

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved On: 08.02.2019
Judgment Pronounced On: 28.02.2019

CRL.A. 328/2003

MANOJ KUMAR

... Appellant

Through: Mr. Akshai Malik, Advocate, Amicus
Curiae

versus

STATE (G.N.C.T) OF DELHI

..... Respondent

Through: Ms. Radhika Kolluru, APP for State
SI Ranbir Singh, P.S. Nangloi.

CRL.A. 543/2003

RAMESH KUMAR

... Appellant

Through: Ms. Inderjeet Sidhu, Advocate
(DHCLSC)

versus

STATE

..... Respondent

Through: Ms. Radhika Kolluru, APP for State
SI Ranbir Singh, P.S. Nangloi.

CORAM:

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

HON'BLE MS JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The present batch of criminal appeals, being Criminal Appeal Nos. 328/2003 and 543/2003 instituted under the provisions of section 374 of the

Code of Criminal Procedure, 1973 (hereinafter referred to as '*Cr.P.C*'), assail the judgment dated 29.11.2002 and order on sentence dated 30.11.2002, rendered by the *Ld. Additional Sessions Judge, Delhi*, in Sessions Case no.105/2000, arising out of FIR No.703/98 (hereinafter referred to as the 'subject FIR').

2. By way of the impugned judgement dated 29.11.2002 and order on sentence dated 30.11.2002, Manoj Kumar and Ramesh Kumar, the Appellants in these two appeals (hereinafter collectively referred to as 'Appellants'), were sentenced to undergo rigorous imprisonment for life and pay a fine of Rs.1,000/- each for the offence punishable under Section 376(2)(g) read with section 34 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC'). In default of payment of fine, the Appellants have been sentenced to undergo simple imprisonment for a further period of two months.

3. The fulcrum of the case of the prosecution is that on 12.10.1998, the Appellants enticed the prosecutrix (PW-2), who was unfamiliar with the city, on the pretext of dropping her to her sister's house and with the common intention, committed rape on the prosecutrix, who was 17 years old on the date of commission of the offence.

4. On 13.11.1998, at 12 PM, DD No. 6A was recorded by the Duty Officer, Ms. Darshana (PW-3) at the instance of the prosecutrix at P.S Nangloi, who complained about being raped by the Appellants on the intervening night of 12/13.10.1998. An FIR bearing No. 703/98 was registered upon the statement of the prosecutrix. Subsequent thereto, the prosecutrix accompanied the police officials to the crime spot where the Appellants were found sleeping on the roof of the premises where the prosecutrix was allegedly raped and were apprehended therefrom at around 1/1:30 PM by SI Partap Singh (PW-10), the IO in the present case, on the pointing out of the prosecutrix. Personal search was conducted of the Appellants [vide personal search memos Ex.Pw-8/B and Ex.Pw-8/C]. On the prosecutrix pointing out the crime spot, a site plan was prepared [Ex.PW-10/A].

5. During the course of investigation of the case, the prosecutrix, as well as, the Appellants were medically examined at DDU hospital by Dr. Anupam (PW-6) [Ex.PW-6/A and Mark B]. The exhibits were later sent for forensic examination [Ex.PA]. The prosecutrix also underwent an ossification test for assessment of her bone age. [Mark -XI and Ex. PW-1/A].

6. Thereafter, the prosecutrix was sheltered at Nari Niketan until her father received a telegram from the authorities; who subsequent thereto reached Delhi and was informed about the unfortunate incident; whereafter the prosecutrix joined the company of her father.

7. By way of order dated 31.03.2000, charges were framed under section 376(2) (g) of IPC against the Appellants. The Appellants pleaded not guilty and claimed trial. At the stage of evidence, in support of its case, the prosecution examined 10 witnesses. The statements of the Appellants were recorded under section 313 of the Cr.P.C. The Appellants denied committing rape on the prosecutrix and chose not to examine any witness in their defence.

8. The Trial Court whilst rejecting the defence set up by the Appellants, convicted them, essentially predicated on the testimony of the prosecutrix which was found to be consistent, credible and truthful.

9. Learned counsel appearing on behalf of the Appellants would canvass that the learned Trial Judge has erred in convicting the Appellants, inasmuch as, the Appellants have been falsely implicated at the instance of the prosecutrix who admittedly reached Delhi on 12.10.1998 at 8AM and joined the company of the Appellants thereafter, whereas the alleged offence is

stated to have taken place on 13.10.1998. Therefore, the only logical inference that can be deduced in these facts and circumstances is that the prosecutrix roamed around with the Appellants for an entire day of her own free will, without raising any hue and cry and hence was a consenting party.

10. The counsel for the Appellants would further submit that there has been an unexplained delay of 24 hours by the prosecutrix in the registration of the subject FIR in the present case.

11. The counsel for the Appellants would also asseverate that the medical evidence belies the allegation of rape against the Appellants, inasmuch as, although the MLC of the prosecutrix reveals that the hymen of the prosecutrix was found to be torn, the same was not a fresh tear. It further reveals the absence of any external injuries on the prosecutrix.

12. Learned counsel appearing on behalf of the Appellants further submits that there is discrepancy in the place of occurrence of the crime and the place of arrest of the Appellants.

13. Lastly, the counsel for the Appellants would urge that the solitary version of the prosecutrix in her examination in chief cannot be taken as the gospel truth in the absence of any corroborating evidence. In order to buttress this submission reliance would be placed on the decisions in **Rai**

Sandeep @ Deepu v. State of NCT of Delhi reported as (2012) 8 SCC 21; *Tameezuddin @ Tammu v. State (NCT of Delhi)* reported as (2009) 15 SCC 566 and *Krishan Kumar Malik v. State of Haryana* reported as (2011) 7 SCC 130.

14. *Per contra*, learned Additional Public Prosecutor whilst supporting the impugned judgment in its entirety, would urge that the findings of the Ld. Trial Court require no interference. It would be asseverated that conviction can be solely based on the testimony of the prosecutrix. However, if the court is dissatisfied, it may seek other evidence, direct or circumstantial to lend assurance to her testimony.

15. We have heard the counsel appearing on behalf of the parties and perused the entire evidence on record.

16. The case of the prosecution is that the prosecutrix who was 17 years old at the time of the commission of offence travelled from her native place in Muradabad at 9PM to Delhi alone in a train that arrived in Delhi at 8 AM on 12.10.1998. A bare perusal of her testimony would reveal that after alighting from the train at the New Delhi Railway Station, she proceeded to a nearby hotel to satiate her hunger where she was approached by the Appellants who enquired about her place of visit and enticed her into

accompanying them to her destination on the pretext that they were residents of the same area. The Appellants thereafter took her along with them in various buses around the city until the same evening, which acts of the Appellants the prosecutrix had strenuously objected to because of her assertion that it would not take that long to reach her sister's place. The Appellants had then threatened her with a knife stating that they would kill her in the event she raised an alarm. Subsequent thereto, the prosecutrix was taken to a secluded spot where she was ravished overnight. The prosecutrix managed to escape from the clutches of the Appellants on the following morning, leaving behind her *chunni* and slippers at the crime spot and managed to reach P.S – Nangloi, where she lodged her complaint.

It is further deposed by the prosecutrix that pursuant to lodging a complaint at the police station, she insisted that the police officers accompany her to the place of commission of offence in order to apprehend the Appellants who would otherwise escape. The Appellants were found sleeping on the roof of the said premises where the prosecutrix was raped and were arrested by PW-10, the IO, at the pointing out of the prosecutrix.

17. The prosecutrix was thereafter taken for medical examination [Ex.PW-6/A] and was then escorted to Nari Niketan. The Appellants were

also medically examined. The Exhibits were sent to the Forensic Science Laboratory (hereinafter referred to as the 'FSL'). In the FSL examination [Ex.PA], it was discovered that human blood comprising of the same blood group was present on the underwear of both the Appellants.

18. In order to appreciate the evidence of the prosecutrix, it would be relevant to refer to the testimony of PW-10 who is the investigating officer in the present case, in relation to the underlying offence. PW-10 has deposed that the investigation was handed over to him post registration of the subject FIR. During the course of the investigation, the Appellants were arrested on 13.08.1998, at around 1-1:30 PM from the roof of a wooden unoccupied room in the vicinity of the timber market near Amar Colony, Rohtak Road, Nangloi Extension (hereinafter referred to as the 'crime spot'), which was the place of the commission of the offence, at the instance of the prosecutrix. Further, PW-10 in his cross examination has further categorically deposed that the Appellants were apprehended from the crime spot and not the roof of Haryana Hotel, where they were employed, as suggested by them.

19. Dr. Amitabh Bhasin, the Chief Medical Officer, DDU Hospital (PW-1), on examining the ossification test report has opined that the age of the prosecutrix is around 17 years.

20. The criminal jurisprudence on the offence of gang rape as it stands today delineates the said offence under Section 376D of IPC which was inserted vide the Criminal Law (Amendment) Act of 2013 that came into force on the 3rd of February 2013 as follows :

“376D. Intercourse by any member of the management or staff of a hospital with any woman in that hospital.—Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine. Explanation.—The expression “hospital” shall have the same meaning as in Explanation 3 to sub-section (2) of section 376.”

21. Since the present case relates to an offence of gang rape committed on the prosecutrix on 13.10.1998, prior to the Criminal Law (Amendment) Act of 2013 coming into force, it axiomatically invokes the erstwhile proviso (g) to section 376(2) of IPC under which, the Appellants were charged and convicted for the said offence by the Ld. Trial Court.

22. For the sake of completeness, we may, at this stage, briefly recapitulate the relevant provisions of Section 376(2)(g) of IPC prior to Criminal Law (Amendment) Act of 2013:

“376. Punishment for rape.—

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years

and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,—

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of

imprisonment of either description for a term of less than ten years. Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2.—“Women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected woman or children or a widows’ home or by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3.—“Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.”

23. It is settled law that in cases involving sexual assault/rape, it is generally difficult to find any corroborative witnesses, except the victim herself and therefore, the evidence of the victim is suffice for conviction unless there exist compelling reasons for seeking corroboration. Thus, a conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. [Ref: Vishnu (alias) Undrya v. Sate of Maharashtra reported as (2006) 1 SCC 283; State of M.P v. Dayal Sahu reported as (2005) 8 SCC 122 and Ravinder Singh v. State being CRL.A 1509/2014].

24. In Gagan Bihari Samal v. State of Orissa reported as (1991) 3 SCC 562, The Hon’ble Supreme Court of India whilst observing that

corroboration is not the *sine qua non* for conviction in a rape case, held as follows :

“Corroboration is not the *sine qua non* for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.”

25. At the outset, the prosecutrix has clearly and unequivocally stated that she was raped by the Appellants, in her examination in chief, as well as, cross examination. Further, she has also deposed that while travelling in the bus with the Appellants, on being suspicious of the route not leading to her sister's house, she tried to raise an alarm but was threatened to silence by the Appellants, with a knife. In view of the foregoing, the testimony of the prosecutrix seems natural and inspires confidence. The same cannot be rendered unworthy of credence solely on the assertion that the prosecutrix did not raise an alarm. This circumstance cannot lead to the assumption to the effect that she was a consenting party, especially when no specific plea was taken by the Appellants that the prosecutrix was known to them.

26. Justice Krishna Iyer, whilst documenting his observations on absence of injuries on the victim, as well as, importance of corroborative evidence in rape cases, in his celebrated judgment in *Rafiq v. State* reported as (1980) 4 SCC 262 has very eloquently cited as follows :

“5. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances. Indeed, from place to place, from age to age, from varying life-styles and behavioural complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggrieved.

6. When rapists are revelling in their promiscuous pursuits and half of humankind — womankind — is protesting against its hapless lot, when no woman of honour will accuse another of rape since she sacrifices thereby what is dearest to her, we cannot cling to a fossil formula and insist on corroborative testimony, even if taken as a whole, the case spoken to by the victim strikes a judicial mind as probable.”

27. It is thus needless to state, in view of the settled jurisprudence that, absence of corroboration by medical evidence is not fatal to the prosecution’s case, if the oral testimony of the prosecutrix is credible and trustworthy. [Ref: *B.C Deva v. State of Karnataka* reported as (2007) 12 SCC 122]. Ordinarily, the weightage to be accorded to medical evidence is

only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. Unless, however the medical evidence completely rules out all possibilities whatsoever of injuries taking place in the manner alleged, the testimony of the eye-witnesses/prosecutrix cannot be discarded on the ground of alleged inconsistency between the oral testimony and the medical evidence. [Ref: Solanki Chimanbhai Ukabhai v. State of Gujarat, reported as (1983) 2 SCC 174].

28. In the present case, vide the MLC report of the prosecutrix (Ex.PW-6/A), it has been opined by PW-6 that no external injury was found on the prosecutrix and that there was no fresh hymen tear. The MLC reports of the Appellants (Mark B) find the latter capable to perform sexual intercourse. Be that as it may, the MLC reports are just a corroborative piece of evidence which is used as a rule of prudence. In keeping with the aforesaid legal position, presence of such injuries is not a *sine qua non* to prove a charge of rape and the testimony of the prosecutrix accredited as reliable is by itself sufficient to convict the Appellants.

29. Further, the FSL report records the detection of human blood stains, comprising of the same blood group on the undergarments of both the Appellants.

30. Even otherwise, the prosecution story clearly brings out that after the commission of the offence of gang rape, the prosecutrix got the subject FIR registered immediately upon escaping and at that time, insisted that the police apprehend the Appellants first before undergoing a medical examination. The said fact is corroborated by the testimonies of the prosecutrix, PW-3 and PW-10, the IO, which remain unrebutted.

31. The argument raised on behalf of the counsel for the Appellants *qua* discrepancy with respect to the place and time of arrest, is founded on the assertion that the arrest memo records the date and time of arrest as – 13.10.1998 and ‘9:40PM’, and that the place of occurrence and place of arrest are two different places. In this behalf, it would be relevant to observe that the figure ‘1’ is not clearly legible on the arrest memo and is being erroneously read as ‘9’ by the Appellants, to raise a dispute *qua* the time of their arrest. This argument is without any basis and unsustainable, since the MLC report of the prosecutrix itself records the day and hour of arrival as – 13.10.1998 and 4 PM, evidently conducted post the arrest of the Appellants. The contention of the arrest having been made subsequent to the medical examination is therefore untenable. Furthermore, the site plan was prepared by PW-10 who has controverted the suggestion that the Appellants were

arrested from the Haryana Hotel and has clearly and unequivocally deposed that the place of the incident is the same as the place of arrest, which was a wooden unoccupied room close to the Timber market, Amar Colony, Rohtak Road, Nangloi Extension. The same is reflected as 'mark A' on the site plan. A bare perusal of the site plan would also illustrate that Haryana Hotel, Timber market, Amar Colony and the crime spot are in close vicinity to each other and are infact, adjacent to each other. Recording of the same, as the place of arrest, on the arrest memo is evidently erroneous; although in our view, the same does not go to the root of the matter and is *a fortiori* inconsequential in view of clear and cogent evidence on record.

32. Insofar as the contention raised on behalf of the Appellants *qua* the unexplained delay of 24 hours by the prosecutrix in the registration of the subject FIR in the present case is concerned, the same is untenable inasmuch as, the time of incident is the intervening night of 12/13.10.1998 and the time of registration of FIR is 12:05 PM on 13.10.1998. Therefore, the time elapsed is very little for the court to draw an adverse inference against the testimony of the prosecutrix.

33. Now alluding to the Explanation to proviso (2) of the erstwhile Section 376(2), which embodies the principle of common intention, we

observe that the conduct of the Appellants in enticing the minor prosecutrix, who was unaware of the city, into accompanying them to a secluded spot, threatening her with a knife and then ultimately committing rape on her offers coherence to the element of *mens rea* present in their minds during the entire course of action and establishes the charge of common intention under Section 34 of IPC against the Appellants.

34. Justice Krishna Iyer with his legal prowess has very succinctly remarked in ***Rafiq*** (*supra*) that “A murderer kills the body but a rapist kills the soul.” Indeed the offence of rape is one of the gravest crime against human dignity, and the magnitude of its depravity escalates manifold times especially in child rape cases. It is trite to state that not only must the Courts have a sensitive approach while dealing with cases of child rape but they should also be adjudicated with alacrity. Delay in administering justice only leads to the abuse of the entire judicial process and has a cascading effect on the vulnerability of the victim, who in the present case has lived with the horror for over 20 years now. Before parting, we would like to observe that although age of the victim is not relevant in the present case, the gruesome and heinous offence was however, committed on a 17 year old girl who exemplified immense courage in not only rescuing herself but also pinning

her perpetrators down, who are prowling in the society like wild wolves by taking legal recourse immediately.

35. In view of the foregoing, after appreciating the evidence of the prosecution in its entirety for determining the commission of the offence under Section 376(2)(g) of IPC, there appears to be no circumstance that warrants an interference of this Court with the findings of the Ld. Trial Court.

36. Consequently, the conviction of the Appellants as recorded in the impugned judgment, as well as, the sentence awarded to both the Appellants by way of the order on sentence, are upheld.

37. The present appeals are accordingly dismissed, with no order as to costs.

38. Copy of the judgment be supplied to the Appellants through the Superintendent, Central Jail, Tihar and also be sent for updation of the records.

SIDDHARTH MRIDUL, J.

SANGITA DHINGRA SEHGAL, J.

FEBRUARY 28, 2019/ns/as