

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

Date of decision: 1st November, 2017

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CRL.A. 683/2017

UMESH GIRI

..... Appellant

Through: Mr. Aditya Vikram, Adv.

versus

STATE

..... Respondent

Through: Mr. Radhika Kolluru, APP.
SI Amit Kumar, P.S. IP Estate.

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CRL.A. 814/2017

EHSAAN

..... Appellant

Through: Ms. Inderjeet Sidhu, Adv.

versus

STATE

..... Respondent

Through: Mr. Radhika Kolluru, APP.
SI Amit Kumar, P.S. IP Estate.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE I.S.MEHTA

I.S.Mehta, J (Oral)

1. Before us are the appeals, i.e. CRL.A. 683/2017 & CRL.A. 814/2017, for setting aside the impugned judgment on conviction dated 07.06.2017 and order on sentence dated 09.06.2017 passed by the learned Additional Sessions Judge/SFTC-2, (Central), Tis Hazari

Courts, Delhi in case No. 28971/2016 in FIR No.411/2016 under Section 376-D IPC registered at police station I.P. Estate, New Delhi wherein the appellants are convicted for the offence committed under Section 376-D IPC.

2. The brief facts placed before us, are that, on the basis of the information received vide DD. No. 5PPJPN, Ex-PW6/A, Sub-Inspector Manoj along with Constable Satish reached the spot near Mata Sundari College gate, and met the victim 'S' and the caller (Benami) of the DD. No. 5PPJPN. Consequently, after making the enquiry an FIR No. 411/2016 under Section 376-D IPC was registered at Police Station I.P. Estate. The accused Umesh Giri who was caught hold by the said caller, was handed over to SI Manoj at the spot and the victim 'S' also identified one of the rapist at the spot, i.e. Umesh Giri. A women Constable was called at the spot and the victim 'S' disclosed that two men committed rape on her person and one of them is accused Umesh Giri. The victim 'S' was sent for medical examination to the LNJP Hospital where the medical examination of the victim 'S' was conducted vide MLC No. EDI 010954 and later her statement was recorded.
3. The accused person Umesh Giri was interrogated and during the interrogation he admitted his guilt and made disclosure statement consequently, the co-accused Ehsaan too was interrogated and arrested, he too admitted his guilt.
4. Thereafter, after completion of the investigation, charge-sheet under Section 173 Cr.P.C. was filed before the Court below. Subsequently, on 04.11.2016 charge under Section 376-D IPC was

framed against the appellants/accused.

5. Both the appellants/accused persons did not prefer to lead defence evidence. Consequently, the learned Additional Sessions Judge/SFTC-2, (Central), Tis Hazari Courts, Delhi vide judgment on conviction dated 07.06.2017 convicted the appellants for the offence under Section 376-D IPC and vide order on sentence dated 09.06.2017 sentenced the appellants to undergo Rigorous Imprisonment for life in case No. 28971/2016 in FIR No.411/2016 under Section 376-D IPC registered at police station I.P. Estate, New Delhi.
6. The appellants aggrieved from the aforesaid judgment on conviction dated 07.06.2017 and order on sentence dated 09.06.2017 preferred the present appeals on the following grounds:-
 - i. That the Court below went wrong in material facts placed on record.
 - ii. That the PW8-Benami witness is an interested witness and his statement could not be relied upon in absence of examination of public witnesses.
 - iii. That PW2-Prosecutrix 'S' was planted under a conspiracy hatched by the PW8 for extortion of money.
 - iv. That IO failed to prepare the site plan at the instance of the victim 'S'.
 - v. That there is no external injury found on the person of the victim 'S'.
 - vi. That the prosecution failed to discharge its case beyond reasonable doubt and the prosecution case suffers from material

contradiction.

7. The learned counsel for the appellants has submitted that the appellants have not committed rape on the person of the victim. The MLC of the victim, i.e. Ex.PW2/A, gives a different story.
8. The learned counsel for the appellants has further submitted that there is a material contradiction between the statement of the victim-PW2 made under Section 164 Cr.P.C. and the statement of PW8. The benefit of the material contradiction between the statement of the victim-PW2 under section 164 Cr.P.C. and statement of PW8 goes in the favour of the appellants and since the appellants are innocent persons they be acquitted.
9. On the contrary the learned Additional Public Prosecutor for the State has vehemently opposed the contention of the learned counsel for the appellants and submitted that the judgment on conviction dated 07.06.2017 and order on sentence dated 09.06.2017 has rightly been passed by the Court below after adducing the documents/material placed on record, therefore, the present appeals be dismissed.
10. The prosecution in support of its case, i.e. Ex.PW2/C, of committing gang rape on the person of the victim 'S' on the intervening night of 06.09.2016-07.09.2016 has examined the victim 'S'/PW2 who has stated before the Court as under:-

"I am illiterate. I am housewife. I am residing with my mother in Bhopura, Ghaziabad, U.P. My family consist of my mother, father and brother Sonu. I am already married and having two sons. My husband resides in the village with my children. I go to village to meet my

husband and children and sometimes he accompanied me to Bhopura. On the day of incident my brother Sonu had quarreled me and had also given me beating and on that account I left the house and forgot the way and somehow I reached Delhi. Two Chhora met me. They opened the string of my Salwar and did "galat kaam". They also give me beating. Galat kaam means forcible sexual intercourse with me. I can identify both the accused persons if they are produced before me.

At this stage, both the accused persons produced before the witness. On seeing them witness identified to be the same person who had committed forcible sexual intercourse with her.."

11. The prosecution in order to prove its case conducted the medical examination of the victim 'S' at LNJP Hospital, Delhi on 07.09.2016 at 8 am vide MLC Ex.PW2/A. In the said MLC the narration given by the victim 'S' is reproduced as under:-

"...According to patient she has lost her way to her home and found by 2 people near Mata Sundari College who sexually assaulted her and then left the place after giving her Rs. 10/-..."

12. During the medical examination the details of injuries found on the person of the victim and exhibits as shown in the MLC Ex.PW2/A was preserved, sealed and were sent to FSL, Rohini.
13. The appellants/accused who were arrested were also medically examined and their blood samples, clothes which they were wearing at the time of the incident, etc. were also sent to the FSL, Rohini.
14. The contention of the learned counsel for the appellants that the appellants did not committed rape on the person of the victim 'S' on the intervening night of 06.09.2016-07.09.2016 at the bus stand near

Mata Sundari College does not seem to be correct in presence of the statement of PW2.

The statement of PW2 is natural, consistent and inspires confidence on the following material points.

15. It is in the statement of PW2 that on the date of the incident she had a quarrel with her brother on account of which she ran away from her home and reached Delhi where she met two unknown persons/appellants herein who took her to an isolated place and committed sexual assault on her person.
16. The incident was witnessed by PW8 Benami witness who made a call to the police and then the accused-Umesh Giri was handed over to SI Manoj by him.
17. The victim 'S' was taken to the LNJP Hospital, Delhi where she was medically examined and she herself has given the history of the incident to the medical doctor examining her.
18. The doctor who examined the victim 'S' at the LNJP Hospital, Delhi preserved and sealed the swab, cubic hair, clothes, etc. as shown in the MLC Ex.PW2/A and prepared a 'sexual assault kit' and sent the same to FSL, Rohini.
19. The appellants were also medically examined after their arrest and their blood samples, clothes, etc. too were preserved and sealed and sent to the FSL, Rohini.
20. The FSL report Ex.PW16/H is reproduced as under:-

"RESULT OF EXAMINATION"

*The alleles from the source of exhibit '3' (Blood sample of Umesh Giri) & exhibit '4' (Blood sample of Eshaan) are **accounted** in the alleles as from the source*

of exhibits 'lk1', 'lk2' (microslides of victim) & exhibit '7' (Underwear of victim). However female DNA profile was generated from the source of exhibit 'lp1' (Blood sample of victim).

CONCLUSION

*The DNA profiling **STAR Analysis** performed on the exhibits 'lk1', 'lk2' (microslides of victim), exhibit '3' (Blood sample of Umesh Giri), exhibit '4' (Blood sample of Eshaan) & exhibit '7' (Underwear of victim) provided is sufficient to conclude that the seminal stains present on the exhibits 'lk1', 'lk2' (microslides of victim) & exhibit '7' (Underwear of victim) **are similar** with the source of exhibit '3' (Blood sample of Umesh Giri) & exhibit '4' (Blood sample of Eshaan)."*

(Underlining supplied)

21. The FSL report Ex.PW16/H indicates that the seminal stains found on the underwear of the victim 'S' and the blood samples of the appellants/accused are of the same source which connects both appellants/accused person's involvement in committing gang rape on the person of the victim 'S'.
22. The contention of the learned counsel for the appellants that the appellants are falsely implicated on the ground of enmity is ruled out as the statement of PW2 is natural, consistent and inspires confidence and the statement of Benami witness PW8 is also natural and consistent on the material points and the minor material contradiction if any does not goes to the root of the present appeals as the statement of the victim 'S' itself inspires confidence to bring home the conviction of the appellants. Moreover, the statement of PW2, supported with medical history of the victim 'S', i.e. MLC Ex.PW2/A,

and further supported by the FSL report, i.e. Ex.PW16/H, which are independent corroboration, completely rules out the false implication of the appellants on the basis of enmity.

23. So far the contention of the learned counsel for the appellants that the site plan was not prepared at the instance of the victim 'S' is concerned the same loses its significance as the site plan Ex.PW16/A is prepared at the instance of the Benami witness PW8 at the spot.

24. So far non examination of the public witnesses is concerned the incident took place at deep night and during the cross-examination nothing has come out about the availability of the public witnesses; or PW8 was a beneficiary of false implication of the appellants in the present case; or hatching a conspiracy by the PW8 qua the appellants for extortion of money. However, PW8 who is a rikshaw puller, who was the witness to the incident and he made call to the police and there is nothing coming on record that PW8 was related with PW2 or he was known to PW2 prior to the incident. Therefore, non examination of the public witnesses loses its significance in the present facts and circumstances of the case.

25. Since both the appellants are involved in commission of sexual assault under Section 367-D IPC on the person of the victim 'S', the possibility of consent is also ruled out on the part of the victim 'S' under Section 114-A of the Indian Evidence Act, 1872. Reliance is placed on the judgment of the Apex Court in ***Md. Iqbal & Anr. State of Jharkhand***; CrI. Appeal Nos. 109-110 of 2011 decided on 22.07.2013.

26. As discussed above we find no merit in the present appeals.

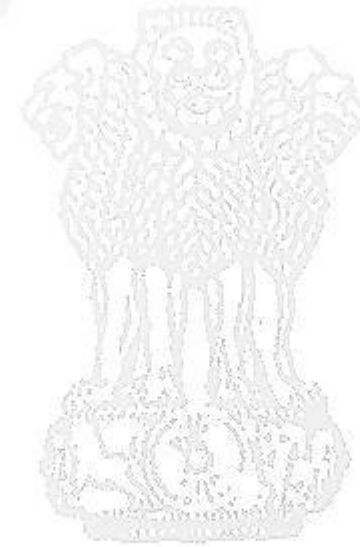
Consequently, the instant appeals, i.e. CRL.A. 683/2017 & CRL.A. 814/2017, are dismissed accordingly.

27. LCR file be sent back forthwith along with a copy of this judgment.
28. No order as to costs.

**I.S.MEHTA, J
(JUDGE)**

**S.MURALIDHAR, J
(JUDGE)**

NOVEMBER 01, 2017



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