

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 04.09.2020

+ **CRL. A. 547/2016 and CRL. M.(BAIL) 149/2020**

SUMITAppellant

Versus

THE STATE (NCT OF DELHI) Respondent

Advocates who appeared in this case:

For the Appellant :Mr Mahavir Singh and Ms Panchajanya B.
Singh, Advocates.
For the Respondent :Mr Ravi Nayak, APP for State.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning a judgment dated 27.02.2016 passed by the Ld ASJ, Saket whereby the appellant was convicted of the offences under Sections 376(1) and Section 506-Part II of the Indian Penal Code, 1860 (IPC). The appellant also impugns an order dated 05.03.2016, whereby he was sentenced to undergo seven years of rigorous imprisonment with a fine of ₹2,000/- and in default of payment of fine, to undergo simple imprisonment for a period of one month for the offence punishable under Section 376(1) of the IPC. He was further sentenced to undergo rigorous imprisonment for a period of one year for the offence

punishable under Section 506-Part II of the IPC. Both sentences would run concurrently.

2. The impugned judgment was rendered in connection with a case arising from FIR No. 583/2013 under Sections 376/506 of the IPC, registered with PS Ambedkar Nagar. The said FIR was registered with PS Ambedkar Nagar on 03.12.2103. The name of the complainant at whose instance the said FIR was registered is withheld and she is hereafter to as 'the prosecutrix'.

3. It is the case of the prosecution that the prosecutrix was living with her husband and children at a *jhuggi* at Shaheed Camp, Dakshin Puri. She would also intermittently reside with her mother as she was anemic and not keeping good health. On 01.12.2013, she had gone to her mother's house. It is alleged that on 03.12.2013, her husband went to his workplace and told her that he had got her medicine, which was lying at their home. It is alleged that when she came to her house to take the medicine, her neighbour (the appellant herein) was standing outside. He caught hold of her by her hand and pulled her inside. He pressed her neck and pushed her and made her lie down on the bed forcibly and raped her. Thereafter, he threatened to kill her children if she reported the said incident.

4. Before the Trial Court, the prosecution examined eleven witnesses and the defence examined five witnesses. The Trial Court evaluated the evidence and found the appellant guilty of the offences for which he was charged.

5. The appellant has challenged the impugned judgment, *inter alia*, on the ground that there are inconsistencies and contradictions in the statements of the prosecutrix. It is further contended that the prosecution failed to produce any evidence substantiating the alleged incident.

Evidence

6. Before proceeding further, it is relevant to briefly examine the evidence led by various witnesses.

7. The prosecutrix was examined as PW-2. She deposed that she lives along with her family in a *jhuggi* at Dakshinpuri. She further deposed that she did not remember the date of the alleged incident due to her ailments from which she had been suffering for about one and half years. No evidence has been produced before the Court regarding her ailments. She deposed that about one week prior to the incident, her husband had left her at her parents' house. On the day of incident, her husband called her and told her that he had brought some medicine for her and had asked her to come at their house and collect the same. She testified that when she reached near her paternal house at about 11/11:30 am, the accused caught hold of her, gagged her mouth and forcibly took her inside his house, bolted the door of his room, pinned her down on the floor of the room and forced her have her a sexual intercourse. She deposed that she tried to resist him and hit him with fists and kicked him but since she was ill, she could not prevent him from forcing himself on her. She alleged that the accused also tore her

clothes and he broke the string (*naada*) of her *salwar*. When she raised an alarm, the accused gagged her mouth. She deposed that the accused further threatened to kill her and her children if she decided to raise an alarm. She testified that after the incident, she again tried to raise an alarm. The accused opened the gate and let her go out and further threatened her not to disclose the incident to anybody. After coming out of the room, she informed about the incident to her husband, who advised her to go to PS Ambedkar Nagar and report the incident. Thereafter, she went to the police station and after half an hour, her husband also reached there. Thereafter, her statement was recorded at the police station (Ex.PW 2/A). After the registration of the FIR, she was medically examined.

8. In her cross-examination, she reiterated her narration of the incident as stated above. She further stated that she did not know if anybody had seen her in the locality in the morning of the day of incident as everyone had gone for their work and that nobody had met her on the way to her in-laws' house nor anyone had seen her there. She stated had been residing in her *jhuggi* after her marriage since more than ten years and that she did not remember the number of her *jhuggi*. She stated that she is anemic and prone to vomiting, giddiness etc. She stated that she had known the accused since her marriage as he was residing in the concerned locality. She further stated that she had never gone out with the accused in the past. She denied the suggestion that she had physical relations with the accused since the

last 3-4 years or had a crush on him or that he used to pay her some amount every month.

9. In her statement recorded under Section 164 of the CrPC, the prosecutrix stated that on 03.12.2013, after collecting the medicine from her in-laws' house, she was going to her mother's house when a boy who lives in her neighbourhood (the accused) came and picked her up in his lap, gagged her mouth and made her lie down on the bed in his house. She tried to raise an alarm but he started kissing her and raped her and committed such acts which only husband and wife do (*Main chilayi par usne mere saath galat kaam kiya. Mujhe kiss karne laga. Rape kiya. Miyan biwi ke jo sambandh hote hai*).

10. In her statement under Section 161 of the CrPC, she stated that she had gone to her parents' house on 01.12.2013, that is, just two days prior to the alleged incident and not a week before as stated in her statement before the court.

11. The husband of the prosecutrix was examined as PW-6 and he deposed that for last one and a half years from the date of incident, his wife (the prosecutrix) had been residing with her mother as she was ill and was better taken care by her mother. He deposed that on 03.12.2013, at about 9:15 am, he made phone call to his wife and told her that he had brought her medicine and same were kept in their house and that she should go there and collect the same. He deposed that at about 11:45 am, he received a call from his wife who told him that the accused had raped upon her and that she is in PS Ambedkar

Nagar. Thereafter, he went there and she told him about the incident and then she was taken for her medical examination.

12. In his cross-examination, he stated that his wife has been suffering from anemia and she had pain in her hands and legs and that she is getting treatment for the same. He reiterated that after her wife became ill, she generally resided with her mother but came to their house to collect medicine.

13. WSI Kamini Gupta, who was posted as SI at PS Ambedkar Nagar on the day of incident, was examined as PW-9. She deposed that on 03.12.2013, the prosecutrix came to the police station and gave her statement (Ex. PW2/A). She stated that on the basis of the same the FIR in question was registered (Ex. PW 2/A). She testified that she apprehended the accused from his house; brought him to the police station and arrested him (Ex. PW 4/A). She deposed that Ct. Ranbir and HC Omvir were also present with her. Personal search of the accused was conducted. She also got the medical examination of the prosecutrix conducted (MLC Ex. PW 7/A). The examining doctor handed over the exhibits pertaining to the prosecutrix along with the sample seal, which she took into possession (Ex. PW 9/A). She also took into possession the clothes (*salwar* and *kameej*) of the prosecutrix. She converted the same to a parcel, sealed it and seized vide memo Ex. PW 9/B. She deposed that she got the also accused medically examined through Ct. Ranbir (MLC Ex. PW 8/A). And, recorded his disclosure statement. She testified that on 04.12.2013, the

statement of the prosecutrix was recorded under Section 164 of the CrPC pursuant to her application.

14. Ct Ranbir Singh was examined as PW-4 and he deposed that on 03.12.2013, he had joined the investigation with the IO (PW-9). He deposed that the accused was present in the police station and was arrested by the IO in his presence. He deposed that the accused's personal search was conducted by him and his disclosure statement was also recorded. Thereafter, on the instruction of the IO, the accused was taken to AIIMS hospital where he was medically examined. He deposed that the examining doctor handed over the exhibits along with the sample seal to him, which he handed over to the IO (Ex. PW 4/D).

15. Dr Devendra Siva Karthik, Senior Resident, Department of Obstetrics and Gynecology, AIIMS was examined as PW-7. He deposed that he had seen the MLC (Ex. PW 7/A), which was prepared by Dr Shweta Rai and per the said MLC, a vaginal discharge was found at the time of examination. Hair clipping, vaginal swab and undergarments of the prosecutrix were taken as samples.

16. Dr Shashank Pooniya was posted as Senior Resident, FMT, AIIMS at the material time and he was examined as PW-8. He deposed that on 03.12.2013, at around 6:30 pm, the accused was brought by police for his medical examination. It is deposed that he was examined and nothing was found to suggest that he was incapable of performing sexual intercourse in normal circumstances. He prepared an MLC (Ex. PW8/A) and also took the exhibits pertaining

to the accused, that is, blood in gauze, penile swab, control swab and underwear. He sealed the same handed it over to the constable with the sample seal.

17. Dr Dhruv Sharma, Asst. Director, Biology, FSL Rohini was examined as PW-10. He deposed that on 27.12.2013, four sealed parcels were received by them for examination. The said parcels were de-sealed and exhibits were taken out. He examined the exhibits and gave a detailed report which was sent to the police along with a forwarding letter (Ex.PW9/E). He deposed that DNA profile generated from the source of exhibit 5 (blood sample of the accused) was found to be accounted in the male DNA profile generated from the source of exhibit 1 (vaginal smear of the prosecutrix) and exhibit 3 (underwear of the prosecutrix).

18. Mr Martin Tigga, who stays opposite to the house of the accused, was examined as DW-1. He deposed that he used to often see the prosecutrix peeping into the house of the accused and that when he used to inquire about the same, she would tell him that she is looking for the accused. It is deposed that he had objected to the same but the prosecutrix told him that she wanted to borrow money from the accused. He deposed that on 03.12.2013, at about 9-9:30 am, when he returned from his morning walk he saw that the prosecutrix and her elder sister's husband (*jijaji*) were desperately looking for someone. He further stated that he had not seen the prosecutrix when she was going near the house of the accused after taking the medicine.

19. Smt Saroj, who lives adjacent to the house of the accused, was examined as DW-2. She deposed that she had reached the police station at about 12 noon on the date of incident. She saw that there were large number of people gathered there from her *mohalla*. She further deposed that the prosecutrix wanted to withdraw her complaint but the IO did not allow her to withdraw the same. She testified that the accused was falsely implicated in the case because if the prosecutrix was raped by the accused, she would have got to know as she was living adjacent to the house of the accused.

20. Sh Jeetu, who is a friend of the accused and lives near his residence, was examined as DW-3 and he deposed that for past 2-3 years, the prosecutrix and accused were having good relations. He stated that he had objected to their friendly relations enquired as to why she was after him. The accused had responded the prosecutrix is in need of money and that is why she has been borrowing money from him. DW-3 testified that about 20-25 days prior to the alleged incident, the accused had told him that the prosecutrix loved him. He had asked the accused as to why he was involved with the prosecutrix who was married and much older to him. He had asked the accused to complain about the prosecutrix but he had refused to do so.

21. Smt Nutan has been residing in the same locality as of the prosecutrix and the accused since last 20 years and she was examined as DW-4. She deposed that she has known the accused since his childhood. She testified that the prosecutrix and the accused has very cordial relations and they used to visit each other's house for last 3-4

years. It is further deposed that she had seen the prosecutrix sitting in the house of the accused on 4-5 occasions. It is deposed that she had asked the prosecutrix the reason for visiting the accused's house, to which she replied that there was no harm in visiting a neighbour. She had further told DW-4 that she had been borrowing ₹50 – ₹100 from the accused as she was in dire need of money. She deposed that she was present at the police station on the day of the alleged incident and at about 7:30 pm in the evening, she had seen the lady police official taking away the prosecutrix forcibly to the hospital.

22. Sh Jatin was examined as DW-5. He deposed that he had known the accused since 2012 and the accused used to work with him as a driver in his tour and travel agency. He deposed that he had seen the prosecutrix with the accused around 4-5 times in NOIDA and that the prosecutrix used to come meet the accused in NOIDA. He further deposed that the accused used to take advance money from him telling him that the prosecutrix was his aunty and his neighbour who was having a financial difficulty. He stated that the accused had taken advance money from him on 7-8 occasions. He deposed that the other drivers had seen the accused and the prosecutrix together and had told him about their affair.

Submissions

23. Mr Mahavir Singh, learned counsel for the appellant contended that the present case was a case of consensual sexual relationship between two consenting adults. According to him, they were in

relationship for more than three years. He submitted that the appellant had been enticed into the relationship by the prosecutrix who was residing just two houses (*jhuggies*) away. He submitted that the prosecutrix was in dire need of money and was in the habit of borrowing small amounts from the appellant who was working as a driver. He stated that this fact has been concealed by the prosecutrix. He stated that the relations between the prosecutrix and her husband were obviously strained as she was living separately at her parental house. The MLC also recorded that the prosecutrix had intercourse with her husband about one year back and this too clearly indicated that they had practically separated. He further contended that the prosecutrix was in love with the appellant and wanted to marry him. However, he had declined and therefore, she had framed him in the present case in connivance with her husband (PW6), the Police/IO (PW9) and her brother-in-law (*Jija*). He submitted that the brother-in-law of the prosecutrix had admittedly met her before she had proceeded to the PS.

24. Next, he contended that the prosecution had failed to prove the date, time and the place of the incident and there were serious contradictions in the statements of PW2 (the prosecutrix), PW6 (the husband of the prosecutrix) and PW9 (IO). He submitted that there were no injury marks, bruises or scratches on any of the body parts of the prosecutrix and the same was established by the MLC (Ex.PW7/A). He contended that this would belie the testimony of the prosecutrix that there was any struggle or resistance from the

prosecutrix. She had alleged that the appellant had thrown her on the bed and had forcibly established physical relations with her. He earnestly argued that the MLC did not establish the same.

25. Next, he submitted that although it was the prosecution's case that the prosecutrix was undergoing any treatment at a Government dispensary, yet there was nothing on record to establish the same. There was also no material to establish that the prosecutrix was suffering from anemia. He contended that the appellant resided in a highly congested and a thickly populated area and it was improbable that nobody had seen the prosecutrix being gagged and pulled inside the house. There was no witness who had heard the prosecutrix screaming or raising any alarm. He also stated that PW9 (IO) had not made any inquiries from the neighbors and therefore, the investigation in this case was also highly flawed.

26. Mr Singh further submitted that one of the vital pieces of evidence, namely, the *nada* (string) of the salwar, which was allegedly broken by the appellant had not been produced. He submitted that according to the prosecution, the prosecutrix had proceeded directly from the place of incident to the police station. He submitted that it was inconceivable how a woman could have walked in a salwar without a *nada* for a considerable distance as claimed by her. He submitted that it was obvious that the clothes of the prosecutrix had been planted.

Reasons and Conclusion

27. At the outset, it is necessary to note that it was not the appellant's case before the Trial Court that he was having an affair with the prosecutrix or had engaged in any consensual sexual intercourse. His statement under Section 313 of the CrPC was recorded. The appellant's response to question no. 20 is relevant and the same is set out below:

“Q. 20. Why is this case against you?

The prosecutrix has been coming to our house for the past 2-3 years and used to complaint to us about her husband ill treating her and the children. She also used to borrow money at least 2 – 3 times in a month sometimes Rs.100 – 500 from me or my mother. Initially she used to return the money, however, about 5-6 months before filing of the FIR, she stopped returning our money. About 1 ½ months before filing of the FIR she told me that she liked me and had fallen in love with me and would like to marry me. She told me that she was very fed up with her domestic situation and asked me to marry her. She told me that she would leave her husband and her children and stay with you. I never reciprocated her feelings as I used to consider her as my elder and call her aunty. I used to try my best to keep my distance from her. About 20-25 days before lodging of the FIR, the prosecutrix threatened me that in case I do not speak to her or marry her, I should be ready for the consequences. On 03.12.2013 HC Omvir came to my house and took me to the police station. Persons from my locality also followed me to the police station. In the police station, I found the

prosecutrix with her husband and the IO and I was informed about the case against me. HC Omvir demanded Rs.30,000/- for finishing the case. When I refused, HC Omvir demanded Rs. 30,000/- for finishing the case. When I refused, he gave me a bottle and asked me to give him my semen, which I gave him since I was scared as he was threatening me that I would be given an injection and my semen would be extracted.”

28. It is apparent from the above that the appellant’s case was that the prosecutrix who had feelings for him but he had not reciprocated her feelings. In fact, he stated that the prosecutrix was elder to him and he used to call her Aunty. According to him, the prosecutrix had implicated him in a false case because he had refused to speak to her or marry her. It was specifically put to him that there was evidence that his DNA profile had been generated from the vaginal smear of the prosecutrix (Ex.1) and the underwear of the prosecutrix. He simply responded that he did not know. However, in response to question no.20, as quoted above, he stated that HC Omvir had demanded ₹30,000/- for closing the case, but when he refused, HC Omvir had given him a bottle and asked him to give his semen, which he gave since he was scared on account of HC Omvir threatening him that he would be given an injection for extraction of his semen. Thus, even in face of the evidence that his semen has been found in the vaginal smear and underwear of the prosecutrix, the appellant did not accept that he had established any physical relations with the prosecutrix. The contention now advanced by Mr Singh that the appellant and the prosecutrix were having an affair for the past two-three years and had

established physical relations consensually, is quite contrary to the appellant's statement under Section 313 of the Cr.PC.

29. It is also relevant to note that the appellant had examined five witnesses in his defence. None of the said witnesses had clearly testified that the prosecutrix and the appellant were having an affair or were in an amorous relationship. DW1 had merely testified that he had observed that the prosecutrix had been peeping into the house of the accused. He also stated that he had objected to her standing in the *gali* and looking into the house of the accused, on which she had responded by explaining that she wanted to borrow money from the accused. He had also testified that the relations between the prosecutrix and her husband were 'fine'. Smt. Saroj (DW2) had testified that she lived in a house adjacent to that of the appellant and had been residing there for the past thirty years. She stated that she knew the prosecutrix well as she was the next door neighbour for about fifteen years. She also did not testify that the relationship between the appellant and the prosecutrix was an amorous one. She merely stated that their relationships was 'cordial' for more than a year. DW3, who was a friend of the appellant, also did not testify that the appellant was in an amorous relationship with the prosecutrix. He merely stated that the appellant and the prosecutrix enjoyed good relations. However, he also stated that he had objected to the friendly relations and had inquired from the accused as to why the prosecutrix was after him. According to DW3, the appellant had told him that the prosecutrix was in need of money and had borrowed money from him.

Thus, even according to the testimony of DW3, the appellant had not disclosed to him that he was having an amorous relations with the prosecutrix or had established physical relations with her. DW5 (who was also a neighbour) had testified that she knew the prosecutrix for the last twelve years and she and the appellant enjoyed cordial relations. She testified that she had seen the prosecutrix sitting in the house of the appellant on four–five occasions. She had further testified that on inquiring from the prosecutrix, she had told her that she has been borrowing money from the appellant as she was in dire need of money.

30. DW5, who was the employer of the appellant, had testified that he had seen him with the prosecutrix. He also testified that the appellant had taken advance money from him on the ground that the prosecutrix who was his Aunt and his neighbour, was in financial trouble. However, he did testify that the other drivers had told him that the appellant was having an affair with the prosecutrix.

31. Given the evidence obtaining in this case, no reasonable doubt can be entertained that the appellant had established physical relations with the prosecutrix. The forensic report (Ex.PW9/E) clearly indicates that the DNA profile generated from the blood sample of the accused was accounted for in the male DNA profile generated from the vaginal smear of the victim and the underwear of the victim. As is apparent from the tenor of the arguments advanced on behalf of the appellant, the appellant does not dispute – although it appears that he had done so before the Trial Court – that he had established physical relations

with the prosecutrix. Thus, the only question to be examined is whether the prosecutrix had consented for establishing sexual relations with the appellant. It is at once clear that there is no material evidence on record which would support the view that the prosecutrix had willingly engaged in sexual intercourse with the appellant on the date of the incident.

32. The prosecutrix had immediately after the incident proceeded directly to PS Ambedkar Nagar. W/SI Kamini Gupta (PW9) had deposed that she was posted at PS Ambedkar Nagar on 03.12.2013 and the prosecutrix had come to the PS and given her statement (Ex.PW2/A) on the basis of which the FIR was registered. She had stated that thereafter, she had apprehended the appellant and brought him to the police station and had also got the medical examination of the prosecutrix conducted. The MLC (Ex.PW7/A) also indicates that the prosecutrix was examined on 03.12.2013. PW9 had further testified that the prosecutrix was weeping while recording her statement. This indicates that the prosecutrix was in considerable distress at the material time.

33. Dr. Dhruv Sharma, Assistant Director Biology, FSL Rohini was examined as PW10. In his cross-examination, he stated that the samples and exhibits were in good condition when they were received. It is, thus, clear that the samples had been generated approximate to the incident. In view of the overwhelming evidence, there is no reason to doubt that the appellant had established physical relations with the

prosecutrix on the date of the incident. There is no credible reason for the prosecutrix to have lodged a false complaint against the appellant.

34. Although it appears to be the appellant's case that the prosecutrix had done so because he had refused to marry her. However, there is little evidence to support this defence either. The prosecutrix was married and had three children at the material time. In the circumstances, there was no question of the appellant and the prosecutrix getting married or the appellant declining such a proposition.

35. Even if it is accepted that the appellant and the prosecutrix knew each other and were friends with each other, the same does not give rise to any doubt that the appellant had committed the offence for which he is convicted. Even if it is accepted that the prosecutrix used to borrow money from the appellant or was otherwise fond of him (although there is no reason for this Court to accept the same), the same does not lead to the inference that she had consented to establish sexual relations with him. The evidence indicates that she had immediately after the incident proceeded to the police station and had recorded a complaint. This coupled with the fact that she was weeping and in considerable distress while recording her statement, clearly indicates that she had not consented to the appellant establishing any physical relations with her.

36. There are certain inconsistencies in the statements of the prosecutrix and her testimony is also not entirely consistent with that

of her husband (PW6). However, the said inconsistencies are not material considering that there is sufficient evidence to establish beyond any reasonable doubt that the appellant was guilty of the offence for which he has been convicted. In her statement recorded on 03.12.2013, the prosecutrix had stated that she had gone to her mother's residence on Sunday (that is, 01.12.2013). However, in her testimony before Court, she had testified that one week prior to the date of the incident, her husband had left her at her parental house as there was nobody in her in-laws house to take care of her. Apart from the fact that her testimony to the aforesaid effect is inconsistent with her statement recorded on the date of the incident (on the basis of which the FIR has been filed), the same is also inconsistent with the testimony of her husband (PW6). He had testified that the prosecutrix had been residing with her mother since past one and a half years prior to the date of the incident. The inconsistency in their statement is clearly not material and does not in any manner raise any doubts as to the case set up by the prosecution.

37. The prosecutrix had stated that she had offered resistance and also tried to ward off the appellant by giving him fists and kick blows but could not restrain him from committing the offence. She had stated that the appellant had forcibly taken her into the room and pinned her down on the floor and had forcibly laid her on the bed. Yet, there were no injury marks or bruises on her body. Mr Singh had contended that this established that the prosecutrix had not offered any resistance and the same raised doubts as to whether the appellant is guilty of raping

the prosecutrix. The said contention is clearly unpersuasive. It is not necessary that the prosecutrix ought to have suffered injuries while trying to ward off the appellant. However, even if it is accepted that she did not offer sufficient resistance so as to result in any injuries on her body, the same does not in any manner establish that she had consented to sexual relations with the appellant.

38. This Court is of the view that absence of any injury marks on the body of the prosecutrix does not in any manner raise any doubts as to whether the appellant is guilty of forcibly raping the prosecutrix.

39. The absence of the *salwar* string (*nada*) amongst the seized clothes also is of little material relevance. The prosecutrix had alleged that the appellant had broken the *nada*. It is possible that while seizing the clothes, the same was not seized. But that does not mean that the clothes were planted as contended on behalf of the appellant. Further, this contention loses any significance in view of Mr Singh's contention that the appellant and the prosecutrix had established sexual relations consensually.

40. In view of the above, the impugned judgment convicting the appellant of the offence under Section 376 of the IPC, cannot be faulted. The appeal is unmerited and is, accordingly, dismissed. The pending application is also disposed of.

VIBHU BAKHRU, J

**SEPTEMBER 04, 2020
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