

Naresh Kumar vs.state

Naresh Kumar vs.state

SooperKanoon Citation : sooperkanoon.com/1212674

Court : Delhi

Decided On : Feb-09-2018

Appellant : Naresh Kumar

Respondent : State

Judgement :

\$~ * % IN THE HIGH COURT OF DELHI AT NEW DELHI Judgment reserved on :

07. 02.2018 Judgment delivered on :09.02.2018 + CRL.A. 549/2011 NARESH KUMAR Appellant Through: Mr R.D. Chauhan, Adv with appellant STATE in person versus Respondent Through: Ms Neelam Sharma, APP with SI Anupama Rathi CORAM: HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1. This appeal has impugned the judgment and order on sentence dated 25.03.2011 and 26.03.2011 respectively wherein the appellant stood convicted under Section 376 r/w Section 511 IPC as also for the second offence under Section 506 IPC; for his first conviction he has been sentenced to undergo rigorous imprisonment for a period of 5 years and to pay a fine of Rs. 2000/- in default of payment of fine to undergo SI for a period of one month; for his second conviction, he has been sentenced to undergo RI for a CRL A. 549/2011 Page 1 of 12 period of one year. Both the sentences were to run concurrently; benefit of Section 428 of the Cr.P.C had been granted to the appellant.

2. The nominal roll of the appellant has been requisitioned. This reflects that as on the date when his sentence was suspended, he had undergone incarceration of about 2 years 4 months which included the remissions earned by him.

3. Record shows that the present FIR has been registered initially under Section 354 of the IPC. The FIR was registered on 22.05.2008 on the statement of the mother of the victim namely Ruby. Pursuant thereto the statement of the victim was recorded under Section 164 of the Cr.PC before the learned M.M. on 31.05.2008; the FIR was thereafter converted from an offence under Section 354 IPC to an offence under Section 376 of the IPC. The conviction as noted supra was a conviction under Section 376 IPC r/w Section 511 and Section 506 of the IPC.

4. The case of the prosecution is that on the fateful day i.e. on 22.05.2008 the complainant Ruby had made a complaint at about 8 pm in the evening alleging that the accused had attempted to rape her minor daughter aged about 7 years and had threatened to kill her; he had also threatened her not to disclose the incident to any person. The accused was absconding; he CRL A. 549/2011 Page 2 of 12 could not be arrested till 03.03.2009.

5. The prosecution had examined 13 witnesses to prove its case. The star witness being PW1(S.J). PW1 was a minor aged about 7 years. Her statement without oath was recorded on 04.09.2009; this deposition matches the statement made by her to the Magistrate under Section 164 of the Cr.P.C which had been recorded on 31.05.2008. She had described the incident in detail both in her statement recorded under Section 164 Cr.P.C as also her version in Court.

6. PW1 used to take tuitions from the accused. The tuition fee of Rs 150/- was being paid by her mother to the appellant. She deposed that earlier the victim used to go to the house of the appellant to take tuitions but later on he started teaching her at her home; at the time of the incident she was in the 3rd standard. The appellant used to ask her to remove her underwear and would lie on top of her; he would also remove his own underwear and lie on top of her; he thereafter did a gandi harkat. She has further described the manner in which the appellant used to put his urinating organ into her private part; she used to feel pain. He threatened to

beat her in case she disclosed this incident to any person. On the fateful day at about 8 pm when her mother came inside the room to pick up a bucket she saw the accused CRL A. 549/2011 Page 3 of 12 doing the act; on seeing her the appellant fled from the spot. The victim was taken to the police station; she was medically examined on the same day.

7. In her cross examination she had stuck to her stand; she did not deviate. Her credibility could not be tarnished. She repeated the manner in which the accused used to perform the unholy act upon her person. He did this act several times earlier also in fact around 50 times. He used to bolt the door of the room before doing the act. She did not disclose this incident to her parents as the accused had threatened her that he would kill her and her parents in case she told any person about it. She denied the suggestion that she is lying or has made a false statement. Relevant would it be to note that in her entire version no suggestion has been given to her as to why she would make a false statement. It is not the case of the defence that she has made a false statement or has given an incorrect version for any enmity which the victim and her family had harbored against the accused.

8. This court also notes that the statement of the prosecutrix was recorded for the first time under Section 164 of the Cr.P.C on 31.05.2008. The argument of the learned counsel for the appellant that the FIR has given a different version and is not in consonance with the statement made on 31.05.2008 is an argument which this Court has to necessarily reject. This is CRL A. 549/2011 Page 4 of 12 for the reason that the FIR had been registered on 22.05.2008 on the statement of Ruby who is the mother of the victim and obviously she did not know what had actually transpired with the victim. This could only be gathered in the statement of the victim which at the cost of the repetition was recorded on 31.05.2008.

9. The statement of the complainant (Ruby) pursuant to which an FIR had been registered was an eye witness account of what Ruby had seen at the time when the accused was in the process of committing this act upon her daughter. The FIR has disclosed this in detail. In her statement on oath in Court, Ruby (PW4) had reiterated this version. She had deposed that on the fateful date i.e. on 22.05.2008

at about 7.30 - 7.45 pm since it was raining she went inside the jhuggi with a bucket for putting the same under the roof where there was a leakage. The accused was giving tuition to her daughter inside the jhuggi. When she entered the jhuggi she saw her daughter lying naked and the accused was lying upon her. The accused was also naked at that time. PW4 tried to catch hold of the accused but he fled from the spot. The complainant reported the matter to police on the same day and her statement (Ex.PW4/A) was recorded pursuant to which the FIR was registered. CRL A. 549/2011 Page 5 of 12 10. In her cross examination the credibility of this witness has also not been destroyed. She has admitted that a monthly tuition fee of Rs. 150/- was being paid to the appellant for giving tuitions to her daughter. The appellant used to give tuition in the evening; since the complainant was running a shop over her jhuggi and she was busy in the evening time she hardly used to visit the jhuggi in the evening as there were several customers at that time at her shop. On the fateful day it was raining; she knew there was a leakage in the jhuggi and that is why she went to put a bucket inside the jhuggi when she saw the incident as narrated by her in Ex.PW4/A. She denied the suggestion that her daughter was tutored by her. She denied the suggestion that she is deposing falsely. Relevant would it be to note that no suggestion has been given to this witness either that PW4 was deposing falsely for some ulterior purpose; it is not the version of the defence that PW4 was harboring any grudge against the appellant or for that reason she was deposing falsely or for that reason she had tutored her daughter to depose falsely.

11. The medical evidence adduced by the prosecution is also relevant. The MLC of the victim was proved by PW8 Dr. Vineet Soni (Ex.PW8/A). No injuries were noted upon her person. Dr. Sarika Verma (PW12) had examined the victim. The MLC had been prepared by her Ex.PW8/B. She CRL A. 549/2011 Page 6 of 12 had deposed that on local examination the hymen of the victim was found to be intact. There was no injury or laceration which had been seen. The history disclosed by her mother had been recorded in the MLC which was to the effect that she was sexually assaulted by her tutor while her mother was not there; her mother had witnessed this incident when she had gone to put a bucket in the jhuggi due to leakage because of rain water.

12. The investigating officer has been examined as PW10.

13. In the statement of appellant recorded under Section 313 Cr.P.C he has made a simplicitor statement that he is innocent and has been falsely implicated. He did not lead any evidence in defence.

14. On behalf of the appellant, the first and foremost argument of the appellant is that there are improvements in the version of the victim and her version does not match the version of her mother. This court has already partially answered this argument while discussing the testimony of PW1. This court is of the firm view that the statement of the victim having been recorded on 31.05.2008 for the first time under Section 164 Cr.P.C and the FIR having been registered on the version of her mother on 22.05.2008, the two versions cannot obviously be the same. That apart on 22.05.2008 the mother of the victim had clearly described the incident in the manner in CRL A. 549/2011 Page 7 of 12 which she had witnessed it; she had eye witnessed the accused lying naked upon the naked body of her minor daughter and attempting to do an unholy act upon her. PW4 appears to be wholly honest. She had described this act as ched chaad which she had also been asked to clarify in her subsequent supplementary statement. The hymen of the victim was intact.

15. At the cost of repetition, the statement of the victim had also described the manner in which accused used to perform the act upon her. Although in one part of her version she has stated that he had committed rape upon her but this court notes that the victim was a 7 year old child and coming from an illiterate background would not know the nuances or the details of the word rape or the distinction between rape or an attempt to rape. Her testimony is otherwise consistent on all squares which was to the effect that the appellant used to perform a gandi harkat upon her; in both her versions under Section 164 of the Cr.P.C as also her deposition in court she has stated that appellant used to remove his clothes; he used to remove the clothes of the victim and then lie upon her and do the gandi harkat. The details of the gandi harkat at the cost of repetition would not be really known to such a child victim who not being educated and probably not having heard the word rape; her otherwise description of the

incident is CRL A. 549/2011 Page 8 of 12 a sufficient proof of the conviction which has followed in this case. This court also notes that at the time when the victim was taken for her medical examination which was immediately after the incident, the MLC had noted that the victim was not wearing her undergarments which also substantiates and supports the statement of PW4 and PW3. The conviction of the appellant under Section 376 Cr.P.C r/w Section 511 of the IPC does not suffer from any infirmity.

16. Reliance by the learned counsel for the appellant on the judgment of the Supreme Court in AIR 2001 SC3049 Dilip and Anr vs State of M.P is misplaced. This is not a case of any contradiction by the witness; there is no doubt that under Section 145 of the Evidence Act the defence has the right to discredit the testimony of a witness by accosting her with her earlier statement; the argument of the learned counsel for the appellant that the version of the mother of the victim does not match that of the victims is, however, a submission which cannot come within the ambit of Section 145 of the Evidence Act. This judgment has no application to the facts of this case. The applicability of second judgment relied upon by the learned counsel for the appellant reported as 1974 AIR SC117Bishwanath Prasad vs Dwarka Prasad is also an argument to be noted to be rejected. This is also CRL A. 549/2011 Page 9 of 12 on the provisions of Section 145 of the Evidence Act. As noted supra there is no improvement in the version of PW1 which had been consistent qua her earlier statement given under Section 164 Cr.P.C before the learned M.M. PW1 is a consistent and steady witness; PW4, the mother of the witness has also been honest. She had in her initial statement disclosed that when she saw the accused, he was in a naked form and so also was her daughter and he was lying upon her and doing some ched chaad.

17. The Supreme Court in AIR 2012 SC2254 Jugendra Singh vs State of U.P in the context of appreciation of evidence has held inter alia as under:-

"The court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to

normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts CRL A. 549/2011 Page 10 of 12 alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy. 18. The conduct of the accused is also not worthy. This is a relevant fact under Section 9 of the Evidence Act. He had fled from the spot. The incident is dated 22.05.2008. He has been arrested only in March 2009. There is also no reason why the accused would have been falsely implicated. Neither has any specific suggestion been given by the defence counsel to the relevant witnesses (PW3 and PW4) on this count and neither has any such statement appeared in the statement of the appellant recorded under Section 313 of the Cr.P.C.

19. The conviction of the appellant under Section 376 r/w Section 511 of the IPC suffers from no infirmity. The sentence of 5 years RI also is a sentence which cannot really be faulted with noting the nature of the crime. The victim a 7 year old girl has been attacked not only in body but also in CRL A. 549/2011 Page 11 of 12 mind; the psychological and emotional distress suffered by her would probably not wear out from her system for years together.

20. The courts have time and again held that a demand for justice and the award of punishment have to be in consonance with one another. There are no mitigating circumstances in favour of the appellant to give him sentence lesser than that which has already been awarded to him. The appeal is without any merit. It is dismissed.

21. The appellant who is on bail be taken into custody forthwith to serve the remaining sentence.

22. Appeal disposed of in the above terms. FEBRUARY09 2018 SU INDERMEET
KAUR, J CRL A. 549/2011 Page 12 of 12

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com