

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

% **Judgment delivered on: 24th December, 2019**

+ **CRL.A. 97/2015**

STATE (NCT of Delhi)

...Appellant

Through: Mr. Ashish Dutta, APP.

versus

ANIL KUMAR

...Respondent

Through: Mr. Govind Singh and Mr. D.K.
Thakur, Advocates.

CORAM:

JUSTICE SIDDHARTH MRIDUL

JUSTICE I.S.MEHTA

JUDGEMENT

I.S. Mehta, J.

1. Instant appeal is arising from the Judgment dated 25.09.2013 passed by the learned Additional Sessions Judge, (Fast Track Court) Dwarka Courts, New Delhi in Session Case No. 30/13 arising out of FIR No. 240/12 registered under Section 376 IPC at PS Bindapur, Delhi, whereby the respondent/accused was acquitted from the charges leveled against him.

2. The brief facts stated are that on 31.07.2012, on receiving the DD No.49A SI Omvir reached to the spot. On finding an offence committed pertains to rape, further investigation was handed over to

W/ASI Kusum by SHO. W/ASI Kusum Lata reached to the PS Bindapur and she alongwith L/Ct. Reema took the prosecutrix 'Y' to DDU Hospital leaving behind accused Anil Kumar at PS Bindapur and got her medically examined.

Thereafter, W/ASI Kusum Lata received two sealed *pulandas* alongwith one sample seal from DDU Hospital, same were seized vide Seizure Memo Ex.PW13/B and deposited with MHC(M) PS Bindapur on the same day vide Entry No.1153 Ex.PW15/A dated 31.07.2012. On inquiry from the victim she revealed that she was subjected to sexual assault by accused Anil Kumar. Statement of victim 'Y' Ex.PW1/A was recorded and *rukka* Ex.PW1/A was prepared. On the basis of *rukka*, FIR No. 240/12 was registered at PS Bindapur. Thereafter, W/ASI Kusum alongwith L/Ct. Reema, prosecutrix and her mother reached to the place of incident i.e. House No. D-113, Bhagwati Vihar, New Delhi. Site Plan Ex.PW16/B of the spot was got prepared on pointing out by victim. Thereafter, W/ASI Kusum seized one bed sheet which was lying on the bed in the room, where offence had been committed. W/ASI also recorded statement of landlord of the House, House No. D-113, Bhagwati Vihar namely Sunil Kumar PW5 and thereafter they came back to PS Bindapur, Delhi. On reaching police station, accused was interrogated and after interrogation accused was arrested vide arrest memo Ex.PW7/A and his personal search was done vide Memo Ex.PW7/B. Thereafter, medical examination of the accused Anil Kumar was conducted. W/ASI Kusum received sealed *pulandas* containing underwear, pubic hair, blood sample and semen sample alongwith one sample seal of CMO

from DDU Hospital, same were seized vide seizure memo Ex.PW12/A, same were deposited with MHC(M), PS Bindapur by IO W/ASI Kusum. Accused made disclosure statement Ex. PW16/C. On 31.07.2012 W/ASI Kusum got statement of prosecutrix 'Y' recorded under Section 164 Cr.P.C. before the Court and victim was sent to Nirmal Chhaya. On 07.08.2012 all exhibits were sent to FSL, Rohini for forensic examination through Ct. Ajay PW8 vide RC No. 118/21/12 Ex.PW15/B. IO obtained the records pertaining to date of birth Ex.PW9/C of the prosecutrix 'Y' from Sarvodya Kanya Vidyalaya, Uttam Nagar, New Delhi where she was studying. Further investigation was handed over to W/SI Domnica, after completion of the investigation, chargesheet under Section 376 IPC read with Section 3 POCSO Act, 2012 was filed. Charges under Section 376 IPC read with Section 3 of Protection of Children from Sexual Offences Act, 2012 were framed against accused Anil Kumar on 10.12.2012. Accused pleaded not guilty.

3. In order to prove its case, prosecution has examined 17 witnesses namely Ms Yogita Gupta (PW1), HC Ashok Kumar (PW2), Smt. Anita Gupta (PW3), Sh. Manoj Kumar gupta (PW4), Sh. Sunil Kumar (PW5), Dr. Neeraj Garg (PW6), Ct. Mohan Singh (PW7), Ct. Ajay (PW8), Sh. Rajesh Gupta (PW9), ASI Omveer (PW10), SI Shamsher Singh (PW11), Ct. Dharmender (PW12), W/Ct. Reema (PW13), W/SI Domnica Purty (PW14), HC Karan Singh (PW15), W/ASI Kusum Lata (PW16) and Ms. Ruchika Singla (PW17) after which the prosecution evidence was closed.

4. Thereafter, statement of accused was recorded under Section 313 Cr.P.C. Accused Anil Kumar examined Sh. Dinesh Kumar as DW1. Thereafter, defence evidence was closed.

5. After concluding arguments, Court below acquitted the accused from charge framed against him. Aggrieved from impugned Judgment State preferred present appeal.

6. Ld. APP on behalf of state has submitted that Ld. Trial court misread the evidence on record and reached to a wrong conclusion. He pointed out the statement of victim 'Y' before the Court is consistent with her Statement Ex.PW1/A recorded under Section 164 Cr.P.C..

7. Ld. APP has further submitted that age of victim 'Y' on date of the incident was 17.5 years and theory of the consent is immaterial in presence of Section 90 IPC. Counsel further submitted that impugned Judgment deserves to be set aside.

8. Per contra, Ld. Counsel for accused has submitted that Court below has rightly acquitted the accused from all the charges and present appeal of the State be dismissed.

9. The facts appearing on record are that alleged incident has taken place on 27.07.2012, FIR No. 240/12 was registered under Section 376 IPC read with Section 3 POCSO Act, 2012 at PS Bindapur on 31.07.2012. Date of Birth of the victim 'Y' is 21.04.1995, as such, on date of incident she was aged about 17 years and 3 months.

The POCSO Act, 2012 came into operation on 14.11.2012 vide Notification No. 2250 dated 09.11.2012.

10. Instant appeal requires two essentials to be proved:-

- i. Sexual intercourse by accused with victim 'Y';
- ii. Sexual intercourse was without victim's consent. In the event of consent, same should have been obtained by putting the victim in fear of death or hurt, or one in whom victim is interested in fear of death or hurt.

11. Although, testimony of the victim is usually sufficient to prove guilt of the accused in sexual offence cases. However, in the instant case the prosecution has to prove the act done was without consent or in the event of consent, same was obtained by putting the victim in fear of death or hurt, or one in whom victim is interested in fear of death or hurt.

12. The relevant statement of victim 'Y' is as under:

She stated that she left her school Sarvodya Kanya Vidyalaya, Uttam Nagar, New Delhi as usual and was walking towards her home at about 12:30 PM on 27.07.2012. On the way she met accused Anil Kumar at some distance who asked her to accompany him. On getting negative reply from the victim, accused got angry and made her sit in the cycle rickshaw in which he came. The accused took her to Bhagwati Vihar via Manas Kunj Road, they got down from the rickshaw at Bhagwati Vihar and started walking on foot. The accused was walking in front of her and he directed her to follow him. Thereafter, they reached to a house and accused opened the gate, victim saw that no one was present inside. He took her inside the room and took off her shoes, he laid her down on the bed and took off all her clothes, kissed her and pressed her breast. He then pulled down zip of his pant and tried to insert his male organ into her female organ, she cried in pain. He inserted his

male organ into her vagina a little bit and she did not permit him to do so completely as she was wreathing in pain. Thereafter, she put on her clothes and requested him to take her to her home. Accused made her sit on rickshaw and he paid charges of the rickshaw and told rickshaw puller to drop her to her home. Her parents were present at the home at that time and she narrated the incident to her mother in the evening.

13. The aforesaid statement of victim 'Y', aged about 17 years and 3 months, *ipso facto* is not sufficient to determine the guilt of the accused unless is corroborated with medical evidence, scientific evidence and other independent evidence. Her statement suffers from absence of allurement, or threat extended to her, or her parents, relatives, friends to whom she fears of death.

Following points are of relevance:

- i. In the instant case victim before Court has specifically stated that she was made to sit on the cycle rickshaw by the accused and reached to the house in Bhagwati Vihar where alleged crime was committed and thereafter, she was again made to sit on rickshaw and fare was given by the accused who told the rickshaw puller to drop the victim at her residence. Accordingly, said rickshaw dropped the victim at her residence on 27.07.2012. The victim did not explains in her statement that she has narrated, any allurement or threat that was given by the accused, to the rickshaw puller or to any passerby on the way from school to place of the incident.

- ii. Similarly, she in her statement does not explains why she has not narrated the entire incident to the rickshaw puller with whom she was travelling back to her residence from place of the incident. She was all alone and she does not utters anything to the rickshaw puller who took her to her residence.
- iii. The IO during investigation has not recorded the statement of either rickshaw pullers or any passerby who were material witnesses to prove allurement or kind of threat given to victim by accused on 27.07.2012 at the relevant point of time.
- iv. The statement of victim that accused inserted his male organ into her vagina a little bit and she did not permit him to do so completely as she was wreathing in pain does not corroborates with MLC Ex.PW6/A which indicates that hymen was intact and no external injury was found present on person of the victim.
- v. The FSL Report Ex.PA, too, indicates that there was no Male DNA found on the microslides having 'White Smears' which were taken from victim 'Y'.
- vi. The FIR was registered on 31.07.2012 in PS Bindapur i.e. after a delay of four days which has not been sufficiently explained. As per statement of victim 'Y', she has specifically stated in her statement before Court as well as in her statement under Section 164 Cr.P.C. Ex.PW1/A, that she narrated the factum of the incident to her mother on the same day in evening i.e. 27.07.2012, whereas, her mother PW3, deposed that the factum of the incident was narrated to her on 30.07.2012. This

unexplained delay of more than four days casts serious doubt on truthfulness of the prosecution version in presence of non-incriminating medical evidence i.e. MLC Ex.PW6/A and FSL Report Ex.PA.

Reliance is placed on Judgments in *Shankarlal v. State of Rajasthan* (2004) 10 SCC 632 and *State of Rajasthan v. Bhanwar Singh* (2004) 13 SCC 147.

- vii. The prosecution further failed to prove place of the incident i.e. House No. D-113, Bhagwati Vihar as shown in Site Plan Ex.PW16/B.

The victim has specifically denied having accompanied the police officials to the place of the incident which is reproduced as under:-

"I did not take the police officials to the house where I was sexually assaulted by the accused and I did not show the same to the police officials. police officials did not seize any article in my presence."

As per PW5 Sunil Kumar, Landlord of the House No. D-113, Bhagwati Vihar, the possession of aforesaid house was with one Jitender to whom he has rented out the house. Said Jitender during investigation has neither been cited as witness nor he was examined before the Court.

14. The non examination of two rickshaw pullers; absence of allurements or threat by the accused as per statement of victim 'Y'; nothing incriminating in MLC and FSL Report; delay in lodging FIR; material contradiction in statement of victim and her mother PW3; and

victim's denial of visiting place of incident with police officials; casts serious doubt about incident happening in the same manner as depicted by the prosecution for want of examination of one Jitender.

Reliance placed on Judgments in *Krishan Kumar Malik v. State of Haryana* (2011) 7 SCC 130 and *Rai Sandeep v. State (NCT of Delhi)* (2012) 8 SCC 21.

15. On the other hand, prosecutrix not being minor on date of the incident i.e. 27.07.2012, **in absence of visible protest i.e.**

"I had met the accused twice before the date of the incident. I had met him on my way after school hours. I could not tell anybody that the accused is taking me forcibly on the rickshaw as nobody was present at the spot."

she could possibly be the consenting party. As such benefit of doubt goes in favour of the accused.

16. As discussed above, we find no ground to interfere with the impugned Judgment and the view taken by the court below is upheld. We do not see any reason why the Appellate Court take contrary view only on the ground that another view too is possible. Reliance is placed on *Union of India v. Bal Mukund & Ors.* (2009) 12 SCC 161.

17. We find no force in argument of Ld. APP. The appeal is accordingly dismissed. The trial court record be sent back alongwith certified copy of this Judgment.

No order as to costs.

I.S.MEHTA, J.

SIDDHARTH MRIDUL, J.

DECEMBER 24, 2019