

Bhupinder Kumar Vs. State

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Court : Delhi

Decided On : May-08-2015

Judge : Sunita Gupta

Appellant : Bhupinder Kumar

Respondent : State

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

8. h May, 2015 + CRL.A. 342/2011 BHUPINDER KUMAR Through: Appellant Ms.Arundhati Katju with Mr.Ali Choudhary and Mr.Himanshu Suman, Advocates versus STATE Through: Respondent Ms.Fizani Hussain, Additional Public Prosecutor for the State alongwith SI Bimla Devi from Police Station Khyala. Delhi
CORAM: HON'BLE MS. JUSTICE SUNITA GUPTA

JUDGMENT

: SUNITA GUPTA, J.

1. The challenge in this appeal is to the impugned judgment and order on sentence dated 07.12.2010 whereby the appellant was convicted under Section 376 Indian Penal Code and was sentenced to undergo rigorous imprisonment for a period of seven (7) years and fine of Rs.2,000/-, in default to undergo rigorous imprisonment for a period of two (2) months in Sessions Case No.64/2010 arising out of FIR No.158/2009 Police Station Khayala under Section 376 IPC.

2. The prosecutrix X was living with her sister - Anita in N - 162, Raghbir Nagar, New Delhi. On 06.07.2009 her sister and sister's husband had gone to Muradabad, U.P. Her brother - Arjun and three children were living with her. Arjun used to leave the house in the morning and used to return at night. On 15.07.2009 at about 4 pm when X was washing clothes in the bathroom, accused - Bhupinder Kumar, who used to live in the same premises, caught hold of her hand and took her inside his room where he committed sexual intercourse with her against her wishes. After the incident, she started living quiet and was not in a position to tell the incident to anyone. When her sister - Anita returned from U.P., she narrated the entire incident to her. She visited the Police Station on 31.07.2009. She got medically examined but her statement could not be recorded as she was having headache. Her sister took her to Police Station next day i.e. on 01.08.2009 when her statement was recorded. This statement culminated in registration of instant FIR under Section 376 IPC. After medical examination of prosecutrix X, the doctor of DDU Hospital handed over slide sealed with the seal of CMO, DDU Hospital and sample seal which was taken in possession. The accused was also arrested; he was got medically examined on 04.08.2009. His blood sample, semen sample was taken into possession. The statement of prosecutrix was recorded under Section 164 Cr.PC wherein she narrated the same facts as told by her to the police. The ossification test of prosecutrix was done for assessment of her age and her age was reported to be more than 14 years and less than 15 years. The exhibits were sent to FSL. After completion of investigation, charge-sheet was submitted against the accused.

3. The accused pleaded not guilty to the charge under Section 376 IPC framed against him and claimed trial. Thirteen (13) witnesses were examined by prosecution in order to substantiate its case. The statement of accused was recorded under Section 313 Cr.PC wherein he denied the case of prosecution. According to him, he was living in a room adjacent to the room of prosecutrix. The family members of prosecutrix used to take money from him and when he demanded back his money, they used to quarrel with him and got him falsely implicated in this case.

4. After considering the entire evidence adduced by prosecution and hearing the learned counsel for the parties, the learned Additional Sessions Judge observed that the delay in lodging the FIR has been duly explained and is not fatal to the case of prosecution; non examination of Arjun - brother of prosecutrix again is of no consequence as he was not an eye witness of the incident; non-seizure of the clothes of prosecutrix was inconsequential because the medical examination was conducted after 16 days and chances of detection of semen on the clothes was practically finished. Therefore, non-detection of semen on the vaginal smear of prosecutrix as per FSL report has no effect. The factum of absence of injury is not a reason to disbelieve the testimony of prosecutrix, who being a victim of rape, is not an accomplice and her testimony does not require any corroboration. Moreover, the accused has failed to assign any reason as to why he would be falsely implicated in this case. The plea that he used to lend money to the family members of prosecutrix and on their failure to return the money, he was falsely implicated in this case could not be believed.

5. Feeling aggrieved the instant appeal has been preferred by the appellant.

6. Assailing the findings of learned Trial Court, learned counsel for the appellant submitted that the delay in lodging the FIR is fatal to the case of prosecution, the explanation given by sister of prosecutrix for not lodging the report immediately after the incident itself is sufficient to cast doubt on the prosecution case inasmuch as according to her she and her family members wanted to believe whether the version given by prosecutrix regarding commission of rape on her by the accused was believable or not. Even the family members themselves were not trusting the prosecutrix and hence the delay in lodging the FIR is fatal to case of prosecution. Statement of prosecutrix required corroboration which in the instant case is lacking inasmuch as, as per MLC her hymen was found intact; there was no external injury and even the FSL report has also not supported the case of prosecution. The age of prosecutrix being less than 16 years is also not duly proved. The prosecution has failed to bring home the guilt of accused beyond shadow of doubt, that being so, the accused/appellant was entitled for benefit of doubt and he should be acquitted of the offence alleged against him.

7. Rebutting the submissions of learned counsel for the appellant, learned Additional Public Prosecutor for the State submitted that the delay in lodging FIR has been duly explained as family member did not want to falsely implicate anyone in the case. The testimony of prosecutrix herself is sufficient to sustain conviction. Moreover, her initial statement made to the police finds corroboration from her statement under Section 164 Cr.PC made before the learned Metropolitan Magistrate and her deposition in the Court. Absence of injury or hymen being intact ipso facto does not raise a presumption that no rape was committed on her because as per Explanation appended to Section 376 IPC, slight penetration is sufficient. Moreover, there was no reason for the prosecutrix or her family member to falsely implicate the accused/appellant in this case. The case set up by the accused that he used to lend money to family member of complainant was not proved by him. That being so, the impugned judgment does not call for any interference and appeal be dismissed.

8. Firstly, coming to the age of prosecutrix, according to her she was 14 years of age at the time of incident. According to PW7 - Dr. J.

Dayal, on 17.08.2009 prosecutrix was examined by the Medical Board under this Chairmanship to determine her age and on the basis of findings of radiological, dental and physical examination, the Board concluded the age of prosecutrix to be more than 14 years and less than 15 years as per Ex.PW7/A. This report was not challenged in cross examination. That being so, it was proved that the prosecutrix was less than 16 years on the date of commission of offence.

9. In her initial statement, which became the bedrock of investigation, the prosecutrix unfolded the entire incident by stating that her parents had already died as such since the last three years she was residing with her sister. On 06.07.2009, her sister alongwith her husband had gone to Muradabad, U.P. leaving behind her brother - Arjun and three children. Her brother - Arjun used to leave the house for work in the morning and used to return back in the evening. The accused used to live in the adjacent room. On the fateful day, when she was washing clothes in the bathroom at about 4 pm the accused came near her and took her to his room where he committed rape on her. She further stated that she

could not disclose the incident to anyone. However, after her sister returned back then she disclosed the incident to her.

10. Thereafter, an application under Section 164 Cr.PC was moved by the Investigating Officer of the case for recording the statement of prosecutrix under Section 164 Cr.PC and her statement was recorded by PW10 - Shri Ashish Aggarwal, Metropolitan Magistrate wherein she reiterated the entire incident. Thereafter when she was examined in the Court, again the incident was reiterated by her. She was cross examined by the learned counsel for the appellant/accused, however, despite cross examination nothing material could be elicited to discard her testimony which remained unimpeachable.

11. It is trite that the victim in the case of rape is not an accomplice and no corroboration is required to her statement. In *Bharwada Bhoginbhai Hirjibhai vs State of Gujarat*, AIR 1983 SC753 it was held that why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion?. The court described the following reasons for accepting testimony of the prosecutrix: (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred; (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours; (3) She would have to brave the whole world; (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered; (5) If she is unmarried, she would apprehend that it would be, difficult to secure an alliance with a suitable match from a respectable or an acceptable family; (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself; (7) The fear of being taunted by others will always haunt her; (8) She would feel extremely embarrassed in relating the incident to others being over powered by feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo; (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy; (10) The parents of an

unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour; (11) The fear of the victim herself being considered promiscuous or in some way responsible for the regardless of her innocence; (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, Crl.A.342-2011 to be acts as a deterrent. This view was reiterated in *The State Of Punjab vs Gurmit Singh & Ors*, (1996) 2 SCC384 and even in *Tameezuddin @ Tammu vs. State of (NCT) of Delhi*, 2009 15 SCR80 relied upon by the learned counsel for the appellant.

12. One of the major contention of learned counsel for the appellant is that there is delay of 16 days in lodging the FIR inasmuch as the incident is of 15.07.2009 whereas the report was lodged on 01.08.2009 and it is not one of those cases where the FIR was not lodged immediately by the prosecutrix or by her family members for saving their reputation but because of the fact that the sister of prosecutrix herself was verifying the factum of commission of rape and, therefore, it is submitted that since the sister herself was doubting the veracity of the statement of prosecutrix, therefore, the delay in lodging the FIR is fatal. The submission is devoid of any merit inasmuch case in *Karnel Singh vs State Of M.P*, (1995) 5 SCC518 it was held by Apex Court that merely because the complaint was lodged less than promptly does not raise the inference that the complaint was false. The reluctance to go to the police is because of society's attitude towards such women; it casts doubt and shame upon her rather than comfort and sympathise with her. Therefore, delay in lodging complaints in such cases does not necessarily indicate that her version is false. In *Gurmit Singh (supra)*, it was observed that that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.

13. In the case of *Tulshidas Kanolkar vs. The State of Goa*, (2003) 8 SCC590 the Hon'ble Supreme Court has observed as under:

..... The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstances for the accused when accusation of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so the mere delay in lodging of first information report does not in any way render prosecution version brittle.

14. Reverting to the factual matrix of the present case, delay in lodging FIR has been satisfactorily explained. The fact that sister of prosecutrix wanted to convince herself whether the incident as narrated by the prosecutrix was correct before proceeding further does not mean that the sister was not trusting prosecutrix. She did not want to falsely implicate any one in such a serious offence as it also affects the reputation of the family. That being so, the delay in lodging the FIR is not fatal. The learned counsel for the appellant relied upon *Sri Chittaranjan Roy vs. The State of Tripura*, Manu/GH/0048/2011 wherein the explanation given by the prosecution in respect of delay occasioned was due to negotiation and discussions in the meeting organized to resolve the issue. The explanation given by prosecution regarding delay in lodging FIR was not found convincing and this was considered to be one of the reasons in acquitting the accused, but the facts were entirely different in that case inasmuch as the prosecutrix was caught redhanded with accused and the possibility of prosecutrix turning around with hostility to lay the entire blame upon accused as the perpetrator of crime, in order to save her skin in her society, could not be ruled out. Further, on the factual matrix of that

case, it was found that the conduct of prosecutrix implying her tacit consent to stay with the accused in the hotel room could not be ruled out. As such the cumulative circumstances over tacit consent coupled with the delay in lodging the FIR on account of negotiations and discussions in the meeting organized to resolve the issue created a doubt in the prosecution case. Similarly, *State of Karnataka vs. Mapilla P.P. Soopi*, AIR 2004 SC85 relied upon by the learned counsel for the appellant does not help the appellant because besides delay in lodging complaint, there were other factors which created doubt in the prosecution case and, therefore, the accused was acquitted by the High Court and the appeal filed by the State against acquittal did not find favour with Honble Apex Court. However, in the instant case, the delay in lodging the complaint ipso facto is no reason to doubt the prosecution case.

15. The submission that absence of injuries or hymen being intact also rules out the possibility of rape again is without substance inasmuch as the medical examination of the prosecutrix was conducted after 16 days, that being so, the chances of detection of any injury on her person was quite remote. As regards, the hymen being intact pursuant to a query raised by the Investigating Officer, the doctor gave the opinion that by definition of rape intercourse has to be there but since hymen is intact rape possibly has not been done, but it cannot be ruled out that in certain circumstances even with intact hymen rape can be done. As per the Explanation appended to Section 376 IPC even slight penetration is sufficient to constitute rape. In *Madan Gopal Kakkad v. Naval Dubey & Anr* (1992) 3 SCC204 it was held that slightest penetration without rupturing hymen is rape. Similar view was taken in *Ranjit Hazarika vs State Of Assam*, (1998) 8 SCC635 where it was held that non-rupture of the hymen or the absence of injuries on her private parts, does not belie her testimony as she nowhere stated that she was bleeding per vaginal. Similarly, in *B.C. Deva @ Dyava vs. State of Karnataka*, (2007) 12 SCC122 it was held that merely because there were no injuries on the persons of the victim and hymen was intact does not lead to a corollary that there was no coitus. In *Tameezuddin @ Tammu (supra)* and *Abbas Ahmad Choudhary vs. State of Assam* (2011) 2 SCC (Cri.) 439, the accused were acquitted on peculiar facts and circumstances appearing in those cases. In *Abbas Ahamd (supra)*, the Court observed that the consent of a girl under 16 years of age at the time of incident

would be meaningless. Even in *Aman Kumar and another vs. State of Haryana*, AIR 2004 SC1497 relied upon by learned counsel for the appellant it was held that to constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law.

16. It is not in dispute that the accused/appellant used to live in the neighbourhood of prosecutrix and as such was very well known to her from before. According to accused family members of prosecutrix used to borrow money from him and whenever he demanded return of money they used to quarrel with him and it is alleged that on that count he has been falsely implicated in this case. This suggestion has been denied by prosecutrix. It is pertinent to note that no such suggestion was given to PW1 - Anita, who was the best person to admit or deny if she and her family had borrowed any money from accused/appellant or not. The omission to put such suggestion to her in this regard, shows that the plea urged by appellant is an afterthought and does not inspire confidence. Moreover, the plea taken by accused is quite vague inasmuch as he did not disclose as to when and how much amount he gave to the family members of prosecutrix. It is not even disclosed as to when accused demanded back the money and what steps he took to recover that money. Strangely enough, he did not lead any evidence to establish his case.

17. Keeping in view the aforesaid facts and circumstances, appellant has rightly been convicted by the learned Trial Court for offence under Section 376 IPC and sentenced accordingly. The appeal is bereft of any merit and is accordingly dismissed. Pending applications, if any, also stand disposed of. Trial Court record be sent back along with the copy of the judgment. Appellant be informed through Superintendent Jail. (SUNITA GUPTA) JUDGE MAY08 2015/rd

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