explain how the belongings of the prosecutrix (PW-2) came into his possession and recovered from him.

22. Since the plea of the consent taken by the appellant during cross examination of PW-2 fails, the learned Trial Court has rightly appreciated her testimony to hold the appellant guilty for committing the offence punishable under Section 376 IPC which calls for no interference by this Court.

23. Taking into consideration the totality of the circumstances and on appreciation of entire evidence supported by the doctor's opinion, I am of the considered view that there is nothing to disbelieve the version of the prosecutrix. The appeal seeking acquittal on the plea of consent fails and is accordingly dismissed.

24. As no argument has been advanced on behalf of the appellant in respect of the conviction under Section 328/392 IPC, the conviction of the appellant for the offence punishable under Sections 328/392 IPC is also maintained.

25. Considering that the appellant has been convicted for committing the offence punishable under Section 392 IPC, he could not have been convicted for committing the offence punishable under

Section 411 IPC in respect of the same property. Hence the conviction of the appellant under Section 411 IPC cannot be sustained and the same is hereby set aside.

26. In view of the above discussion the appeal is dismissed except to the extent that his conviction for the offence punishable under Section 411 IPC is set aside for the reason recorded in para 24 above.

27. TCR be sent back alongwith copy of this order.

28. Copy of the order be also sent to the appellant through concerned Jail Superintendent.

PRATIBHA RANI
(JUDGE)

AUGUST 16, 2017
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