

Sarla Vs. State

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Court : Delhi

Decided On : Feb-06-2014

Judge : Indermeet Kaur

Appellant : Sarla

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % + Judgment reserved on :30.01.2014 Judgment delivered on 06.02.2014. CRL.A. 64/2006 SARLA Through Appellant Mr. Sumit Verma, Adv. versus STATE Through Respondent Mr. Navin K. Jha, APP CORAM: HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

The appellant before this Court is Sarla. She has been convicted under Sections 363, 366-A and Section 376 read with Section 120-B of the IPC. She had been charged under Section 376 (g) of the IPC but had been acquitted of the said charge. For the offence under Section 366 of the IPC, she had been sentenced to undergo RI for a period of 2 years and to pay a fine of Rs.500/- and in default of payment of fine, to undergo SI for 15 days. For the offence under Section 366-A of the IPC, she had been sentenced to undergo RI for a period of 2- years and to pay a fine of Rs.500/- and in default of payment of fine, to undergo SI for 15 days. For the offence under Section 376 read with Section 120-B of the IPC, she was sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.500/- and

in default of payment of fine, to undergo SI for 15 days. The husband of the appellant Dhan Bahadur was also an accused in the present FIR; however, since he was absconding and could not be traced, he had been declared a proclaimed offender on 24.04.2004. Accordingly, the appellant was tried alone. The version of the prosecution is that on 30.07.2003 on receipt of DD No.6-A, SI Vikram Singh (PW-9) along with constable Hakik Singh (PW-8) had gone to the spot i.e. village Bharat Garh where the prosecutrix K (PW-3) met them. Her statement (Ex.PW-3/A) was recorded. It was to the effect that she had come from West Bengal along with her mother and sisters to search for work in Delhi. Her mother had returned back. PW-3 was working in a factory at Okhla and was living with her sister and brother in Gali No.7, Govindpuri. Sarla, the appellant who was a resident of Ali Village was also working there. On 29.07.2003 at about 10:00 am Sarla came to their house and asked PW-3 to accompany her on the pretext that she would look for a job for her in a nearby factory. PW-3 accompanied Sarla to her house. This was at about 03:00 pm in the afternoon. In the evening, PW-3 told Sarla that she wanted to return home on which Sarla told PW-3 that she could go home the next morning. At about 09:00 pm, Sarla served food; husband of Sarla, Dhan Bahadur was also present there. At 10:00 pm, Sarla, PW3 and the younger son of Sarla went to sleep on the floor; Dhan Bahadur along with his daughter who was aged 6-7 years lay on the cot. The eldest son of Sarla aged 20 years had slept on the roof. Further deposition of PW-3 being that Sarla and her husband were talking in Nepali language and after that they both smoked cigarettes. Later on Sarla came and slept with PW-3 on the floor. After half an hour, Dhan Bahadur came to the floor and held PW3 hand; when she objected, he gagged her mouth; she shouted but Sarla did not respond. PW-3 attempted to flee but Dhan Bahadur caught hold of her and forcibly made her sit on the floor; he also sat on the floor. The younger son of Sarla also woke up but Dhan Bahadur scolded him and made him to sleep. Dhan Bahadur threatened PW-3 with a knife. Sarla also told PW3 that her husband is a dangerous person and she should do what he says. Dhan Bahadur then committed rape upon her. After one hour, this act was repeated again. In the morning, PW-3 was able to come out of the room; she started crying; people gathered; matter was reported to the police. Her statement (Ex.PW-3/A) was recorded. FIR was registered on this statement. The victim was medically

examined at the AIIMS hospital by Dr Suman Meena (PW-7). Her MLC had noted her hymen to be torn and there was a fresh tear. No external injuries were noted. In this MLC, the history as informed by PW-3 was that she was taken away by Sarla to her house where she was sexually assaulted by Dhan Bahadur, the husband of Sarla. The statement of the prosecutrix under Section 164 of the Cr.PC was recorded by the Magistrate (Ex.PW-2/B) on 05.08.2003. She had given a detailed statement; the demeanor of the witness had been noted by the learned Magistrate; in the middle of the statement, PW-3 had started crying and for that reason, her statement had to be deferred. In the statement of the accused recorded under Section 313 of the Cr.PC; her submission being that a wife would not allow her husband to commit rape on another person in her presence; this was an unbelievable story; this is a clear a case of false implication. No evidence was led in defence. On behalf of the appellant, arguments have been addressed by the learned amicus-curiae in detail. First submission of the learned counsel for the appellant is that the appellant has rightly been acquitted of the charge under Section 376 (2)(g) of the IPC as a woman could not have been convicted under this Section and for which submission, he seeks support from a judgment of the Apex Court reported as (2006) 6 SCC263Priya Patel Vs. State of M.P. and Another ; submission being that the offence of rape could only be committed by a man and not by a woman. The trial Court having acquitted the appellant under Section 376 (2)(g) of the IPC has followed the correct legal position but the conviction of the appellant under Section 376 read with 120-B of the IPC is clearly an illegality as the offence under Section 120-B is a substantive offence and no separate charge having been framed against the appellant for the aforementioned offence, the question of her conviction under the said provision of law without a formal charge cannot be sustained. Submission being that this has caused a grave injustice to the appellant. Conviction is liable to be set aside on this ground alone. Second submission of the learned counsel for the appellant is that there was no age proof of the victim. To convict a person for the offence under Sections 363 & 366-A of the IPC, it was incumbent upon the prosecution to lead positive evidence to show that the victim was a minor on the date of the offence; no such positive evidence was led. Merely because PW-3 stated her age to be 15-16 years would not be sufficient evidence; attention has been drawn to the cross-examination of

PW-3 wherein she had stated that she did not remember her date of birth and neither the year in which she was born. Submission being that this answer of PW-3 would be sufficient to hold that the prosecutrix could well be even 19-20 years on the date of the incident. There was also no reason as to why no ossification test of PW-3 has been conducted by the prosecution. On this ground also, the trial Court having convicted the appellant under Sections 363 & 366A of the IPC has committed an illegality. On merits, learned counsel for the appellant points out that the substantive charge under Section 376 is even as per the prosecution worded against Dhan Bahadur who has been declared a proclaimed offender; even presuming the worst situation qua the appellant and the charge against the co-accused under Section 376 of the IPC if proved, keeping in view the aforementioned two submissions of the learned counsel for the appellant, the conviction of the appellant is clearly bad in law. Arguments have been refuted by the learned public prosecutor. It is pointed out that on no count, does the impugned judgment suffer from any infirmity. On merits, it is pointed out that the version of PW-3 which has gone unchallenged and unrebutted in her cross-examination fully corroborated by the medical evidence (Ex.PW-7/A) shows that rape was committed upon her. Attention has been drawn to the statement of the prosecutrix recorded under Section 164 of the Cr.PC; her version in her MLC as also her statement on oath in Court; submission being that at all stages, the prosecutrix has given her age as 15-16 years. There being no rebuttal on this point, it necessarily has to be accepted. On the first argument of the learned counsel for the appellant, learned public prosecutor points out that unless and until a prejudice has been suffered by the appellant for an error in framing of the charge, non-framing of a formal charge under Section 120-B of the IPC would not come to the aid of the appellant to hold that the conviction of the appellant under the aforementioned provision of law is an illegality. To support his argument, reliance has been placed upon (2011) 8 SCC300 Rafiq Ahmad @ Rafi Vs. State of Uttar Pradesh. Attention has also been drawn to Section 215 of the Cr.PC. It is pointed out that a mere omission in framing of charge will not vitiate the trial; if an accused is charged for a graver offence but the same has not been established on merits or for a technical reason the accused can still be convicted and punished for a lesser offence provided that the lesser offence is of a cognate nature and its ingredients are independently

proved beyond reasonable doubt; in this case also, no prejudice has been suffered by the appellant; she being an accomplice along with her husband in this act which had been committed upon the victim; could in no manner argue that non-framing of charge under Section 120-B of the IPC has resulted in failure of justice. Arguments have been heard. Record has been perused. Accused Sarla had been charged with the following offences: This was vide order dated 31.03.2004. I, Deepa Sharma, Addl. Sessions Judge, New Delhi do hereby charge you accused Sarla W/o Dhan Bahadur as under: That you on 29.7.2003 at about 10 a.m. 7 p.m. from the House at gali No.7, Govind Puri, New Delhi you kidnapped Kumari Kajol (a minor aged about 15 years) from the lawful guardianship and thereby committed an offence punishable u/s363 of the Indian Penal Code and within my cognizance. That you on the aforesaid date time and place you induced Kumari Kajol (a minor girl aged about 15 years) with intent that she may be compelled (or knowing it to be likely that she will be compelled) and may be forced or seduced to illicit intercourse with your husband Dhan Bahadur and thereby committed an offence punishable under Section 366-A IPC and within my cognizance. That during the night of 29.7.03 your husband Dhan Bahadur committed rape on Kumari Kajol in your presence and thereby you have committed an offence punishable under section 376(g) IPC and within my cognizance. And I hereby direct you that you shall be tried by me on the aforesaid charge. (DEEPA SHARMA)/ 31.3.2004 Addl. Sessions Judge, New Delhi The aforesaid charge has been read over and explained to the accused to which he is questioned as under: Q. Have you heard the charge?. A. Yes. Question. Do you plead guilty or claim to be tried?. Ans. I plead not guilty and claim trial. R O & A.C. ASJ:NEW DELHI313.2004 After the trial, the conviction of the appellant was ordered under Sections 363/366-A and Section 376 (g) read with Section 120-B of the IPC. Certain portions of the testimony of PW-3 (prosecutrix) would also be relevant to answer this argument. On oath in Court in her examination-in-chief, PW-3 has stated that Sarla had taken her to her house promising her a job; at night she had gone to sleep with her on the floor along with her child. The husband of Sarla Dhan Bahadur was sleeping on the cot. He came down from the cot near to the victim; the victim got perplexed and told the appellant (referred to as aunty) to save her but the appellant did not respond. After rape had been committed upon

her by husband Dhan Bahadur, the prosecutrix attempted to flee but Sarla bolted the doors from inside and did not allow her to escape. For the second time, her husband Dhan Bahadur committed rape upon her; Sarla told her that her husband is a dangerous man and she should abide by what he states. All this appears in the examination-in-chief of PW-3. It is an admitted fact that no formal charge under Section 120-B of the IPC has been framed. It is also undisputed that Section 120-B of the IPC is a substantive offence and under the procedure, separate charge for conspiracy may be framed. Section 120-B of the IPC reads herein as under:

120B. Punishment of criminal conspiracy.-(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, 2[imprisonment for life]. or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence. (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both.]. This Section had been introduced by the Indian Criminal Law Amendment Act, 1913 (8 of 1913) along with Section 120-A. This is an independent offence and though other offences are committed in pursuance of a conspiracy the liability of the conspirators for the conspiracy itself cannot disappear. As the definition of conspiracy itself suggests, there have to be two or more persons who must be parties to an agreement to commit an illegal act or do something which is not legal by illegal means. It is also well established that no overt act is necessary to establish the offence of conspiracy. Section 215 of the Cr.PC speaks of effect of errors in formulation of charge. It reads herein as under:

215. Effect of errors. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice. Illustrations (a) A is charged under section 242 of the Indian Penal Code (45 of 1860), with" having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was

counterfeit," the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material. (b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material. (c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in the case, a material error. (d) A is charged with the murder of Khoda Baksh on the 21st January, 1882. In fact, the murdered person's name was Haidar Baksh and the date of the murder was the 20th January, 1882. A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh: The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial. (e) A was charged with murdering Haidar Baksh on the 20th January, 1882, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January 1882. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh. The witnesses present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled, and that the error was material.

Illustrations attached to this Section clearly shows that the error in charge will not in any manner affect the offence unless the accused has been misled by such an error or omission or there has been a failure of justice. Legal position is well settled. Unless the irregularity or omission in the charge has misled the accused or caused a prejudice to him in his defence and thereby there has been a resultant failure of justice, it will not vitiate the trial. Where the omission has not misled the accused or not occasioned in a failure of justice, the error in the charge will not vitiate the final conviction. The Supreme Court in Rafiq Ahmad (supra) had the opportunity to examine the facts of a case where the accused had been formally charged under Sections 396 & 201 of the IPC. He had been convicted under Sections 302 & 201 of the IPC. The contention before the Supreme Court was that

Section 302 was a more graver offence than Section 396 and no formal charge having been framed under Section 302 of the IPC and the accused not having been put to notice of the said offence, the conviction under Section 302 of the IPC was bad in law. This position was negated by the Supreme Court. The appeal had been dismissed. The Court had noted that the Code is a code of procedure and like all procedural laws is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused gets a full and fair trial along with certain well-established and wellunderstood canons of law that accord with the notions of natural justice. Before a conviction can be set aside, it must necessarily be established that the accused has suffered a prejudice or a failure of justice. The accused must show that he has suffered some disability or detriment in the protections available to him under the Indian criminal jurisprudence. Each case has to be examined in its own facts and circumstances. In fact Section 464 of the Cr.PC clearly states that the appellate or revisional Court can convict an accused for an offence for which no charge was framed unless failure of justice would occasion, if such a conviction is sustained. It is on the aforesaid principle that this Court shall now revert to the facts of this case. The charge specifically states that the appellant had induced the prosecutrix with the intention and knowledge that she is going to be compelled for illicit intercourse with her husband Dhan Bahadur and thereby guilty of the offence under Section 366-A of the IPC. This was the second charge. The charge under Section 376 (g) speaks of the husband Dhan Bahadur having committed rape upon the prosecutrix in presence of the appellant. The purpose for framing charge is to put an accused to notice that he or she has to answer the aforesaid allegations which have been leveled against him or her. The evidence of PW-3 as noted supra is also material. She has clearly and categorically recited that the appellant had induced her in taking her away; this was on false pretext of giving her a job; at the time when the prosecutrix was sleeping on the floor along with the appellant and her child, her husband had come down on the floor; he gagged her mouth and committed rape upon her. The appellant was lying close and the prosecutrix PW-3 had shouted for help but the appellant in complicity with her husband has remained quiet. On her attempt to flee, the prosecutrix was restrained and withheld by the appellant by bolting the

door from inside. At this point of time, coaccused Dhan Bahadur had committed rape upon her for the second time. These facts as have emerged in the case show that the appellant was fully aware that she was accomplice with her husband in this act which has been committed by Dhan Bahadur upon the victim. Viewed in this scenario, it cannot be said that the appellant was not aware of the charge that she was facing or any failure of justice has been occasioned as she was not able to answer the charge of conspiracy. No prejudice has been caused to her by her conviction under Section 376 read with Section 120-B of the IPC. The word prejudice has to be in fact examined, as noted supra, with reference to the rights or protections available to the accused. Even in her statement recorded under Section 313 of the Cr.PC. the entire incriminating evidence had been put to the appellant including the specific questions No.9, 10, 11 & 13 wherein all these pieces of evidence had been accosted to her. The only defence projected by the appellant was that since she was unable to produce her husband Dhan Bahadur, she has been falsely implicated. In this background, the first argument propounded by the learned counsel for the appellant that the omission to frame charge under Section 120-B of the IPC has resulted in vitiation of the trial is an argument without any merit. It is accordingly rejected. The second argument of the learned counsel for the appellant is based on the submission that merely because the prosecutrix had given her age as 15-16 years would not necessarily mean that she was a minor; she has been cross-examined on this point wherever she has been specifically stated that she did not know either her date of birth or her year of birth. Submission being reiterated that it was incumbent in these circumstances for the prosecution to have led positive evidence to establish that the victim was a minor. The prosecution as noted supra has charged the appellant for the offence under Sections 363 & 366-A apart from the offences under Section 376 (g). Section 363 and 366-A of the IPC clearly postulate that for a conviction under this Section, the victim must be minor. Under Sections 363 & 366-A, the victim should be less than 18 years of age. The statement of the prosecutrix under Section 161 of the Cr.PC was recorded for the first time on 30.07.2003 followed by her statement under Section 164 of the Cr.PC which was recorded on 05.08.2003. In both these statements she has stated her age as 14-15 years. In her statement under Section 164 of the Cr.PC which is a judicial proceeding conducted by a Magistrate she

stated her age 14-15 years which was the answer of the victim on a specific query put by the Presiding Officer. She has given her age in this statement as 14-15 years. Her MLC (Ex.PW-7/A) recorded on 30.07.2003 also shows that her age was 15 years. On oath in Court when she had come into the witness box which was in August, 2004 (after one year) she has categorically stated that her age is 15-16 years. Merely because on a question where she was unable to give her date of birth or year of birth does not take away the fact that she was between 15-16 years. In fact the testimony of the prosecutrix is truthful. On all occasions, she has given margin of one year stating her age to be between 14-15 and one year later in court to be between 15-16 years; she has not given a specific year. She was a rustic village girl; she had come from West Bengal looking for a job; she was alone in the foreign land as her mother had gone back after leaving PW-3 in Delhi hoping that she would be able to earn some money. In this background, it is but natural that such a witness would not know her exact date or year of birth. The appellant at the time of charge was fully aware that she has been charged for having kidnapped a minor girl with the intent that she would be subjected to illegal sexual intercourse. The entire version of PW-3 shows that no cross-examination has been effected by the learned defence counsel on this line; there is no suggestion whatsoever suggesting to the prosecutrix that she is not a minor. In fact the appellant had been charged for having committed offence of kidnapping a minor. It was for him to suggest to the prosecutrix (when she had come into the witness box) that she was not a minor. No suggestion having been given to PW-3 on this score. No suggestion has been given to Investigating Officer either or for that matter to any other witness of the prosecution, it does not now lie in the mouth of the appellant to argue that the prosecutrix was not a minor. This argument of the learned counsel for the appellant that the prosecutrix could well have been major is an imaginative thinking and the version of the prosecution that PW-3 was in fact a minor not having been challenged or cross-counteracted has necessarily to be accepted. This argument of the learned counsel for the appellant is also without any merit. Learned counsel for the appellant has fairly stated that on merits of the case, the testimony of PW-3 that the act of sexual intercourse had been committed by Dhan Bahadur upon her in presence of the appellant has remained unchallenged. In fact the entire version of PW-3 where she has narrated the gory

incident of Dhan Bahadur having committed rape upon her twice on the fateful day i.e. 29.07.2003 and the appellant lying in the room and not responding to the shouts of PW-3 and later on bolting the door from inside preventing PW-3 from escaping which had led to rape having been committed upon her for the second time by Dhan Bahadur; the appellant also threatening the victim that she should follow the dictum of her husband, all goes to show the complicity of the appellant in the aforementioned crime. Her defence that no woman would allow her husband to commit such an act in her presence is an argument bereft of force as there are individuals of varying kinds; with different temperaments; what are the levels of normalcy and socially acceptable behavior for one individual may not be relevant for another. Undoubtedly there was no reason for the Prosecutrix to have falsely implicated the appellant. Neither has this been argued and nor is this evident from the record. PW-3 has spoken the truth. The medical record i.e. MLC of the victim shows her hymen was torn and there was a fresh tear on the hymen. The incident was reported to the police on the very next day when the victim was able to run out of the clutches of the appellant and her husband. She was medically examined in the afternoon of 30.07.2003. The oral testimony of PW-3 coupled with the medical examination fully corroborates the version of the prosecution. The fact that she was a minor also stands established. The conviction of the appellant does not call for any interference. Record shows that on the date the appellant was granted bail which was on 04.05.2006, she had suffered incarceration of 2 years and 8 months. Under Section 376 of the IPC, the sentence of 7 years is minimum sentence; for adequate and special reasons the sentence lesser than the minimum may be granted; this depends on the facts of each case; however the words special and adequate reasons have been held by judicial pronouncements to be read conjunctively and not disjunctively; both special and adequate reasons have to be made out for giving a punishment lesser than the minimum. The Supreme Court in the case of Kamal Kishore vs. State of H.P. (2000) 4 SCC502 had noted that where the occurrence was 10 years old and the accused and victim might have settled in life could not be treated as a special reason for reducing the minimum statutory period prescribed. Moreover, the words adequate and special cannot be read disjunctively; they have to be read in conjunction. No special or adequate reasons have been pleaded and not could this Court decipher any from

the record of the case. In this view of the matter, the sentence also calls for no interference. The appeal is without any merit; Dismissed. Bail bond of the appellant is cancelled. Surety is discharged. INDERMEET KAUR, J FEBRUARY06 2014

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