

Deepak @ Deepchand vs.state

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Court : Delhi

Decided On : Jun-01-2017

Appellant : Deepak @ Deepchand

Respondent : State

Judgement :

* % + IN THE HIGH COURT OF DELHI AT NEW DELHI Decided on:

1. t June, 2017 CRL.A. 512/2016 DEEPAK @ DEEPCHAND STATE Appellant Represented by: Mr. Harsh Prabhakar, Advocate (amicus curiae) and Mr. Anirudh Tanwar, Advocate. versus Respondent Represented by: Mr. Ravi Nayak, APP for the State with SI Jasmer Singh PS Jahangir Puri. CORAM: HON'BLE MS. JUSTICE MUKTA GUPTA MUKTA GUPTA, J.

(ORAL) 1. Convicted for offences punishable under Sections 363/342/376(2)/323 IPC Deepak @ Deep Chand challenges the impugned judgment dated 4th February, 2016 and the order on sentence dated 6th February, 2016 directing him to undergo rigorous imprisonment for a period of seven years and to pay a fine of `8,000/- for the offence punishable under Section 363 IPC, rigorous imprisonment for a period of one year and to pay a fine of `1,000/- for the offence punishable under Section 342 IPC, rigorous imprisonment for a period of ten years and to pay a fine of `20,000/- for the offence punishable under Section 376(2) IPC and rigorous imprisonment for a period of one year and to pay a fine of `1,000/- for the offence punishable under Section 323 IPC. CRL.A. 512/2016 Page 1 of 10 2.

Assailing the conviction, learned Counsel for the appellant contends that there is a delay in reporting the matter to Police. Though even as per case of the prosecution, the prosecutrix reached back to her grand-mother on 6th February, 2010 in the morning, however till 7th February, 2010 no PCR call was made and only after informing Bhoop Singh a call was made at 10.17 PM. Further even compliance as mandated under Section 157 Cr.P.C. was not done immediately and the copy of the FIR was received by the learned Metropolitan Magistrate on 11th February, 2010. After the PCR call was made at 10.17 PM on 7th February, 2010 the return information sent by the PCR was that no rape has been committed. Though in the statement of the grand-mother on the basis of which FIR was registered, particulars of the place where the prosecutrix was allegedly raped were not given, however in the Tehrir recorded by the investigating officer it was stated that the offence of rape took place at Mahender ka Makan. There is no explanation as to how the place of occurrence was added in the Tehrir. Further during the course of investigation, a status report was filed by the Police which was accompanied by the statement of the landlady of the house where the appellant was residing. She stated that the appellant was residing at H.No.2/420, Shah Alam Band, Jahangir Puri since many years. Thus learned counsel for the appellant seeks to draw an inference that the appellant was not residing at Mahender Ka Makan. Reliance is placed on the decisions reported as 228 (2016) DLT162(DB) Vishal Vs. State and 2016 LawSuit(Del) 2525 Mohd. Hanif; Mohd.Rafiq; Mirazuddin; Sirazuddin Vs. State. There are material contradictions and improvements in the statements of the prosecutrix and her grand-mother, thus the appellant is liable to be acquitted. CRL.A. 512/2016 Page 2 of 10 3. Learned APP for the State on the other hand contends that though the sister and uncle of the prosecutrix appeared as witnesses, however they were not cross-examined. Even in cross-examination of the grand-mother though delay was put to her, however she was not asked to explain the reasons for delay in lodging of the FIR. The delay in lodging of the FIR has however been explained by the grand-mother who deposed that after the prosecutrix informed her of the incident, they tried to search the appellant and wanted to confront him, however since he was not available, the facts were informed to Bhoop Singh who made a PCR call. He further states that to challenge the factum of noting Mahender Ka Makan as the

place of incident, the investigating officer ought to have been cross-examined which was not done and hence now no such plea of the appellant can be entertained. Further mother of the prosecutrix was dropped as a witness as her statement under Section 161 Cr.P.C. was not recorded and Mahender was dropped as he was not traceable. From testimony of the witnesses, facts that the prosecutrix left the home in the afternoon of 5th February, 2010; came back only in the morning of 6th February, 2010 and was picked up by the grand-mother and her sister from the bus stop after information was given by the appellant have been proved beyond reasonable doubt. The alleged improvements in statements of the prosecutrix and her grand-mother are not material in nature and do not go to the root of the matter.

4. Process of law was set into motion on receipt of DD No.25A at 10:20 P.M. on 7th February, 2010 at PS Jahangir Puri informing that a woman has been raped at H-2 Block, Shah Allam Bandh, Sai Baba Mandir near Jahangir Puri. SI Umed Singh along with Ct. Jasbir went to the spot and met grandmother of the prosecutrix and the prosecutrix. Thereafter, he informed CRL.A. 512/2016 Page 3 of 10 W/SI Sushila and went back to the police station along with the prosecutrix and her grandmother. The prosecutrix was taken to BJRM Hospital for medical examination. Though the MLC was prepared, however, the doctor refused to perform internal examination as mother of the prosecutrix was not present. On 8th February, 2010 itself the prosecutrix was again taken to BRJM Hospital for her medical examination. Thereafter, statement of grandmother of the prosecutrix was recorded, on the basis of which FIR bearing number 50/2010 was registered under Sections 363/342/376(2)(f)/506 IPC. During the course of investigation, Deepak @ Deep Chand was apprehended at the instance of the prosecutrix from House Number 1144, Gali Number 2, Khadda Colony. Statement of the prosecutrix was recorded under Section 164 Cr. P.C. vide Ex. PW-11/A.

5. During the course of trial, Principal, Primary School appeared as PW18 and furnished copy of the admission register Ex. PW-18/A, copy of admission form Ex. PW-18/B and copy of affidavit executed by mother of prosecutrix Ex.PW-18/C and stated that the date of birth of the prosecutrix, as per the school record, is 28th April, 2005.

6. After satisfying that the prosecutrix PW-2, who was aged 8 years at the time of incident, was capable to understand the questions and give rational answers and competent to depose correctly about the incident, the learned Additional Sessions Judge recorded the statement of the prosecutrix. The prosecutrix stated that on 5th February, 2010, Deepak @ Deep Chand was standing near Sai Baba Mandir and she was peeling off cholia outside her house. Deepak @ Deep Chand called her to the Mandir. When she went there, he took her to a room in Swaroop Nagar. She requested him to drop her at her house as it was night but he refused. He closed the door and CRL.A. 512/2016 Page 4 of 10 removed her underwear. He also removed his underwear after which he lay down over her. Thereafter, he put his urinating organ in her urinating part. When she felt pain and cried, he pressed her mouth with his hand. He threatened to kill her if she made any noise. He made her hold his penis and shake the same. He also slapped her and kept her in the room the whole night. Next day, in the morning, he made her sit in a bus which went to Jahangir Puri and asked the driver to drop her at 100 number bus stand. When she got down, she met her grandmother and sister to whom she narrated the entire incident. During her cross examination, she stated that when the appellant was taking her from Jahangir Puri to Swaroop Nagar by bus, neither did she complain nor did she raise her voice to the passengers that the appellant was taking her forcibly. She further stated that Mahender was occupying the room adjacent to the room where "galat kaam" took place. However, she did not go to the room of Mahender to inform him about the "galat kaam". She further stated that there was no bleeding when the "galat kaam" was committed by the appellant.

7. PW-4 grandmother of the prosecutrix deposed that her elder son was married and had three sons and two daughters. His son became mentally imbalanced and left the house. Deepak @ Deep Chand is the son of her brother in law. After her son left, she married her daughter-in-law i.e. mother of the prosecutrix to Deepak @ Deep Chand. On 5th February, 2010, around 6:00 P.M., when she returned home after work, she found that the prosecutrix was not at home. She was informed that the appellant had taken the prosecutrix. However, she kept on searching for the prosecutrix. On 6th February, 2010, she received a call from the appellant stating that there was nothing to worry and asked her to reach 100 number bus stand. She along CRL.A. 512/2016 Page 5 of 10 with her

granddaughter i.e. sister of the prosecutrix went to the bus stand. Prosecutrix got down from the bus. She was not accompanied by the appellant. Clothes of the prosecutrix were torn. Thereafter, the prosecutrix narrated the entire incident to her and her sister.

8. PW-6, sister of the prosecutrix corroborated the testimony of the prosecutrix and her grandmother.

9. PW-3 Dr. Sumitra, SR, Gynaecology, BRJM Hospital, was deputed on behalf of Dr. Mamta who had prepared the MLC of the prosecutrix, who deposed and exhibited the MLC vide Ex.PW-3/A. As per the MLC, on local examination, there was no sign of external injury over breast, mouth, lips and abdomen. Pubic hair were not developed, libia majora and minora were normal, hymen was torn, bruising was present and there was no fresh bleeding.

10. PW-19 Ms. L. Babyto Devi, Sr. Scientific Officer, FSL, Rohini prepared the FSL report Ex. PW-19/A and the serological report Ex. PW- 19/B. As per Ex.PW-19/A, semen was detected on the underwear of the appellant.

11. In respect of the contention of learned counsel for the appellant that there is delay in compliance in terms of Section 157 Cr.P.C. it is required to be noted that FIR was registered on 8th February, 2010 at 11.15 AM and on the same day appellant was arrested. Thus, he was produced before the learned Metropolitan Magistrate within 24 hours of the arrest when the case diary was also produced. Thus the delayed submission of the special report to the learned Metropolitan Magistrate on 11th February, 2010 is not fatal to the case of the prosecution. The delay in lodging of the FIR from the morning of 6th February, 2010 to the late night of 7th February, 2010 has CRL.A. 512/2016 Page 6 of 10 been duly explained from the deposition of the grand-mother of the prosecutrix who stated that after the prosecutrix informed her of the incident she tried to find out the appellant as he was living in the same house and had got married to the mother of the prosecutrix after the father of the prosecutrix went missing and only after his whereabouts were not known and he was not traceable, she informed about the incident to her son who made the PCR Call.

12. As regards mentioning of the place of incident being Mahender Ka Makan in the Tehrir it may be noted that the investigating officer PW-20 SI Sushila Rana had made enquiries from the grand-mother and the prosecutrix where after they were taken to the hospital and only after getting the MLC of the prosecutrix prepared wherein the Doctor did not gynecologically examine the prosecutrix for the reason that the mother of the prosecutrix was not present, whereafter formal FIR was lodged on the statement of grandmother of the prosecutrix. Thus it cannot be ruled out that the place of offence being noted as Mahender Ka Makan in the Tehrir was on the basis of the inquiry. In any case on this issue there is no cross-examination of SI Sushila Rana who would have been the relevant witness to explain how she noted this fact in the Tehrir. In the absence of cross-examination of the material witness on this count in view of the decision of the Supreme Court reported as (1998) 3 SCC561 State of U.P. Vs. Nahar Singh it cannot be adversely used against the prosecution.

13. The return PCR call though noted that rape Nahin Hain, however it also notes that Chacha of the prosecutrix who was aged 10 years has done Galat Kam with her. Since this witness from the PCR has not been examined and the information being hearsay, the appellant cannot take CRL.A. 512/2016 Page 7 of 10 advantage of this fact. Further the status report which accompanied the statement of the landlady of the house where allegedly the appellant was residing has not been exhibited during the course of trial. The statement so recorded at best can be used as a previous statement of the landlady who has not been examined in the Court. Further as per the statement of the landlady, the appellant was residing at H.No.2/420, Shal Alam Band, Jahangir Puri. It is not the case of the prosecution that she was raped by the appellant at his second house and the same is not sufficient to rule out that no offence took at the place alleged.

14. As per learned counsel for the appellant the improvements/ contradictions in the statement of the prosecutrix were that though in her statement under Section 161 Cr.P.C. she stated that the appellant lay upon her and committed rape, however in her statement recorded under Section 164 Cr.P.C. she stated that the appellant committed Galat Kam with her, that he was forcing her and made her hold his penis in her hand. In her statement before the Court the prosecutrix stated

that the appellant lay upon her and committed rape and also asked her to hold his penis. A perusal of the three statements show no contradictions or variations except that the words used are different. Further in her deposition before the Court the prosecutrix stated that the appellant called her to Mandir, however this fact was neither stated in her statement under Section 161 Cr.P.C. nor under Section 164 Cr.P.C., does not go to the root of the matter. Moreover, in her statement under Section 161 Cr.P.C. prosecutrix stated that her uncle made a call to the Police whereas in her deposition she stated that a call was made by her grand-mother would also not discredit the version of the prosecutrix, as the prosecutrix was examined in Court nearly one and a half years after the CRL.A. 512/2016 Page 8 of 10 incident and these minor aberrations will not discredit her otherwise reliable version.

15. From the testimony of the prosecutrix, her grand-mother and sister, the prosecution has proved beyond reasonable doubt that the prosecutrix had gone missing from her house from the afternoon of 5th February, 2010 and came back only on 6th February, 2010 in the morning and was picked up at the bus stop which fact was informed by the appellant to the grand-mother of the prosecutrix. The version of the prosecutrix is consistent that the appellant took her to a place and committed rape on her besides other sexual activities. Further the semen could not be detected on the vaginal swabs etc., for the reason there was delay in the medical examination of the prosecutrix as the FIR was got lodged only on the intervening night of 7th and 8th February, 2010 and further she was gynecologically examined only on 8th February, 2010 in the late evening. The prosecutrix was aged 9 years at the time of incident and soon after the incident her hymen was found torn with bruising on the vaginal area.

16. It is well settled that even on the uncorroborated testimony of the prosecutrix if the same is reliable, conviction for an offence of rape can be based. [See (1993) 2 SCC622 State of Himachal Pradesh Vs. Raghubir Singh and (2012) 7 SCC171 Narender Kumar Vs. State.]. In the present case the version of the prosecutrix is duly corroborated by her grand-mother, sister and her MLC. Further even as proved by the prosecution, the prosecutrix was in the company of the appellant since the evening of 5th February, 2010 till the morning of 6th February,

2010 and thus in terms of Section 106 of the Evidence Act onus shifts upon the appellant to explain as to how she was ravished at the time when she was in his custody, which he CRL.A. 512/2016 Page 9 of 10 has miserably failed to do. Explanation of the appellant in his statement under Section 313 Cr.P.C. being bald denial on these facts and stating that he was innocent and falsely implicated does not come to his aid. Consequently, the appeal is dismissed. Judgment of conviction and order on sentence are upheld. The appellant will undergo the remaining sentence.

17. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellant.

18. TCR be returned. (MUKTA GUPTA) JUDGE JUNE01 2017 ga CRL.A. 512/2016 Page 10 of 10

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