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Court : Delhi

Decided On : Oct-13-2015

Judge : The Honourable Ms. Justice Indermeet Kaur

Appeal No. : CRL.A. Nos. 201, 304, 535 of 2013 & Crl. M.A. Nos. 12955 of 2014, 7153, 7402 of 2015

Appellant : Anil @ Balbir and Others

Respondent : State

Judgement :

1. These appeals are directed against the impugned judgment and order on sentence dated 27.11.2012 and 17.12.2012 respectively wherein the appellants namely Anil @ Balir, Vijay and Vinay Kumar stood convicted under Section 376 (2)(g) of the IPC i.e. for the offence of gang rape. Each of them had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.5,000/- and in default of payment of fine to undergo SI for 3 years. Accused Anil @ Balir and Vinay had also been convicted under Sections 506/34 of the IPC for which the sentence imposed upon them was SI 2 years and a fine of Rs.5,000 and in default of payment of fine to undergo SI 6 months. Accused Vijay was also convicted under Sections 366/341 of the IPC for which the sentence imposed upon him was SI 10 years and a fine of Rs.5,000/- and in default of payment of fine, to undergo SI for 3 years for the two offences respectively. Benefit of Section 428 of the Cr.PC had been granted to the appellants.

2. The version of the prosecution was that on 16.06.2010 DD No. 19-A was got recorded by Mishri Devi (PW-7), the mother of the victim relating to an incident of gang rape having been committed by Anil @ Balir, Vijay and Vinay Kumar upon her daughter. Separate statement of the victim (PW-3) was recorded. Criminal law was set into motion. In the course of investigation, the victim was medically examined. Her MLC was prepared; her hymen was found torn. Exhibits which included her vaginal swab, blood samples and clothes were seized and sealed and sent to the CFSL for examination. The blood samples and the clothes of the appellants had also been seized. The CFSL vide its report (Ex.PW-13/A) had opined that there was blood detected on the salwar of the victim; semen stains were also detected on her half torn kurta as also her vaginal swab; semen stains were also detected upon the underwear of accused Vijay and the nicker of Anil @ Balir.

3. In the statement of the accused recorded under Section 313 of the Cr.PC, they had pleaded innocence stating that they have been falsely implicated in the present case.

4. In view of the aforementioned evidence, both oral and documentary, the appellants were convicted and sentenced as aforementioned.

5. On behalf of the appellant Vinay, it has been submitted that he has not been named in DD No. 19-A (Ex.PW-6/A). His name does not find mention; this is a clear case of false implication qua the appellant; his defence all along was that he was running a grocery shop and a sum of Rs.350/- was owed by the complainant and her family to him and on his asking this led to squabble which was the reason for his false implication. The version of the prosecutrix is full of contradictions. There is no explanation as to why if there was an act of forcible rape, no injury was noted upon her person.

6. On behalf of appellant Vijay, learned counsel for the appellant submits that he has been falsely implicated. The version of the prosecutrix is contradictory; whether she was known to the appellant or not known to him is not clear from her deposition; she was confused and her conflicting stands entitles the appellant to a benefit of doubt and a consequential acquittal. There is also no explanation as to

why there are no injuries upon the person of the victim. To support this line of argument, learned counsel for the appellant has placed reliance upon the judgments of the Apex Court reported as (2007) 6 SCC 465 *Narayan @ Naran Vs. State of Rajasthan*, (2000) 9 SCC 161 *State of Rajasthan Vs. Shanker* and AIR 1998 SC 2694 *Kuldeep K Mahato Vs. State of Bihar*. Submission being that where there was no injury upon the person of the victim, it could safely be presumed that the victim was a consenting party.

7. On behalf of the third appellant Vinay Kumar, learned amicus curiae submits that the role attributed to Vinay Kumar was that he was standing outside when the alleged act was committed; it is not the case of the prosecution that he had committed rape upon her. His presence outside by itself would not be sufficient to nail the appellant and to support this proposition, he has placed reliance upon the judgments reported as (2011) 14 SCC 309 *Om Prakash Vs. State of Haryana*, 2006 (3) JCC 1347 *Pardeep Kumar Vs. Union Administration, Chandigarh* as also another judgment of the Apex Court reported as 2009 (3) JCC 2139 *Jitender Vs. State*. Submission being that in the case of *Om Prakash* (supra), the Apex Court had gone on to note that even where the prosecutrix had used the word guardin her deposition while attributing a role to a particular person, the Apex Court had held that this was a mere presence and this could not establish that the said person had a common intention with the other co-accused to rape the prosecutrix, his conviction under Section 376 (2)(g) of the IPC had been set aside.

8. Needless to state that these arguments have been refuted.

9. Record has been perused. Arguments have been appreciated.

10. The star witness of the prosecution was PW-3. She was the prosecutrix. She was examined in camera. She has deposed that she was working in a tiles factory in Karala where the accused Vijay also used to work. He used to have an evil eye upon her. On the fateful day i.e. on 15.06.2010, when she was going to the market, accused Vijay met her on the way. This was at about 09:00 pm. He forcibly took her to a vacant room. He pressed her mouth with his hands. He threatened to kill her and her brother. He forcibly committed rape upon her. Meanwhile, Anil @ Balir and Vinay Kumar also come there. They also threatened

her that if she did not perform the sexual act with them, they would prepare a video of her and show it in the area. After committing rape upon her, they threatened to kill her if she disclosed the incident to any person. She was sent home. She did not narrate the incident to her mother due to fear and shame. On the following day, her condition started deteriorating. On query by her mother about the same, she narrated the incident to her, pursuant to which a complaint was lodged by her mother in the local police station. Her statement was recorded by the police. She was medically examined.

11. PW-3 was subjected to a lengthy cross-examination. She admitted that she was working in the factory with her sister where the accused Vijay was also working since the last 4-5 months. She used to talk to Vijay sometimes due to professional reasons. On an earlier occasion, she had made an oral complaint against Vijay to her factory owner. During the incident, Vinay Kumar had told her that he was preparing a video film of the act of rape and if she disclosed this incident to any person, he would show this film in the colony. In a further part of her cross-examination, she admitted that the incident lasted for about less than one hour. She had gone to the police station with her mother; she was also medically examined; she was accompanied by her mother at that time; she knew the house of accused Anil @ Balir but she did not know the house of other persons. She denied the suggestion that she had purchased certain grocery items from the shop of Vinay Kumar and she owed some money to him pursuant to which a quarrel had taken place as this money has not been returned by her and this was the reason for false implication of Vinay. She denied the suggestion that the accused had been falsely implicated.

12. The testimony of the prosecutrix as highlighted supra does not discredit her version qua her statement recorded under Section 161 of the Cr.PC. On oath in Court, the witness had stated that a video film of her was being recorded by accused Vinay and he threatened to show the same in the neighbourhood if she did not perform the sexual act with the appellant and this part of her version did not find any mention in Ex.PW-3/A for which reason, the Trial Court had rightly rejected this part of her version. The explanation furnished by the victim in this regard was that her statement was recorded by the police (admittedly there was

no statement recorded of the victim under Section 164 of the Cr.PC); she being illiterate, she had disclosed the incident to the police but she did not know what was exactly recorded by the Investigating Officer.

13. The narration of the prosecutrix as discussed supra otherwise is clear and cogent. She has been consistent that at the time when she was going to market at about 09:00 pm on 15.06.2010, accused Vijay who was working in the same factory and who had evil eyes upon her pursuant to which she had also lodged an oral complaint against him had taken her to a vacant room where he forcibly committed rape upon her; her mouth had been gagged and that is why she could not raise an alarm. She was threatened that if she disclosed the incident to any person, she and her family would be killed. Anil @ Balir and Vinay Kumar had also reached at the spot by that time. Anil @ Balir had also committed rape upon her. All three of them had threatened her that in case she disclosed this incident, she would be shamed.

14. The role attributed to Vinay Kumar was that he was the accomplice with Vijay and Anil @ Balir; he was fully aware of the illegal act which was being committed upon the prosecutrix and in fact he along with his accomplices had threatened the prosecutrix that in case she disclosed the incident to any person, she would be killed. The threat to kill the prosecutrix, her mother and brother was emanating from all three and this is clear from her testimony. Her statement being cogent and coherent, the Trial Court had rightly relied upon the same.

15. Apart from her oral version, the medical evidence also supports this stand. The medical evidence which was the MLC of the victim (Ex.PW-11/A) shows that her hymen was torn. She was referred to a Gynecologist. The Gynecologist Dr. Megha was examined as PW-12. There was no fresh injury upon the victim and this has been highlighted vehemently by the appellant to advance an argument that even presuming that a sexual act had been done, it could not be without the consent of the victim. 16 This Court notes that the victim was 16 years of age. Her hymen was found torn. Apart from this medical evidence, the CFSL had also supported the version of the prosecution and the report of the CFSL (Ex.PW-13/A) had evidenced that there was blood on the salwar of the victim; this salwar had been

seized on the following day; the victim had disclosed that she had not taken a bath the previous night (the incident had occurred at 09:00 PM and the matter was reported on the following day at 01:30 pm); semen stains were detected on her vaginal swabs which was taken on the following day as also on her half torn kurta; semen was also detected on the underwear of accused Vijay and the nicker of Anil @ Balir; all supporting the coherent version of PW-3 that it was Vijay and Anil @ Balir who had committed this forcible act of rape upon her and Vinay Kumar along with the other accomplices were threatening her to succumb to this act or else she and her family would be killed.

17. In this background, the absence of injuries on the victim could not be a telling factor by itself to hold that the otherwise coherent version of PW-3 which is supported not only by the medical evidence but also by the scientific evidence is to be discarded.

18. In this context, the observations of the Apex Court in 2013 (2) ACR 2252 *Manoj Giri Vs. State of Chhatisgarh* are relevant:-

It was next contented that there are no injuries on the prosecutrix to infer rape. There is no merit in this contention in view of the fact that the prosecutrix was a married woman and was overpowered by several men before she was raped. She was obviously not in a position to resist and to fight several men, who had threatened her with death in case she cried out. There is, however, ample evidence of rape in view of the forensic report regarding the clothes of the prosecutrix and those of the Appellant. The report clearly discloses the presence of semen spots and human sperm on the clothes of the accused including the Appellant and the prosecutrix. The entire evidence thus collected along with the proper and clear identification of the accused at identification parade and in the court by the prosecutrix leaves no manner of doubt that conviction of the Appellant is well founded. ?

19. The mother of the prosecutrix was examined as PW-7. She was the complainant. Her evidence was to the effect that on 16.06.2010, her daughter was not feeling well and was perplexed. On inquiry, she disclosed the incident to her stating that Vijay and Anil @ Balir had committed rape upon her and Vinay had

also helped them in this act.

20 PW-7 was also subjected to a lengthy cross-examination wherein she stuck to her stand. She admitted that her daughter disclosed the incident to her on the following morning as she looking perplexed and feeling shamed. She also denied that the accused have been falsely implicated. She had in fact volunteered that the accused persons were threatening them for settlement and were pressurizing them.

21. DD-19 A reflects that this complaint was lodged at 01:30 pm i.e. after victim who was both under fear and shame had disclosed the incident to her mother (PW-7).

22. The defence of the appellant is moonshine. The defence of Vijay is that he has been falsely implicated. He has not denied that he was unknown to the prosecutrix or that he was not working in the same factory where the victim was also working. Vijay was arrested at 11:00 pm in the presence of the prosecutrix which is corroborated by her version. Accused Vinay was also arrested on the same day. His arrest was also witnessed by the prosecutrix. Anil @ Balir was arrested at 11:20 pm; the victim was present there. This has been corroborated in the version of the victim.

23. The defence of Vinay that because of a quarrel over a sum of Rs.350/-, he has been falsely implicated is also a defence noted to be rejected. The victim would not put her honour at stake for a sum of Rs.350/- and that too when there was other documentary evidence apart from her oral version i.e. the report of the CFSL to nail the appellant Vinay. There is also no explanation given by appellant Anil @ Balir as to how his nicker had semen stains.

24. The submission of the accused Vinay that the only role attributed to him was that he was standing outside and a mere presence would not attract his conviction under Section 376 (2)(g); this is also an argument without any merit. As discussed supra, the victim has categorically disclosed that after Vijay had taken her to a room and had committed the forcible act of rape upon her, Anil @ Balir and Vinay had joined and both of them had threatened her that if she disclosed this incident

to any person, they would kill her and her family. This threat continued even after Anil @ Balir raped her. Her version clearly disclosed that Vinay was well aware of the forcible act being committed upon the victim by both Vijay and Anil @ Balir. It is not a case where he was unaware of what was going on; he was an active accomplice; in fact he had clearly told the victim that in case she did not succumb to the pressure of his accomplices, she and her family would be wiped out.

25. In this factual matrix, the judgments relied upon by the learned counsel for the appellant Vinay would not be applicable. Each case is distinct on its own factual matrix.

26. This Court is of the considered view that the conviction under Section 376 (2)(g) qua all the appellants is fully established. There is no gainsaying to the settled legal proposition that if the statement of the prosecutrix inspires confidence, the conviction can be based on this solitary statement itself. In the instant case, not only is the version of PW-3 corroborated by her mother (PW-7) but the medical and the scientific evidence also support this stand, the victim was conscious of the fact that her complaint in a non-permissive society may ostracize her and there was absolutely no reason but for the fact that it was an honest narration that the victim would falsely implicate the accused. Except for the bald defence raised by Vinay that there was a dispute over a grocery item for a sum of Rs.350/-, the other two accused had not projected any defence. The defence of Vinay was also rightly held to be unbelievable.

27. The impugned judgment does not call for any interference. The sentence of 10 years RI imposed upon the appellants which is the minimum for the offence of gang rape also calls for no interference.

28. Appeals are without any merit. Dismissed.

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