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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 18th September, 2018

+ CRL. A. 60/2017

VIJAY

..... Appellant

Through: Mr.S.K.Sethi,Adv. (DHCLSC)

versus

STATE

..... Respondent

Through: Mr.Ravi Nayak, APP along with
W/ASI Sushma, PS Uttam Nagar

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This appeal has been filed challenging the judgment dated 19th May, 2012 passed by the learned Additional Sessions Judge-01(West) Delhi in Sessions Case No.91/11 finding the appellant guilty of offence under Section 376 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and the order dated 21st May, 2012 sentencing him to undergo RI for a period of ten years and a fine of Rs.2,000/-, in default of which SI for a period of one month, for the above offence.

2. The case of the prosecution is that in the night of 4th July, 2011 at about 8.49 p.m., an information was received that a girl has been raped at Radha Krishan Mandir, Om Vihar,

Phase-V, 40 Foota Road, Veer Bazar Road, Mohan Garden, Delhi. On receipt of this information, SI Jagdish Chander (PW-11) was asked to investigate the matter.

3. On reaching House No.80, Ram Chander Enclave, Mohan Garden, Uttam Nagar, SI Jagdish Chander found the mother of the prosecutrix holding the prosecutrix in her lap and there was bleeding from the vagina of the prosecutrix. The appellant had been caught hold of by the parents of the prosecutrix. SI Jagdish Chander (PW-11) brought the accused along with the prosecutrix and her parents to the police station Uttam Nagar where he handed over the custody of the appellant to the duty officer and he along with Constable Amit (PW-6) took the parents of the prosecutrix along with prosecutrix to Deen Dayal Upadhyay Hospital(DDU). In the said hospital, the prosecutrix was first examined by Dr.Deepshikha (PW-1) who had duly proved the MLC as Ex.PW1/A. The time of admission of the prosecutrix at the hospital is 9.55 p.m.

4. The doctor, PW-1, further deposes that on local examination, bleeding from vagina was present and there was no other external injury visible on the prosecutrix. The prosecutrix was therefore, referred to the Department of Gynaecology for further management and expert examination.

5. In the Department of Gynaecology, the prosecutrix was examined by Dr.Namita Gupta (PW-2) who duly proved her report as Ex.PW2/A. Ex.PW2/A records as under:

“C/S/B Gynae

2 year old girl brought by parent & police alleged h/o being taken by some known person and was brought back by the same person after the child was bleeding p/v- at that time.

That person is not giving any h/o sexual assault done by him.

pn- xxxxxx

Undergarments have been changed before coming to the hospital.

xxxxxx

L/e-Undergarments

Slightly soaked c blood

Child is not allowing exam.

Adv.

- Admit in CRT

- For EVA in OT

6. PW-2 also deposed that the undergarments of the prosecutrix were slightly soaked with blood at the time of her examination.

7. It may be noted that the prosecutrix on the date of the offence was aged only two years.

8. On recording the statement of the parents of the prosecutrix, the FIR was registered at 11.50 p.m. on the same date that is 4th July, 2011.

9. The appellant was formally arrested at 2.00 a.m. on 5th July, 2011 and was brought for medical examination to the Hospital on 5th July, 2011 at 2.00 pm.

10. The prosecution in support of its case examined 11 witnesses most relevant of those are PW-3 and PW-4, who are the parents of the prosecutrix. A reading of their statements clearly reveals that it is proved and not denied by the appellant

that the appellant used to work as Beldar with the father of the prosecutrix. The parents further state that on 4th July, 2011 at about 8.00 p.m., the appellant visited their house and on the pretext of getting something for the prosecutrix, he took the prosecutrix out. When the prosecutrix did not return after more than half an hour, the parents went in search of their daughter and on reaching the house of the appellant, they heard the noise of their child crying coming from inside the house. The mother (PW-3) of the prosecutrix peeped into the house and found the appellant naked from lower portion. The prosecutrix was also naked from lower portion and the appellant was holding her in his lap. The parents of the prosecutrix shouted, on which the appellant opened the door and tried to run away. He was, however, caught by the father of the prosecutrix (PW-4), and he telephoned the police. Though, they were subjected to cross examination, their testimony could not be dislodged on material aspects. Based on the statement of the parents, the Trial Court has found the appellant guilty of having committed the offence under Section 376 IPC with the prosecutrix.

11. The learned counsel for the appellant has urged that in the medical examination of the prosecutrix conducted by PW-1 and PW-2 as also in their statements, they have not stated that they found the appellant to have been raped. Mere bleeding from the vagina could not infer rape. He further submitted that the material evidence in form of the alleged blood soaked

undergarment of the prosecutrix and the neighbours have not been examined. Infact, it was an admitted case of the prosecution that the underwear worn by the prosecutrix has been changed, however, no effort was made to recover the same. He further submits that the FSL report does not in any manner connect the appellant with the offence. He further submits that the appellant had taken a categorical defence that he was being framed in this case only because the father of the prosecutrix (PW-4) owed a sum of Rs. 3,000/- to the appellant for his work as the Beldar, which he did not want to pay. Learned counsel for the petitioner submits that infact, there were contradictions in the statements of the witnesses.

12. I have considered the submissions made by the learned counsel for the appellant, however, I do not find any force in the same. PW-3 and PW-4, the parents of the prosecutrix have given complete details of the happenings of the night of 4th July, 2011. Though, they were cross examined, I do not find anything in their cross examination which would cast a doubt on their statements.

13. The timings of the MLC of the prosecutrix, registration of FIR and arrest memo also lead credence to the case of the prosecution. The appellant in his statement recorded under Section 313 of the Code of Criminal Procedure, 1973(hereinafter referred to as 'Cr.PC') has not set up any case of him being arrested at a later date or from a different place. The prosecution has also been able to prove that the appellant

was caught from his house itself, on the report being received. Therefore, not only is the testimony of eye-witness proved on record, the other attending circumstances also point to guilt of the appellant alone.

14. In *Puran Chand vs. State of Himachal Pradesh* (2014) 5 SCC 689, the Supreme Court has held that the lacuna in the medical examination cannot lead to the prosecution version being brushed aside totally. The prosecution version has to be judged by the other attending circumstances brought on record. The case would have to be examined with the aid of the accompanying circumstantial evidence in order to test the veracity of the prosecution case. Therefore, merely because, the doctors, i.e. PW-1 and PW-2, did not categorically state about rape having being committed on the prosecutrix, the prosecution case cannot be held to be doubtful.

15. As far as non recovery of the undergarment worn by the prosecutrix or non-examination of the neighbours are concerned, no doubt these are lacunas in the investigation, however, they again are not sufficient to cast a doubt on the prosecution case in the face of the direct testimony of the eye-witnesses in form of PW-3 and PW-4, the parents of prosecutrix. In *State of UP vs. Hari Mohan & Ors.* AIR 2001 SC 142, the Supreme Court has held that defective investigation cannot be made a basis for acquitting the accused if despite such defect and failures in the investigation, a case is made out against the accused.

16. As far as the defence version of the appellant being that appellant was falsely implicated in the case as father of the prosecutrix (PW-4) owed Rs.3,000/- to him is concerned, the same cannot be accepted. Apart from putting this suggestion to PW-4 and stating so in his statement recorded under Section 313 Cr.PC, the appellant led no evidence in this regard. As noted above, no evidence was led by the appellant of him not being present in the house on 4th July, 2011, or being apprehended therefrom. Such vague plea in defence, therefore, is not sufficient to cast a doubt on the case of the prosecution.

17. The contradictions being pointed out by the learned counsel for the appellant are not material in nature. Such contradictions cannot throw a doubt on the case of the prosecution.

18. In view of the above, I find no merit in the present appeal and the same is accordingly dismissed.

19. The Trial Court Record be sent back.

20. A Copy of this judgment be supplied to the appellant through the concerned Jail Superintendant.

NAVIN CHAWLA, J

SEPTEMBER 18, 2018
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