

Jai Narain Vs. State

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Court : Delhi

Decided On : Jan-09-2014

Judge : Mukta Gupta

Appellant : Jai Narain

Respondent : State

Judgement :

* + IN THE HIGH COURT OF DELHI AT NEW DELHI CRL.A. No.1296/2012
Decided on:

9. In January, 2014 % JAI NARAIN Through Appellant Mr. S.B. Dandapani, Adv. versus STATE Through Respondent Mr. Manoj Ohri, APP with S.I. Premvir Singh, PS Sultan Puri Coram: HON'BLE MS. JUSTICE MUKTA GUPTA MUKTA GUPTA, J (ORAL) 1. By the present appeal the Appellant challenges the judgment dated 12th April, 2012 convicting him for offences punishable under Sections 376/342/506 IPC and order on sentence dated 16th April, 2012 whereby he has been awarded sentence of rigorous imprisonment for a period of 7 years and to pay a fine of Rs. 3000/- for offence under Section 376 IPC, and rigorous imprisonment for a period of 1 year each and a fine of Rs. 1000/each for offences under Sections 506 and 342 IPC.

2. Learned counsel for the Appellant contends that the only evidence against the Appellant is the oral testimony of the prosecutrix which does not inspire

confidence. There are material contradictions in the statement of the prosecutrix. Neither the medical evidence nor the FSL report supports the version of the prosecutrix. The delay in lodging the FIR has not been explained and in a case of promise of marriage the offence at best committed by an accused can be of cheating and not rape. The testimony of the son of the prosecutrix is tutored and hence cannot be taken into consideration. The prosecutrix does not deny knowing the Appellant. It is the admitted case of the prosecutrix that she had been visiting the Appellant earlier as well and if he wanted to take advantage of her he would have done it earlier as well. The version of the prosecutrix is highly improbable and hence the Appellant is entitled to be acquitted of the charge. Reliance is placed on Narender Kumar Vs. State (NCT of Delhi) AIR 2012 SC2281 3. Learned APP on the other hand contends that the case of the prosecutrix PW1 is duly supported by PW3 her minor 10 year old son. Though suggestions have been made to PW1 the prosecutrix, however no such suggestions have been given to either the son or the mother of the prosecutrix i.e. PW3 and PW4. There is no suggestion to PW3, that he has been tutored. The delay in lodging of the FIR has been explained by the prosecutrix as the Appellant threatened her that he would kill her and her son. The medical evidence could not support the prosecution case as the MLC itself records that the prosecutrix had changed the clothes and taken bath twice after the incident. The testimony of PW4 the mother has gone unchallenged as no cross-examination has been done except suggesting that the Appellant has been falsely implicated. It is well settled that the conviction can be based on the sole testimony of the prosecutrix. (Ref. Vijay @ Chinee Vs. State of Madhya Pradesh (2010) 8 SCC191 The delay in lodging of the FIR has been properly explained and this fact has also been supported by the investigating officer to whom the prosecutrix told that she was threatened by the Appellant. (Ref. Santosh Moolya and Anr. Vs. State of Karnataka (2010) 5 SCC445 4. Heard learned counsel for the parties and perused the record. The case of the prosecution is based on the testimony of PW1 the prosecutrix who lodged the FIR. The prosecutrix has stated that the husband of the prosecutrix expired in the month of June 2008 where after she along with her son started residing with her mother and the two brothers. About six months prior to the date of incident she became familiar with the Appellant who was residing in a Jhuggi at Sultanpuri. The

Appellant told her that he was possessing spiritual powers (Tantrik Shakti) and he would solve all her problems (Vipattion ko door kar dega). About 10 days prior to 3rd May, 2009 she visited his place with regard to her problems, when the Appellant asked her to come on Sunday, the 3rd May, 2009. On 3rd May, 2009 at about 3.00 PM she along with her son reached the Jhuggi of the Appellant where the Appellant hypnotized her and gave her something to smell. The Appellant sent her son outside the Jhuggi. He closed the Jhuggi from inside and raped her. When she regained consciousness, she scolded the Appellant and told him that she would inform the Police. On hearing this the Appellant threatened to kill her and her son, asked her to be silent and not to disclose this incident to anybody. She along with her son went back to her home, however due to the fear of threat extended by the Appellant she did not tell any one about the incident. On 5th May, 2009 she narrated the whole incident to her mother where after she along with her mother went to PS Sultanpuri and lodged the complaint Ex. PW1/A. In the cross-examination the prosecutrix has stated that she got married in the year 1988 and her son was born on 31st October, 1999. When her son was nearly 10 year old her husband expired. Though PW1 has been suggested that she used to meet the Appellant at Bahadurgarh, however she denied the said suggestion. In the cross-examination the Appellant has sought to elicit from her that in the statement recorded under Section 161 Cr.P.C. the problems faced by the prosecutrix were not noted. Besides these facts, nothing material could be elicited in the cross-examination of the prosecutrix.

5. The version of the prosecutrix is supported by PW3 her son who stated that once he had visited the Jhuggi of the Appellant along with his mother. The Appellant was performing Pooja ceremony and his mother was sitting by his side. The Appellant asked him to go outside Jhuggi to get some article. He went outside and after purchasing Kurkure and eating the same again reached at the Jhuggi of the Appellant. At that time he found the door of the said Jhuggi closed. After some time when the door of the Jhuggi was opened, he saw his mother weeping and feeling giddy. He asked his mother as to what had happened but she kept mum. Thereafter he along with his mother reached their house and her mother went to the bed to sleep as she was not feeling well. He further stated that enquiry about the incident was made from him by a Police officer. In the cross-examination he

reiterated that he accompanied his mother to the Jhuggi and that the Appellant asked him to go outside for some article, that the door of the Jhuggi was closed when he came back. He denied the suggestion that he did not see his mother in a shock condition when the Jhuggi was opened. No suggestion has been given to this witness that he was tutored and it was only suggested that he was deposing falsely and implicating the Appellant falsely.

6. This evidence of PW3 is relevant under Section 6 and 8 of the Evidence Act. The fact that PW3 was sent outside the jhuggi to buy an article, when he came back the door was locked and after some time when his mother came out she was weeping are facts which are admissible and relevant under Section 6 of the Evidence Act. While explaining the principle of *res gestae* in *Gentela Vijayavardhan Rao and Anr. Vs. State of A.P.* (1996) 6 SCC241 it was held:

15. The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of *res gestae* recognised in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue as to form part of the same transaction becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res gestae*. In *R. v. Lillyman* [(1896) 2 QB167: (1895-99) All ER Rep 586]. a statement made by a raped woman after the ravishment was held to be not part of the *res gestae* on account of some interval of time lapsing between the act of rape and the making of the statement. Privy Council while considering the extent up to which this rule of *res gestae* can be allowed as an exemption to the inhibition against hearsay evidence, has observed in *Teper v. R.* [(1952) 2 All ER447 thus:

The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement.

The correct legal position stated above needs no further elucidation.

7. Section 8 of the Evidence Act provides that any act which shows the motive or preparation of the accused are relevant. The fact that the Appellant asked PW3 to go out to get an article constitutes an act of preparation by the accused and is relevant under Section 8 of the Evidence Act. This is a piece of conduct which is inculpatory in nature and the accused has no explanation for it.

8. There is no Doubt that in the present case there is delay of 2 days in lodging of the FIR, however the said delay has been duly explained by the prosecutrix as in her initial statement itself she has stated that after the rape when she fought with the Appellant and stated that she would inform the Police, the Appellant threatened her that he would kill her and her son and she should quietly go away and not disclose anything to anybody. Santosh Moolya (supra) the Supreme Court held: In

19. From the evidence of PW1 PW2 owner of the quarry, PW4 and mother of the victim, PW14 we are satisfied that though there was a delay of 42 days in lodging the complaint, the same was properly explained by the victims and the other witnesses. In addition to the same, we have also noticed that except the victims, no male member is available in their family to help them. In fact they came to the village where the incident occurred to eke out their livelihood. Further, PWs 1 and 2 asserted that after committing rape A-1 and A-2 threatened that they would kill them if they informed anyone. All these material aspects were duly considered by the trial court and accepted by the High Court. We concur with the same.

9. The delay having been satisfactorily explained, the second issue which arises is whether the Appellant can be convicted on the sole testimony of the prosecutrix PW1 and her son PW3 in the absence of any medical evidence supporting her allegations. It may be noted that since the FIR was lodged 2 days late and the prosecutrix has taken bath twice by that time, nothing could be detected in the vaginal smears of the prosecutrix. In *State of U.P. Vs. Pappu (2005) 3 SCC594* it was laid down:

12. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do.

10. In *Narender Kumar (supra)* relied upon by the learned counsel for the Appellant the Supreme Court reiterated the settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the Court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitates the Court for corroboration of her statement. The corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. A prosecutrix complaining of having been a victim of offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the Court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence direct or substantial which may lend assurance to her

testimony.

11. In the present case nothing material has been elicited to show that the testimony of the prosecutrix is not reliable except the bald suggestion that she had been visiting the Appellant earlier also. In the statement under Section 313 Cr.P.C. the Appellant had stated that the prosecutrix wanted to marry the Appellant and since he refused to do so the Appellant has been falsely implicated. However, no such suggestion has been given to the prosecutrix. Thus, the explanation offered in the statement under Section 313 Cr.P.C. is clearly an after-thought. In the present case the version of the prosecutrix is fully supported by the version of PW3 her son who has described the pre-event conduct of the Appellant in sending him away and bolting the door of the Jhuggi and also the condition of his mother when she came out after the incident.

12. In view of the testimony of the prosecutrix PW1 and her son PW3, I am of the considered opinion that the learned Trial Court committed no error in convicting the Appellant for the offences as mentioned and passing the order on sentence. Appeal is consequently dismissed. (MUKTA GUPTA) JUDGE JANUARY 09 2014
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