

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

Judgment delivered on 27th March, 2019

CRL. A. 1160/2013

STATE

.....Appellant

versus

PARSHU RAM

.....Respondent

Advocates who appeared in this case:

For the Appellant : Mr. Ravi Nayak, APP for the State
along with SI Mukesh Kumar (original IO)
presently with PS Vasant Kunj

For the Respondent : Mr. Anwesh Madhukar, Advocate (DHCLSC)
with Ms. Prachi Nirwan and Mr. Tushar
Gupta, Advocates

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

J U D G M E N T

SIDDHARTH MRIDUL, J. (ORAL)

1. The present appeal instituted by the State assails the judgment of the trial court dated 01.10.2011, in Session Case No. 110/2010, arising out of FIR No.266/2010 (hereinafter referred to as the 'subject FIR'), under Sections 363/376/308 Indian Penal Code (hereinafter referred as 'IPC'), registered at Police Station - Moti Nagar; whereby the trial court, whilst arriving at a finding that the prosecution has failed to establish the guilt of the accused; acquitted the latter of all charges.

2. The case of the prosecution as elaborated by the trial court is briefly encapsulated as follows:-

“In brief, the case of the prosecution is that on 21.8.10 the complainant Bablu made a complaint in the police station regarding the missing of his daughter namely Soni (hereinafter be referred as ‘prosecutrix’) aged about one year and 7/8 months during the intervening night of 19/20.8.2010. The prosecutrix was found missing from the divider near Ramesh Nagar Metro Station, where the prosecutrix was sleeping with the complainant. On the basis of the complaint, the FIR was registered. It is further the case of the prosecution that accused Parshu Ram who was sleeping with the complainant on the divider on the date of the alleged incident has taken the prosecutrix to back side of Ramesh Nagar Metro Station and committed rape upon the prosecutrix and had caused injuries on her person. The accused was apprehended by the complainant and was produced before the police and the police arrested the accused.”

3. The charge sheet having been filed under sections 363/376/308 IPC; the trial court framed charges against the accused under Sections 363/376(2)(f) IPC and under Section 308 IPC, to which the accused pleaded not guilty.

4. In order to establish the guilt of the respondent/accused, the prosecution has examined 13 witnesses. Subsequent thereto, the statement of accused was recorded under Section 313 Cr.P.C., wherein he denied the case of the prosecution in toto and pleaded false implication.

5. The trial court in the impugned judgment has dealt with the circumstances, relied upon by the prosecution in order to prove its case against the accused, beyond reasonable doubt, as follows:-

“(i) That the accused has pointed out the place of incident i.e. back side of Ramesh Nagar Metro Station. PW13, the investigating officer of the case has deposed that on 25.8.10, the accused had pointed out the place of concurrence vide memo Ex. PW12/D.

PW13 has already visited the place of occurrence on 21.8.10 along with the H.C. Ramesh. He has proved the site plan of that spot as Ex. PW13/B which is dated 22.8.10.

Under Section 27 of The Indian Evidence Act, The information given by the accused is admissible only if it leads to the discovery of the fact which is direct outcome of such information.

In the present case as the police is already aware of the place of the occurrence prior to the pointing out the accused, so this circumstance as to information as to the pointing out of the place of occurrence is not admissible is evidence.

(ii) Second circumstance on which the prosecution has relied upon is the past criminal act of the accused with the daughter of PW4. PW4 has deposed that one day her two daughters were sleeping in the room and the accused under the influence of liquor entered in the room where her daughters were sleeping. The neighbour caught the accused and gave beating to the accused and she was informed about the incident of the accused by her neighbour. They have not lodged any complaint to the police about this incident.

The incident as alleged by PW4 as to the criminal act of the accused has not been witnessed by PW4. There is no inquiry or investigation in the criminal act as alleged to be committed by the accused, because no complaint has been registered with the police. The evidence of PW4 is only hearsay evidence as to the alleged criminal act of the accused. Accordingly, the prosecution has failed to prove this circumstance.

(iii) The other circumstance on which the prosecution has relied upon is that in the intervening night of 19/20.8.10, the accused was also sleeping on the same divider near Ramesh Nagar Metro Station on which the prosecutrix along with the complainant Babloo was sleeping and in the morning the accused as well as the prosecutrix was found missing.

To prove this circumstance the prosecution has examined the complainant as PW5. PW5 has deposed that he along with the prosecutrix was sleeping on the divider of the road when he got up in the morning the prosecutrix was not found there. He lodged the missing report of the prosecutrix which is Ex. PW5/A. Later on, he gave a statement to the police that the accused Parshu Ram was also sleeping along with them. He has also deposed that at about 3 a.m. when he woke up he found the accused as well as the prosecutrix missing. He searched his daughter and the accused but both were not found. In cross examination, PW5 has deposed that he noticed about 15/20 rickshaw pullers used to sleep on the divider at Metro Station Ramesh Nagar.

The police has not examined any of the rickshaw puller. The testimony of PW5 is uncorroborated on the fact that the accused was sleeping along with him on the divider along with the prosecutrix. The incident is of the intervening night of 19/20.8.10. PW5 has made a complaint to the police on 21.8.10 which is Ex.PW5/A. PW5 in his complaint Ex.PW5/A has not named the accused as suspect as the complainant has simply made the complaint about missing of the prosecutrix. PW5 has named the accused in his supplementary statement recorded U/s 161 Cr.P.C. on 21.8.10. The prosecutrix is alleged to be recovered on 21.8.10 at about 7 p.m. behind Ramesh Nagar Metro Station. The prosecutrix was medically examined on 21.8.10 at about 7.20 p.m. as per her MLC Ex.PW7/A. PW7 has deposed that it might be 4/6 hours ago when the hymen was torn.

The alleged incident of rape with the prosecutrix may have happened at about 1 p.m. on 21.8.10. The time

period in between the missing of the prosecutrix at about 3 a.m. in the intervening night of 19/20.8.10 and the time of alleged rape at about 1 p.m. is about 34 hours. The accused has not been witnessed by any person along with the prosecutrix during the intervening period of 34 hours.

Keeping in view the facts that the accused was not named in the FIR, uncorroborated testimony of PW5 that the accused was also sleeping on the same divider and the fact that there is no evidence that the accused has been seen with the prosecutrix in between the period of missing of the prosecutrix and the time of alleged commission of offence, so I am of the opinion that this circumstance has not been proved beyond reasonable doubt by the prosecution against the accused.

(iv) The other circumstance on which the prosecution has relied upon that the accused was missing since the intervening night of 19/20.8.10 and was apprehended by the complainant on 24.8.10. The accused has put a suggestion to PW5 that he along with the accused had searched the prosecutrix. One suggestion has been put by the accused to PW13 that he had surrendered himself in the PS when he came to know that police was searching him.

PW5 has deposed that on 24.8.10, he has apprehended the accused and called the police and handed over the accused to the police officials. PW13 has deposed that H.C. Ram Niwas brought the accused and the complainant in the PS stating that they were quarrelling with each other. The prosecution has also failed to prove this circumstance as alleged.

(v) The FSL report which has been proved as Ex.PW13/C and Ex.PW13/D does not contain any findings involving the accused with the alleged offences.”

6. After appreciating evidence on record and for the reasons elaborated in the paragraphs extracted hereinabove, the trial court whilst relying on the dictum of the Hon'ble Supreme Court of India in **Ashish Batham vs State Of Madhya Pradesh** reported as **AIR 2002 SC 3206** *inter alia* to the effect that “*mere suspicion, however, strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and grave the charge is greater should be the standard of proof required*”, acquitted the accused of all charges.

7. Mr. Ravi Nayak, learned APP appearing on behalf of the State after inviting our attention to the testimony of PW-5, the complainant, who is also the father of the prosecutrix, as also that of PW-4, would urge that the case of the prosecution has been proved beyond reasonable doubt. It would, therefore, be submitted that the impugned judgment dated 01.10.2010 deserves to be set-aside, and the present appeal be allowed; and the accused be convicted and sentenced for the commission of offences under Section 363/376 (2)(f) IPC and under Section 308 IPC.

8. The submission on behalf of the State is founded primarily and substantially on the disclosure statement, whereby the accused is stated to have indicated the place where the commission of offence occurred, which fact is urged to be the core of the prosecution's case.

9. On the contrary, Mr. Anwesh Madhukar, Advocate appearing on behalf of the accused would support the findings arrived at by the trial court in their entirety. In addition, it would be urged that the testimony of PW-5 does not inspire any confidence amongst others; for the reason that although the Missing Person's Report was belatedly instituted two days after the incident, even at that juncture, the complainant did not express

any suspicion against the accused. It is further asseverated that there is no last seen evidence against the accused although the victim is stated to have been in his illegal custody for over 34 hours till her recovery on 21st August, 2010, at about 7:04 PM. Lastly, it is urged that the testimony of PW-7 clearly and unequivocally established that the hymen of the victim, which was opined to be torn, was fresh and caused within a period of 4 to 6 hours, prior to her physical examination by the doctor. In other words, it is urged that, it is improbable that although the victim is alleged to have been in illegal custody of the accused for almost 34 hours, the commission of offence as clearly inferable from the testimony of the attending doctor, occurred only 4 to 6 hours prior to her recovery.

10. In the present case, it is observed that the testimony of PW-4 can at best be only characterized as *hearsay* evidence. The prosecution has been unable to establish similar criminal act of the accused in past from the testimony of PW-4, since the same had not in fact been witnessed by her. The uncorroborated testimony of PW-5 falls woefully short of establishing the hypothesis that, the accused alone was guilty of offences with which he had been charged, in terms of the dictum of the Hon'ble Supreme Court of India in **"Tanviben Pankaj Kumar Divetia versus State of Gujrat"** reported as **AIR 1997 SC 2193** to the effect that "*The Court has to be watchful and avoid the danger of allowing suspicion to take the place of legal proof, for some times unconsciously it may happen to be a short step between moral certainty and legal proof*".

11. In our considered view, therefore, the legal position that obtains in a case of circumstantial evidence, as the present one, is that there is a long mental distance between 'may be true' and 'must be true' and conjecture

and suspicion cannot take place of credible evidence of the guilt of the accused.

12. In addition, the medical evidence available on record in terms of FSL reports Ex. PW-13/C and Ex. PW-13/D, does not contain any findings, even remotely involving the accused in the commission of the offence.

13. In view of the foregoing, we find no warrant to interfere with the findings and conclusions as hereinabove extracted, arrived at by the trial court in the impugned judgment dated 01.10.2011.

14. The appeal is accordingly dismissed.

(SIDDHARTH MRIDUL)
JUDGE

(MANOJ KUMAR OHRI)
JUDGE

MARCH 27, 2019
sm/na