

Jagan Vs. State

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Court : Delhi

Decided On : Jan-22-2014

Judge : Indermeet Kaur

Appellant : Jagan

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment reserved on:16.01.2014 Judgment delivered on:22.01.2014. CRL.A. No.145/2000 Through: ..Appellant Mr.Neeraj Bhardwaj, Adv. Through: ..Respondent Mr.Varun Goswami, APP. JAGAN versus STATE CORAM: HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1 Appellant is aggrieved by the impugned judgment and order of sentence dated 13.11.1997 and 17.11.1997 respectively vide which he had been convicted under Sections 366 and 376 of the IPC and had been sentenced to undergo rigorous imprisonment for 84 months and to pay a fine of Rs.8400/-; in default of payment of fine to undergo RI for a period of 12 months for the offence under; separately for both the offences. 2 The case of the prosecution emanates from the statement of the prosecutrix Kumari Kanchan examined as PW-4. Crl.A. No.145/2000 Incident is dated Page 1 of 15 07.9.1996. As per her version while she was going to school to appear for her examination in the morning at 7.00 a.m. when she reached near gali no.10 accused Shambu Shah met her; he was a tenant in her uncles house;

he gave her some prasad pursuant to which she became unconscious; she regained consciousness at the house of Shyama, the sister of co-accused Jagan. Jagan was present there; he was also known to PW-4 as he was also living as a tenant along with Shambu. Further version being that during her stay in the house of Shyama Jagan committed rape upon her against her will ten times; she made a complaint to Shyama but to no avail; she was rescued by the police from the house of Shyama. She was medically examined. 3 The father of the prosecutrix on whose statement the FIR had been registered was Doodh Nath Shukla examined as PW-1. Since his daughter was found missing since 07.9.1996 the FIR had been got registered by him on 10.9.1996. He had deposed that his daughter was found missing after 07.9.1996 when she had gone to Babu Ram Senior Secondary School, Shahdara for taking her examination; when she did not returned he had lodged a police complaint. He had five children of whom PW-4 was the eldest. She was stated to be 14 years old at the time of the incident. He had deposed that his daughter was recovered on 14.9.1996 from Badayun District from the house of the sister of Jagan. This witness was partly hostile; he was cross-examined by learned APP for the State. He denied the suggestion that uniform of the prosecutrix was recorded in his presence. In his cross-examination he reiterated that Sambhu was a tenant of his brother and Jagan was also living with him and he knew both of them. 4 The mother of PW-3 Dev Wati was examined as PW-2. She had stated that her daughter was studying in the 7th class; on the date of incident she was 14 years of age. The victim was recovered on 14.9.1996 from Badyun District i.e. from the house of the sister of Jagan. 5 On the point of recovery PW-1, PW-2 and PW-4 have all stated that the prosecutrix was recovered at Badayun. Version of the prosecution is different on this count. The investigating officer SI Ram Mehar (PW-12) along with constable Satpal (PW-3) and constable Bimlesh (PW-6) have stated that on 14.9.1996 the prosecutrix along with other co-accused was apprehended from the ISBT Anand Vihar, Delhi. The prosecutrix as also both the accused persons were medically examined. They have stuck to the stand that the recovery of the prosecutrix was made from ISBT Anand Vihar bus stand. 6 It is this discrepancy which has been highlighted vehemently by learned counsel for the appellant to point out that the version of the prosecution is incredible and cannot be relied upon as the investigating officer and his team are totally opposed to the

version of PW-1, PW-3 and PW-4 on the place of arrest; this goes to the root of investigation for which benefit of doubt must accrue in favour of the appellant. 7 Another submission of learned counsel for the appellant is that the sister of Jagan has not been examined; as per PW-1 and PW-4 the prosecutrix had been recovered from the house of the sister of Jagan; she was also a material witness. Her non-examination also leads to drawing of an adverse inference against the prosecution. 8 The medical evidence i.e. MLC of the prosecutrix has been proved as Ex. PW-9/A; it was proved through Dr. Rajan Khanna. Her MLC evidences that her hymen was torn; it has further reported that it was old tear; there are no external injury present on her person. 9 Learned counsel for the appellant has argued that this medical evidence also reflects that the prosecutrix was a consenting party as no injuries were noted upon her person. Her hymen was also an old tear; even prior to this incident she might have sexual relations. 10 The MLC of the accused was proved as Ex. PW-7/A through Dr. N.K.Tangri (PW-7) noting that there was nothing to suggest that the accused was incapable of performing sexual intercourse. 11 Learned counsel for the appellant has also drawn attention to the statement of Ms.Pushpa (PW-11) who was studying along with prosecutrix and was accompanying her on the fateful day when she had purportedly been picked up by Shambu. It is pointed out that this witness has not supported the version of the prosecution and the entire story in fact starts from this point and this witness not being trustworthy on this score again gives a benefit of doubt to the appellant. 12 The learned Metropolitan Magistrate who had recorded the statement of the prosecutrix on 14.9.1996 under Section 164 of the Cr.P.C. was Mr.Sanjeev Jain examined as PW-5; his proceeding sheets were proved as Ex. PW-5/C. 13 PW-16 was the head clerk of Govt. Girls Senior Secondary School No.2, Bholanagar, Delhi; he had brought the admission form of the victim which had been proved as Ex.PW-16/A; school leaving certification was proved as PW-16/B evidencing her date of birth as 03.02.1982. The offence is dated 07.9.1996 and as per this record the age of the prosecutrix was 14 years and 7 months on the date of the offence. Ossification i.e. the bone density of PW-4 had also been conducted from the Guru Teg Bahadur hospital by Dr. Gopesh Mahrotra examined as PW-15. As per the X-ray plate collected by PW-15 he had given the bony age of the victim as less than 16 years on the date of the X-ray which was on

28.9.1996. His report was proved as Ex.PW-15/C. 14 This is the gist of the version of the prosecution. 15 In the statement of the accused recorded under Section 313 Cr. P.C. he had pleaded innocence. His case is that he has been falsely implicated in the present case. No evidence was led in defence. 16 Arguments of the appellant have already been noted. Written submissions have been filed and perused. Submission being reiterated that the version of the prosecution suffers from inherent discrepancies. Ex.PW-4/DA the love letter admittedly written by PW-4 shows that the prosecutrix was a consenting and a willing party and she had accompanied Shambu and gone to Badayun and stayed at the house of sister of Jagan voluntarily. The version of PW-1, PW-3 and PW-4 who are the star witnesses of the prosecution is not in conformity with the version of the investigating team on the place of arrest. The place of arrest i.e. whichever the arrest of the appellant and the recovery of the prosecutrix was effected at Badayun or at Anand Vihar bus stand is also conflicting. Ossification test proved through PW-15 shows that she was less than 16 years and giving a margin of two years on either side she was a major on the date of the incident. No role has been attributed to Jagan. Even as per the version of the prosecutrix, she has stated that Shambu had offered her prasad had taken her; Jagan had come into picture later on. Benefit of doubt on all counts must accrue to the appellant. 17 Arguments have been refuted by the learned counsel for the State. It is stated that on no count does the impugned judgment call for any interference. It is pointed out that even presuming for the sake of argument that the prosecutrix was a consenting party; her consent would be no consent in the eyes of law as Ex. PW-16/B clearly shows that she was minor on the date of the offence. Minor discrepancies on the place of arrest and the hostility of PW-11 would also not go to the root of the case as the substantive offences under Sections 366 and 376 otherwise stand proved. The appellant has been convicted under Section 366 along with his co-accused Shambu. Even presuming that Shambu had taken the prosecutrix, the categorical assertion of the prosecutrix that rape had been committed upon her by Jagan had gone unrefuted. The medical evidence also corroborates the version of PW-4. On no count does the impugned judgment call for any interference. 18 Record had been perused. Submission of the learned counsel for the parties have also been noted. The star witness of the prosecution is PW-4. She was 14 years on the date

of the incident. This was noted in the FIR at the time when the complaint was lodged by her father PW-1. Her mother PW-2 has also come into witness box and deposed that her daughter was 14 years on the date of the incident. Her school record proved as Ex.PW-16/A shows that she was studying in the 7th class in Govt. Girls Senior Secondary School, Bhola Nath Nagar, Delhi. Her date of birth had been brought on record vide Ex.PW-16/B showing that she was born on 03.02.1982. This record is a public record; there is also no argument on this point that this is not an authentic record; it is not as if this record has been created later on. This record was lying with the Govt. Senior Secondary School. It clearly evidences that the prosecutrix was a minor on the date of the offence being just about 14 years and 7 months. PW-4 has also categorically asserted that she was studying in 7th class on the date of the incident. Even in her statement under Section 164 Cr. P.C., she has reiterated her age as 14 years. Submission of the learned counsel for the appellant that by giving a margin of two years the prosecutrix was 18 years of age on the date of offence (as per the ossification report) is an argument without merit. Where the school record is available as is so in this case which has clearly evidenced the date of birth of the prosecutrix as 03.02.1982 holding her to be a minor on the date of the offence, the submission of the learned counsel for the appellant that the ossification report which is in his favour should be looked into is an argument bereft of force. Not only is the record from a Government School, it is also authentic and credible. No suspicion can be attached to this record. In this background when the authentic age proof of the victim was on record which was through her date of birth from her school records, there was no question of falling back on the ossification report. 19 It has thus been established and proved on record that the prosecutrix was admittedly a minor on the date of the offence. It is in this background that the statement of victim has to be viewed. 20 Ex.PW-4/A was a letter purported to have been written by the prosecutrix. In her cross-examination PW-4 has admitted that this letter was written by her but her answer is that it was under coercion and pressure. That apart consent of a minor is no consent in the eyes of law. Her consent even if it was there; was immaterial under Clause VI(3) of the definition of rape as contained in Section 375 of the IPC. 21 The Apex Court in AIR 2006 SC508 Vishnu Vs. State of Maharashtra while dealing with the age determination of the

prosecutrix had noted as under:

In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother-PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.1964, which is supported by the unimpeachable documents, as referred to have in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. .. Normally, the age recorded in the school certificate is considered to be the correct determination of age provided the parents furnish the correct age of the ward at the time of admission and it is authenticated. In the present case, as already noted, the parents had admitted to have given an incorrect date of birth of their daughter, presumably with a view to make up the age to secure admission in the school.

22 The testimony of PW-4 has also gone unrebutted. It inspires confidence. There is no reason whatsoever not to accept her version. The incident had occurred on 14.9.1996. Her statement under Section 164 Cr.P.C was recorded by PW-5 on 17.9.1996; proceedings sheets have been proved as Ex. PW-5/C. She had categorically averred that she was taken by Shambu after she taken Prasad from him and she became unconscious. When she regained consciousness she found herself in the house of the sister of appellant Jagan who was also present there. He committed rape upon her ten times against her wishes. Her cross-examination has also remained unblemished. 23 No girl in the permissive bounds of our society would depose falsely implicating somebody for ravishing her chastity; she would not compromise on her self-respect and dignity and jeopardize her future prospects by a false implication. No reason has also been brought on record as to why the accused would have been falsely implicated by PW-4. 24 The Supreme Court in AIR 1996 SC1393 State of Punjab Vs. Gurmit Singh while dealing with the version of a victim in a rape case had inter alia noted as under:

The testimony of victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion?. The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satiny its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, die case spoken of by the victim of sex crime strikes the judicial mind as probable. 25 In the instant case the version of PW-4 has also been fully corroborated by her MLC Ex. PW-9/A, the hymen has been found to be torn. There was occasion for the hymen of a minor girl to be found torn except for the reason that sexual intercourse had been

committed upon her. As already noted supra consent of a minor is no consent in the eyes of law and the submission of the appellant that no external injuries were noted upon her person would thus not merit any consideration. 26 The plea of arrest is no doubt discrepant. Whereas PW-1, PW-3 and PW-4 have stated that the accused were arrested at Badayun from where the prosecutrix was recovered; the version of the prosecution is otherwise; their version is that accused persons were arrested from ISBT Anand Vihar bus stop. The documentary evidence in this regard has been appreciated by the trial court. Recovery memo Ex.PW-1/C and the arrest memo of the accused Ex.PW-1/D as also the MLC of the victim Ex. PW-9/A; and that of the accused Ex.PW-7/A are all dated 14.9.1996. The medical report i.e. the MLC of the victim and that of the accused are from a Government Hospital showing that they have been both examined on 14.9.1996; the time in the MLC of the accused is 12.15 p.m. and that of the prosecutrix is 12.30 p.m.; meaning thereby that the version of the prosecution appears to be correct that the accused persons were formally arrested in Delhi and not in Badayun. Even otherwise, a minor discrepancy of such a nature does not affect the substantive offence for which the appellant had been convicted i.e. for the offence under Sections 366 and 376 of the IPC. This is a minor variation. It would not in any manner dent the version of the prosecution. 27 So also is the position of a hostile witness i.e. Pushpa examined as PW-11. Her version even if ignored does not in any manner detract from the offence for which the appellant had been convicted. 28 On no count does the impugned judgment call for any interference. 29 The maximum punishment imposed upon the appellant is 7 years. This court has been informed that fine has since been paid. Nominal role of the appellant show that he had undergone 4 years and 8 months as on the date when he was released on bail which was inclusive of the period of remissions earned by him. There is minimum punishment of 7 years prescribed for the offence under Section 376 IPC. There is no reason for awarding a lesser punishment. The appeal is without any merit. Dismissed. 30 Appellant be taken into custody to suffer the remaining sentence. 31 Copy of this order be sent to the Jail Superintendent for intimation and implementation. INDERMEET KAUR, J JANUARY22 2014 ndn