

Mahender Vs. State

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Court : Delhi

Decided On : Sep-23-2013

Judge : Mukta Gupta

Appellant : Mahender

Respondent : State

Advocate for Def. : Mr. Manoj Ohri

Advocate for Pet/Ap. : Ms. Meena Chaudhary Sharma

Judgement :

* + IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. No.1180/2010 & Crl.M.B. 1400/2012 Reserved on:

7. h May, 2013 Decided on:

23. d September , 2013 % MAHENDER Through: Appellant Ms. Meena Chaudhary Sharma, Adv. versus STATE Through: Respondent Mr. Manoj Ohri, APP with SI Gopeshwar Nath Tiwari, PS Sarai Rohilla. Coram: HON'BLE MS. JUSTICE MUKTA GUPTA 1 The Appellant impugns the judgment dated 2nd July, 2010 whereby he has been convicted for offence punishable under Section 376 IPC and the order on sentence dated 3rd July, 2010 directing him to undergo rigorous imprisonment for a period of 7 years and to pay a fine of Rs. 1000/- and in default of payment of fine to further undergo simple imprisonment for 15 days.

2. Learned counsel for the Appellant contends that the FIR was an afterthought doctored version lodged at the instance of the mother of the prosecutrix to grab the property of the Appellant. Material witness i.e. Raj was not examined. The statements of the defence witnesses have not been considered by the learned Trial Court. Despite the fact that the prosecutrix was a minor, no injury was found either on the body or on the private parts of the prosecutrix or that of the Appellant. Recovery of articles like slacks of the prosecutrix is doubtful, as when the same was produced in the Court the same was in cut condition. Gadda, blanket and setti were not seized. Though the mother of the prosecutrix stated that blanket was recovered, however the same was not produced in the Court. In the statement under Section 164 Cr.P.C. the prosecutrix stated that she was raped on 8 th August, 2007 whereas as per the FIR she was allegedly raped on 9 th August, 2007. PW10 Shri Sanjay Jindal stated that he recorded the statement correctly and thus the date of incident is doubtful. The prosecutrix thus completely demolished the case of prosecution. Further her statement is not corroborated either by the medical evidence or by her mother i.e. PW4s statement. The prosecutrix admitted in her cross-examination that after the alleged incident she came back home and told her sister about the said act, while her mother had gone to see a house on rent along with the Appellant. Prosecutrix further stated that after her mother came back along with the Appellant, his wife and sister-in-law also came to house and left after some time which is a very unnatural course of conduct. The prosecutrix further stated that when she reached the house, her mother was present there and had left after some time. The Appellant came to take her mother to show her the room. She further stated that the Appellant reached her house after 5-6 minutes of her reaching the house and thereafter her mother left with the Appellant happily. The slacks of the prosecutrix which is a very vital piece of evidence had no semen stains on it as per the FSL report. There is discrepancy with regard to the blue cloth, as some witnesses state that there was one cloth and the others say that there were two clothes. It is also not known from where the cloth was recovered. The conduct of the mother is quite unnatural as she states that she slept normally in the house and it is only after consultation with her relatives she made a complaint to the Police on 10th August, 2007. There is discrepancy as to when the statement resulting in registration of FIR was

recorded. Admittedly the mother of the prosecutrix had given betadine vaginal wash to the prosecutrix as was noted by PW5 Dr. Chabi Shukla. The defence witnesses DW4 stated that he had seen the prosecutrix and her mother in the market on the day of alleged incident dated 9th August, 2007 while purchasing the vegetables. The prosecutrix and her mother have not supported the prosecution case with regard to manner and time of registration of FIR, conducting of MLC, arrest of Appellant, seizure of the cloth and slacks. The mother of the prosecutrix PW4 stated that all papers were signed at Police Station and not at the place of arrest nor at the place where the cloth was seized. The residential area of the Appellant is widely populated however no public witness was associated at the time of arrest. The constable who went to arrest the Appellant has not been examined. The defence witness clearly stated that the Appellant was detained in Police Station. PW4 denied that the Appellant was arrested in her presence. In view of the material contradictions and improvements, the impossibility of the prosecution version and false implication being writ large, benefit of doubt be extended to the Appellant.

3. Learned APP for the State on the other hand contends that PW3 the prosecutrix has clearly stated that the Appellant wiped off the fluid with the cloth. This cloth was duly seized by seizure memo Ex. PW4/A on 10 th August, 2007 and as per the FSL report Ex.PX the same had semen stains on it. There is no discrepancy in the seizure of blue colour cloth and merely by witnesses saying that two pieces of clothes were seized, the recovery cannot be shrouded in mystery. The prosecutrix who was a minor clearly deposed about the act of the Appellant which falls within the definition of rape. There are no contradictions in the testimony of the witnesses and the version of the prosecution witnesses is not impossible.

4. Heard learned counsel for the parties and perused the record. Briefly the case of the prosecution based on the statement of the prosecutrix PW3 aged 11 years is that she was living with her mother and two elder sisters and her mother PW4 used to treat the Appellant as her brother. Her mother wanted to shift from the house they were living on rent and thus she sent the prosecutrix to call the Appellant at about 7.15 PM on 9 th August, 2007. The prosecutrix returned to her house weeping. She was not able to walk properly. On enquiry she informed her

mother that the Appellant had raped her. After discussions with her relatives PW4 informed the Police which information was recorded vide DD No.14A Ex. PW-9/A at 11.40 hours on 10th August, 2007 in Police Station Sarai Rohilla. The same day statement of the mother of the prosecutrix was recorded as Ex. PW-1/A on the basis of which FIR was registered. The prosecutrix was medically examined and vaginal swab with the undergarment of the victim were seized. The investigating officer went along with the prosecutrix and her mother to the spot i.e. the factory of the Appellant which was found locked. The wife of the Appellant was called at the spot to open the lock of the factory. While searching of the factory premises where the alleged rape took place was being conducted, the investigating officer recovered two clothes pieces of blue colour allegedly used by the Appellant after committing rape for wiping his private parts and semen on the person of the prosecutrix. The same were seized vide memo Ex.PW4/A. On 11th August, 2007 the Appellant was apprehended from Daya basti at the instance of the complainant. The Appellant was medically examined and his blood sample was taken vide memo Ex.PW9/D. The statement of the prosecutrix was recorded under Section 164 Cr.P.C. wherein she reiterated her version made to the Police.

5. PW3 the prosecutrix in her testimony stated that she was studying in 6th standard and on 9th August, 2007 her mother had sent her to call the Appellant at about 6.30 PM. When she reached the factory, the Appellant called her inside and pulled down the shutter to some extent. He gave her a push and laid her on the setti on which a blanket was already spread. The Appellant opened his pant and started fiddling his pennies. After some time the Appellant wiped off the fluid with a cloth and hid the same in a gunny bag. Thereafter, the Appellant asked her to leave immediately and threatened her that if she told anything to her mother, he would get them jailed and also get them killed. The prosecutrix reached her home weeping and narrated the incident to her mother. On cross-examination by the learned APP the prosecutrix stated that the Appellant took off her slacks and committed Bura Kaam with her. She further stated that after that Bura Kaam some hot fluid dropped on her legs. She stated that when the Appellant committed Bura Kam she felt pain and when the pain increased he left her. Since some sticky material had fallen on her clothes, the Appellant cleaned her slacks with a cloth. She clarified that by Bura Kam she meant that the Appellant had inserted his

pennies in her vagina. The prosecutrix identified the blue colour clothes with which the Appellant had cleaned himself and her slacks as Ex.P1. She also identified the slacks of black colour which was in torn condition as Ex.P-2. No doubt, this witness in her cross-examination states that when she reached her house, she narrated the incident first to her sister who was elder to her as her mother was not present at that time and had gone to see a house with the Appellant. She, however, clarified that when she reached the home her mother was present and had left after some time. The Appellant had come to take her mother to show her the room. The Appellant reached her house after 5/6 minutes of her reaching the house. She clarified that she had not taken bath in the next day morning and had only changed the cloth in the night, and the clothes which she was wearing at the time of accident were kept aside without washing. In her cross-examination she stated that her mother had applied medicine Betadine on the injuries on the night of the incident, however her private parts were not washed by her mother.

6. A perusal of the suggestion given on behalf of the Appellant itself show that it is the case of the defence that the prosecutrix had gone to the Appellant at that time and she was having money in her hand. However, no rape was committed on her and nothing happened at the spot as alleged. Version of the prosecutrix is supported by her mother PW4 who stated that on 9th August, 2007 she had sent her daughter PW3 to the Appellant who was her foster brother at about 6.30 PM to his factory and she returned back at about 7.30 PM, when she was weeping and was not walking properly. On asking as to why she was weeping, the prosecutrix replied that the Appellant did Galat Kam with her in the factory. After 10/15 minutes the Appellant came to her residence when she talked him about wrong acts with her daughter, on which the Appellant left her house. She consulted her family members i.e. her mother and brother and then made a call next day to the Police to inform.

7. Objections of learned counsel for the Appellant to the testimony of the prosecutrix is that in the statement under Section 164 Cr.P.C. the prosecutrix changed the date of alleged incident from 9th August to 8th August. The same is not an error which would entail discarding the statement of prosecutrix who was of tender age i.e. 11 years at the time of incident. The non-examination of the elder

sister of the prosecutrix to whom she disclosed about alleged rape is immaterial, as the prosecutrix also disclosed about the rape to her mother who has been duly examined. The contention of the learned counsel for the Appellant that according to both the prosecutrix and her mother, the wife and sister-in-law of the Appellant came to their house and no prudent person will let the family of the accused sit peacefully in the house is liable to be rejected. It may be noted that the Appellant was the foster brother of PW4 and was thus having some kind of control on her. He had also threatened the prosecutrix not to inform anybody. In this background PW4 let them come into the house, then on coming to know scolded them and sent back the family. Finally the FIR was got registered. Getting the FIR registered after consultation with her mother cannot be said to be unnatural as many a times the offences of rape and molestation go unreported or are reported belatedly as the honour of the prosecutrix and the family is also involved. The mother of the prosecutrix was living along with her three little daughters and to take a decision which would have affect on the honour of the daughter, it was but natural for her to have consulted her mother and her brother, and no advantage can be derived by the Appellant on this count. It is the case of PW4 that when the Appellant came, she shouted at him and turned him out. The Appellant, his wife and sister-in-law apologized to her.

8. No doubt the prosecutrix states that when she reached her home her mother was there, however later she states that her mother reached after 5/6 minutes of her reaching the house, but the same would not amount to a contradiction much less a material contradiction. Such variations in the testimony are bound to take place with passage of time. The prosecutrix has been cross-examined at a great length. A child of tender age with such a lengthy cross-examination would not be in a position to repeat the sequence of events verbatim the same like a parrot and is bound to err. The entire emphasis of the learned counsel for the Appellant is on the minor abrasions which have been sought to be brought out in the cross-examination. Learned counsel for the Appellant states that the slacks of the prosecutrix had not been seized. There is ample evidence on record to show that the slacks was seized and sent to the laboratory. Learned counsel for the Appellant has also pointed out that when the slacks was seized it was not cut but when the same was produced in the Court the same was with the cut position.

This in itself contradicts the earlier contention. Fluttered the cut marks are because when an exhibit is sent for examination at the FSL to find out blood or semen stains, most of the time portion of it is cut for testing as the test cannot be performed with the entire cloth. As per the case of the prosecution the blue colour cloth was having semen stains of the Appellant and thus the same sufficiently corroborates the testimony of the prosecutrix. CRL.A. 1180/2010 discrepancies in the statement of the witnesses as to from where the slacks of the prosecutrix was seized is also immaterial.

9. Major contention of the learned counsel for the Appellant is that the evidence of the defence witnesses has not been considered. The Appellant has examined his wife, sister-in-law and neighbours, however the said testimonies do not vindicate the Appellant. DW-1 Saroj is the wife of the Appellant who has stated that when the prosecutrix came to the factory to call the Appellant she was present there, however in the cross-examination of neither the prosecutrix nor the mother PW4 any such suggestion was given that DW-1 was present in the factory when the prosecutrix reached there. DW2 Sneha Lata has not stated anything about the alleged incident and is only a witness to state that on 10th August, 2007 she produced her brother-in-law the Appellant herein in the Police Station where he was detained. DW3 Shri Shyam Lal stated that on 9th August, 2007 the Appellant and PW4 the mother of the prosecutrix had gone to his house to see a room on rent, however PW4 did not take the room on rent. This is the case of the prosecution also and thus nothing material has been stated by this witness. DW4 Kishan Pal who is the tenant of Appellant has stated that on 9th August, 2007 at about 8.30/9.00 PM he saw PW4 and the prosecutrix purchasing vegetables in the market and they were laughing and talking to each other. Later he came to know that the prosecutrix had been raped. It may be noted that before entering in the witness box as a defence witness this witness has not made any complaint to any authority. Further admittedly this witness has been a tenant of the Appellant for the last about 4 years and thus his testimony cannot be given too much of credence. DW5 is the sister-in-law of the Appellant. She stated that on the day of the incident at about 7.00 PM she was sitting with her sister-in-law i.e. DW1 at her house and talking to each other when the elder daughter of PW4 came to their house and called them that her mother was calling. When they reached the house of PW4

they saw a quarrel between the Appellant and PW4. Thus this version of DW5 belies the version of DW1 that at around 6.00 PM and thereafter she was along with her husband. Admittedly, even after the incident the Appellant had gone to the house of the prosecutrix where her mother fought which fact is even deposed to by DW5 though she states that the fight was for constructing a room on the top floor of the Appellants house and to give the same on rent to PW4. DW6 Tulsi Ram also states about the surrender of Appellant on 10th August, 2007 and does not say anything relevant regarding the alleged incident. The Appellant appeared in the witness box as DW7 and examined himself. According to him he has been falsely implicated in the rape case because PW4 wanted him to construct a room above his house and to give the same on rent to her which he and his family refused and thus he was implicated. Thus as per DW7 and the other defence witnesses, PW4 was asking the house on rent. It is highly unnatural that she would implicate her foster brother merely because he did not construct a room and give it on rent which she would have otherwise got at any other place. The case of the defence is that the Appellant has been falsely implicated. However, none of the defence witnesses throw any light on the incident i.e. what happened at the time of alleged incident except implicating motives of false implications.

11. In the present case the prosecutrix has been examined at great length and as noted above except slight abrasions due to the lengthy crossexamination there is nothing material which has been found from the testimony of the prosecutrix. The version of the prosecutrix is further supported by the medical evidence. Though MLC Ex.PW-5/A shows no evidence of any external physical injury on the breast, however hymen was found torn and admitted the index finger easily. A perusal of the FSL report Ex.PX shows that the cloth pieces used for wiping the semen gave positive for human semen, though the grouping could not be proved. In view of the evidence of the prosecutrix and her mother on record, I find no infirmity in the impugned judgment of the learned Trial Court convicting and sentencing the Appellant. Consequently, the appeal and application are dismissed. (MUKTA GUPTA) SEPTEMBER 23 2013 ga