Sobhnath Vs. State

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Court : Delhi

Decided On : Jul-07-2015

Judge : Indermeet Kaur

Appellant : Sobhnath

Respondent : State

Judgement :

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

03. 07.2015 Judgment delivered on :

07. 07.2015 Crl. Appeal No.1574/2011 SOBHNATH Appellant Through: Versus Mr. Sumeet Verma, Adv. STATE Through: .Respondent Mr. O.P. Saxena, APP for the State. CORAM: HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1. This appeal is directed against the impugned judgment and order of sentence dated 12.07.2011 and 13.07.2011 respectively wherein the appellant Sobhnath stood convicted under Sections 376 (2) (f)/506 (I) of the IPC. He had been sentenced to undergo RI for a period of 10 years for the graver offence under Section 376 (2)(f) of the IPC and to pay a fine of Rs.2,000/- and in default of payment of fine to undergo SI for a period of 2 months. For the offence under Section 506 (I) of the IPC, he had been sentenced to undergo RI for a period of 6 months. Both the sentences were to run concurrently.

2. The victim was a minor girl aged about 9 years and unfortunately was the granddaughter of the appellant; she used to address him as dada. The complaint was lodged on the date of the incident itself i.e. 10.04.2010. The complainant was the father of the victim. The father Om Prakash (PW-6) had seen the appellant zipping up his pant having clamped the mouth of his daughter (PW-5). The statement of the victim was recorded under Section 164 of the Cr.PC before the learned Metropolitan Magistrate (PW-4). Apart from the versions of PW-5 & PW-6, there was an eyewitness account of CW-2 (the brother of the victim). He had seen the appellant lying upon his sister and doing the untoward act whereupon he had disclosed this fact to his father who on reaching the jhuggi of the appellant had seen the appellant zipping up his pant; at that time, his daughter was lying in the room with her mouth tied with a cloth.

3. Apart from the aforenoted evidence which had been collected by the prosecution, the victim was medically examined on the same day. Her MLC (Ex.PW-1/A) had witnessed a fresh hymen tear; although no swelling was reported on her vaginal and private parts yet redness was noted. The exhibits which included the vaginal and vulval swabs as also the undergarments of the victim and that of the accused were sent to the CFSL for examination. The CFSL vide its report (Ex.PW-14/E) had noted human blood on the baby skirt of the victim.

4. The appellant on the basis of the aforenoted evidence collected by the prosecution has suffered the conviction and sentences as noted supra.

5. On behalf of the appellant, arguments have been addressed in detail. It is pointed out that the statement of the victim suffers from infirmities and she being a child witness, a close scrutiny of her statement is required. Attention has been drawn to that part of her crossexamination wherein she has admitted that the police aunty had told her how to disclose about the incident in the Court; she had also revealed that her statement was not read over by the police aunty; submission being that this witness is a tutored witness. If her testimony is disregarded, there will be nothing left with the prosecution. Attention has also been drawn to the testimony of PW-6, the father of the victim. Submission being that this witness was also an interested witness and the fact that the FIR has been lodged

at 11:30 PM when the incident as per the prosecution had occurred at 10:40 AM clearly shows that this was an afterthought and this was for the reason that PW-6 and his family were annoyed by the fact that the appellant was living with their mother; the appellant had also had a fight with their mother who was in Sonipat at that time. The CFSL has also not supported the version of the prosecution as no semen has been detected on either the vulval or vaginal swabs of the victim or on her clothes. Submission being that this could well be a case of false implication as the family of the victim was unhappy by the fact that the appellant was living with the mother of PW-6.

6. Arguments have been refuted.

7. Record has been perused.

8. PW-5 is the child victim. She was 9 years of age on the date of the incident and this has been established by the version of PW-3 who had brought the birth certificate of the child victim evidencing her date of birth as 05.10.2001. PW-5 was examined in camera. A preliminary round of question had been put to her before her statement was recorded. The Court was satisfied that the victim was capable of giving rational answers to the questions and she appears to be well oriented. The witness in detail disclosed the manner in which the incident had occurred. She has deposed that the appellant had taken her inside the house of her dadi and slapped her. He had removed her underwear. He also removed his pant and had thereafter done the wrong act upon her by lying upon her. She felt pain. Blood oozed out. She was threatened that if she disclosed this incident to anyone, her throat would be cut.

9. In her cross-examination, she has stuck to her stand. Her earlier version recorded under Section 161 of the Cr.PC (Ex.PW-5/DA) was put to her but there was nothing apparent or evident which could be termed as an improvement and which would demolish her otherwise well explained testimony. Relevant would it be to note that the entire confrontation of the victim is with Ex.PW-5/DA and her statement recorded under Section 164 of the Cr.PC (Ex.PW-4/A) was never confronted to her. Perusal of Ex.PW-4/A shows that it was in conformity with her version on oath in Court. This statement (Ex.PW4/A) was recorded on 12.04.2010

i.e. just two days after the date of the incident. Even in Ex.PW-5/DA, nothing crucial has been pointed out by the learned counsel for the appellant which could demolish the version of PW-5.

10. The matter does not rest here. Apart from the version of PW-5, the testimony of PW-6 is fully corroborative of PW-5. He was the father of the victim. He had deposed that on the fateful day i.e. 10.04.2010, he was in his jhuggi and remained there till 10:35 AM. His son (CW-2) wanted to put a pin on his trouser as the hook of his trouser was broken. CW-2 told him that he would get the pin from his dadis house. On coming back, CW-2 told him that he had seen dadaji doing an untoward act with his sister (PW-5). PW-6 on reaching the jhuggi of the appellant saw the appellant zipping up his pant; the mouth of his daughter was tied with a cloth. His daughter was sweating. Also accused ran away from the spot. PW-5 narrated the incident to him. PW-6 informed the children of the accused and consulted his wife. His mother had returned from Sonepat at 03:30 PM. At first a request was made by their close relations to hush up the matter but PW-6 was not inclined to do so. Complaint was accordingly lodged on the same day.

11. Nothing has been brought out in the cross-examination of PW-6 either which could dent his version.

12. CW-2 was the brother of the victim. He was not arrayed as a witness of the prosecution but since he has not been summoned, at the request of the Court, he was brought into the witness box. He was the eyewitness to the incident. His version was fully corroborative of PW-5 & PW-6. CW-2 deposed that on the fateful day i.e. 10.04.2010, which was a holiday, since his pant hook was broken, he told his father that he would get a pin from his grandmothers jhuggi. On reaching there, the door was closed. On forceful opening of the door, he saw that his dada (the appellant) had removed his undergarment and so also the undergarments of his sister. The appellant was doing Gandi Harkat with his sister and was inserting his male organ in her private part. His sisters mouth was tied with a cloth. CW-2 rush to his jhuggi and informed his father about the same. When PW-6 reached there, the appellant was zipping up his pant and his daughter was present there with her mouth tied with a piece of cloth.

13. CW-2 was subjected to a lengthy cross-examination. He admitted that his statement Ex.PW-7/A was recorded before the Magistrate. This version (Ex.PW-7/A) was fully corroborative of the version of CW-2 on oath in Court.

14. The MLC of the victim (Ex.PW-1/A) reveals that the victim was examined on 10.04.2010 at 07:45 PM. There was a fresh hymen tear and redness was noted upon her vaginal part. The vaginal and vulval swabs were picked by the doctor and sent to the CFSL for examination. Although no semen was detected on any of these exhibits yet human blood was noted on the skirt of the victim. This medical and scientific evidence also supports the version of the prosecution and advances it.

15. Learned counsel for the appellant submits that there is every possibility that the victim has been tutored as the family of the victim was unhappy with the fact that their grandmother was living with the appellant. This line of defence now picked up by the learned counsel for the appellant did not find mention in the cross-examination of witnesses. No such suggestion has been given to PW-5. It appears that the accused, however became wiser at the time of cross-examination of PW-6 and a suggestion to the said effect has been given to PW-6 but this appears to be palpably false as admittedly the mother of PW-6 was living with the appellant since the last several years and it would be difficult to believe that all of a sudden, on one fateful day, PW-6 and his family got annoyed with this fact when mother of PW6 was living with the appellant since long.

16. PW-6 has also deposed that after the incident, he had disclosed these facts to the children of the appellant as also to his wife and at first efforts were made by the relations to hush up the matter but his conscious did not permit him to do so. He waited for his mother to come back from Sonepat and when she returned at 03:30 PM, after consultation with her, they were advised to lodge the complaint which was done so on the same day. The delay if any in lodging the FIR is satisfactorily explained.

17. All these facts also show that there appears to be no reason to falsely implicate the accused. It appears to be vice-versa. In fact the family of PW-6 has advised him not to complain about the matter as their mother was living with the

appellant but this did not deter PW-6 from doing so. In fact his mother (second wife of the appellant) was herself of the view that the matter should be reported to the police.

18. In the statement of the accused recorded under Section 313 of the Cr.PC, the line of defence is still different. Version of the appellant is that on the fateful day, he had had a quarrel with his wife (Gulabo Devi) and the complainant (PW-6) took advantage of this and instigated Gulabo Devi to lodge this false complaint against him. It was not the defence of the accused that he has been falsely implicated for the reason that the family of PW-6 was annoyed with the fact that he had married Gulabo Devi.

19. DW-1 had come into the witness box to depose that on the fateful day (10.04.2010), PW-5 was getting ready to go to school. 10.04.2010 was a Saturday; it was not a working day. CW-2 has categorically stated that it was a school holiday. Although in one part of her deposition, PW-5 stated that she was going to school on that day yet this can be attributable to the fact that the witness being a child of tender years and only on a suggestion given to her, she had stated that 10.04.2010 was not a holiday. However admittedly 10.04.2010 being a Saturday, it was not a school working day. The defence appears to be confused.

20. In the context of the evaluation of the testimony of an eye witness the Supreme Court in 1998 Crl. LJ4044 Panchhi and Ors. Vs. State of U.P., has held as under:

The evidence of a child witness must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness in an easy prey to tutoring. The Court has to assess as to whether the statement of the victim before the Court is the voluntary expression of the victim and that she was not under the influence of others. The trial Court and the High Court have found the evidence of the child witness cogent, credible and had grain of truth. The High Court found that the evidence of victim was free from any influence.

21. Thus, prosecution has been able to prove its case to the hilt. The testimony of the child victim PW-5 coupled with the eyewitness account of her brother (CW-2), as also the res gestae testimony of her father (PW-6) builds up a complete circle disclosing the manner in which the incident had occurred. The role of the appellant in the said crime is evident. The medical and scientific evidence also support the version of the prosecution.

22. Rape has been defined under Section 375 of the IPC. The law as it stood prior to the amendment (Amendment Act of 2013 dated 03.02.2013) has to be looked into for the purposes of this offence as the offence relates to the year 2010. The explanation contained in Section 375 of the IPC discloses that penetration by itself is sufficient to constitute the offence of rape.

23. Section 376 speaks about the punishment for rape. Sub Section (2) (f) makes it clear that whoever commits rape on a woman when she is under 12 years of age shall be punished with RI for a term which shall not be less than 10 years but which may be for life and shall also be liable to fine. Proviso appended to Sub-section (2) makes it clear that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than 10 years.

24. It is clear from the above statutory provision that for the offence of rape on a girl under 12 years of age, punishment shall not be less than 10 years but which may extend to life and also to fine shows that the legislature intended to adopt strictness in awarding sentence if the victim is below 12 years of age. No doubt, the proviso to Section 376(2) lays down that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than 10 years. It is settled law that courts are obliged to respect the legislative mandate in the matter of awarding of sentence in all such cases. In the absence of any special and adequate reasons, recourse to proviso mentioned above cannot be applied in a casual manner.

25. This Court notes that the appellant was in a trust relationship with the victim; the victim addressing the appellant as dada and the appellant having betrayed the

trust of his minor granddaughter deserves no leniency on the minimum sentence imposed upon him does not call for any interference.

26. Appeal is without any merit. Dismissed.

27. Trial Court record be sent back. INDERMEET KAUR, J JULY07h 2015 A/m