

Chander Dev Rai Vs. the State (Nct of Delhi)

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Court : Delhi

Decided On : Dec-17-2008

Reported in : 2009CriLJ1931; 156(2009)DLT229

Judge : Anil Kumar and; V.K. Shali, JJ.

Acts : Indian Penal Code (IPC) - Sections 376; Code of Criminal Procedure (CrPC) - Sections 313

Appeal No. : Crl. Appeal No. 204/2002

Appellant : Chander Dev Rai

Respondent : The State (Nct of Delhi)

Advocate for Def. : M.N. Dudeja, Additional Public Prosecutor

Advocate for Pet/Ap. : Sumeet Verma, Amicus Curia

Disposition : Appeal allowed

Judgement :

Anil Kumar, J.

1. The appellant in the present appeal has challenged his conviction under Section 376 of Indian Penal Code and his sentence of life imprisonment and a fine of Rs. 10,000/- in FIR No. 832 of 1992, Police Station Shalimar Bagh, Delhi imposed by

the learned ASJ, Tis Hazari Courts, Delhi.

2. The case of the prosecution was that on 28th November, 1999, Shri Ram Bahadur, father of the two-year old prosecutrix, Pooja had come to House No. 564, Gali No. 6, Ambedkar Nagar, along with his wife to attend the Chati ceremony at the house of the son of his Chacha, named Pramod. On the said day, at about 7.00 PM, Shri Ram Bahadur found his daughter missing from the house. He along with other family members tried to search her but could not find her. At about 9.45 PM the cries of Pooja were heard coming from the house of the appellant which was in Gali No. 6, Haidar Pur, Delhi.

3. When Shri Ram Bahadur, father of Pooja, came to House No. 565 of the appellant, he found Pooja wrapped in a blanket. Along with Ram Bahadur his wife and other people of the locality had also come to the house of the appellant. Pooja, at that time, was bleeding from the vagina and a call was made to Phone No. 100. The police vehicle, which had come pursuant to the call made to phone No. 100, took Pooja to Bara Hindu Rao Hospital along with wife of Ram Bahadur. DD No. 48B was recorded and the investigation was handed over to SI Tejpal Singh who along with Constable Umender Singh, reached the House of the appellant and found many people gathered there. When SI Tejpal Singh and Constable Umender Singh reached the house of the appellant, they came to know that Pooja had already been taken to Bara Hindu Rao Hospital. Statement of Ram Bahadur was recorded and thereafter, an FIR under Section 376 of Indian Penal Code was registered by the local police and investigation handed over to SI Tejpal Singh.

4. During investigation scratches were found on the abdomen of two-year old girl, Pooja, and therefore, the nail clippings of the appellant were taken. Besides the prosecutrix, Pooja, the accused was also medically examined and the CFSL Report and FSL Report were also obtained with regard to the various articles like garments etc. which were seized from the spot. The charge was framed against the appellant on 3rd May, 2000 as under: 'That on 28th November, 1999 between 7.00 PM to 9.45 PM at House No. 565, Gali No. 6, Ambedkar Nagar, Haidar Pur, Delhi, you committed rape on Kumari Pooja, aged two years, daughter of Shri

Ram Bahadur and thereby committed an offence punishable under Section 376 of IPC'.

5. The appellant pleaded not guilty to the charge and claimed trial. The prosecution in order to prove the case examined father of the prosecutrix, Pooja, Shri Ram Bahadur, as PW-1; his wife Kusum, mother of Pooja, was examined as PW-2; Pramod, son of the uncle of the father Ram Bahadur, was examined as PW-3; Constable Umender Singh as PW-6 and SI Tejpal Singh as PW-14 and Shri Devender Sharma, Record Clerk as PW-7 in place of Dr. Sapna. Prosecution examined in all 14 witnesses and the statement of the accused under Section 313 of the Criminal Procedure Code was also recorded.

6. We have heard the learned Counsel for the parties and have also perused the testimonies of witnesses and documents. Learned Counsel for the appellant, Mr. Verma, has very emphatically contended that there is no evidence to connect the appellant with the offence alleged to have been committed by him. According to him, there is no direct evidence and mere suspicion cannot take the place of proof. It is contended that there are no such complete chain of circumstances established from which the guilt of the appellant can be inferred conclusively.

7. Learned Counsel has also challenged the modality of proof of the MLCs of the accused and the prosecutrix by a Record Clerk, Shri Devender Sharma, who was also examined twice in place of the concerned doctors. Reliance in this regard was placed on *Sher Singh v. State* 1995 JCC 259, to contend that it is not at all appropriate to examine a Clerk from the hospital to prove handwriting and signatures of the Doctors without making sufficient enquiries about the whereabouts of the concerned doctors. It was asserted by the learned Counsel that the investigating officer should have made inquiries to trace Dr. Sapna, who had examined the prosecutrix and prepared the MLC or some other doctor acquainted with the handwriting and signatures on the medical report from the hospital. It was argued that the examination of some other Doctor could be of assistance to the cause of justice and not the examination of a record clerk. On behalf of the appellant, recalling of the said record Clerk, as he was first examined on 19th April, 2001 and then again recalled for examination on 3rd July, 2001, has

also been challenged. Learned Counsel for the appellant has also contended that the circumstances in the present case do not fully establish the guilt of the appellant.

8. According to him, another hypothesis is also possible, as it has not been established that the prosecutrix was picked up by the appellant at about 7.00 PM, as no person including the children with whom Pooja was playing had been examined to show that it was the appellant only who had picked her up from the place where she was playing. It is contended that the version as given by the appellant that he found her loitering and crying and, therefore, he took her to his home is also plausible and feasible. It is asserted that no blood and skin tissues were recovered from the nails of the appellant though there were marks on the abdomen of prosecutrix to connect him with the marks on the abdomen of the prosecutrix. Consequently the marks on the abdomen of the prosecutrix could not be attributed to had been caused by the appellant.

9. Further on the vaginal swab no semen of the accused was found and in the circumstances there is no evidence to link the appellant to the fact that it was he who committed rape of the minor girl. Mere recovery of the minor girl from his house does not establish that she was raped by her when neither the scratches on her abdomen can be connected to him nor any semen was found on the vaginal swab of the minor girl.

10. Learned Counsel has also contended that the appellant was living with his daughter and wife in one room tenement and that they were present there and therefore, in these circumstances, it was highly improbable that he would have committed rape of two year old girl. Learned Counsel has also contended that there were no injury marks on the mail organ of the appellant and merely because there were semen stains on his dirty undergarment, no inference, could be drawn against the appellant that he had committed the rape.

11. The pleas and contentions on behalf of appellant are refuted by the learned Additional Public Prosecutor, Mr. Dudeja, contending that there was no delay in registering the FIR and the accused was arrested from his residence from where the prosecutrix was found crying and also bleeding from her private part. It was

also urged by him that semen stains were found on the undergarments of the appellant which clearly shows overwhelming circumstantial evidence on the basis of which an irresistible conclusion could be drawn that it was appellant alone who had committed this ghastly crime. Referring to the statement of the appellant under Section 313 of Criminal Procedure Code, it is contended that it was a bland and pure denial which is an additional link pointing to the guilt of the accused. Emphasis was also laid on the unnatural conduct of the accused of washing the pajama of the prosecutrix. Learned Prosecutor contended that since the prosecutrix was recovered from the appellant, there was no need to examine any other children with whom she was playing on the fateful day. In the circumstances, it is contended that the evidence against the appellant is sufficient to prove his guilt beyond reasonable doubt and he has been rightly convicted.

12. Sh. Ram Bahadur, father of the prosecutrix, who was examined as PW.1 stated that he is a rickshaw puller and his daughter went missing at about 7 PM. At about 9 PM three houses away from the house of his brother Prem, the cries of Pooja were heard and therefore he along with other persons who had been searching for her reached the house of the appellant. There he found his daughter wrapped in some cloth and she was bleeding and the appellant was in the room. According to him appellant was beaten by the public and his kacha (undergarment) was seized. The accused/appellant had also produced the pyjama (kachi) of Pooja, which was also seized. In his cross examination he admitted that he cannot tell the names of any of the persons who had accompanied him to the house of the accused after hearing the cries of his daughter. He denied the suggestion that wife of the appellant and his minor daughter was also present in the room. He also specifically denied the suggestion that the appellant had tried to locate the parents of the prosecutrix and only when he failed to do so did he take her to his room. The wife of PW.1 and mother of the prosecutrix namely Kusum, was examined as PW.2. Though PW.1 had stated that he found Pooja at about 9 PM, however, his wife deposed that the cries of Pooja were heard at about 9.45 PM when she along with her husband and other persons had gone to the house of the accused. She deposed that the daughter Pooja was wrapped in a blanket and she was bleeding from her vagina. She had identified the pyjama of her daughter which Pooja was wearing at the time she went missing. She, however, admitted

that the appellant is a married person and has one daughter and that his wife is alive.

13. The son of the uncle of the father of prosecutrix, Pramod Kumar deposed that on that fateful day the prosecutrix along with her parents had come. He deposed that at about 7 PM when they were busy in Bhoj, Pooja was playing with other children and she went missing. He also deposed that her cries were heard at about 9.45 PM and after hearing the cries he along with other persons went to the room of the accused and one woman went inside the room and collected Pooja who was wrapped in a blanket and thereafter, other persons went into the room. He, however, admitted that the appellant is a married person and he has a wife and a daughter aged about 7 to 8 years. He also admitted that there were no complaints received against the appellant regarding anything in the past. He, however, denied the suggestion that the appellant had picked up Pooja as she had been lost and as she was on crying on the road. He also denied that the appellant had not been aware of the parents of the child and he had brought her to his house in order to restore her to her parents. He stated that the blanket in which Pooja was wrapped was having some blood which was not seized by the police. He denied the suggestion that the appellant has been implicated only on the basis of suspicion.

14. Constable Omender Singh who appeared as PW.6 deposed that when he reached the house of the appellant along with SI Tejpal Singh, PW-14, a huge crowd had gathered there and the appellant was in the clutches of public and Pooja had already been removed by a PCR van to the hospital. It was deposed that the appellant was arrested at the spot vide memo exhibit PW.1/F and his arrest memo, exhibit PW.1/G, was prepared. According to his deposition he remained there till morning of 29th November, 1999 and he along with Constable Prem Chand had taken the appellant for medical examination. In the cross examination the said constable deposed that he had reached the spot at about 11.35 PM and there were about 30 to 40 persons present. He also admitted that the IO, however, did not record the statement of anyone.

15. To prove the MLCs pertaining to Pooja, Sh.Devender Sharma, Record Clerk, HRH, Delhi was examined who deposed that Dr. Charu Gupta had left the services of the hospital and he proved the MLC No. 16712/99 as exhibit PW.7/A. He proved the MLC No. 16717 of the appellant as PW.7/B. This witness was re-summoned on the ground that Dr. Sapna was not available in the hospital. He deposed that he had seen the back of MLC No. 16712/99 of Pooja and he proved the report of Dr. Sapna as exhibit PW.7/C. According to him the whereabouts of Dr. Charu Gupta and Dr. Sapna were not available.

16. The prosecution examined Sh.Tejpal Singh as PW.14 who had cut the long nails of the accused and had seized the cut nails vide seizure memo exhibit PW.4/A. He also deposed that he had reached the spot at about 11.45 AM. He however admitted that the pyjama of the girl was seized at about 4.30/5 AM. He volunteered that the pyjama was washed by the accused. He also admitted that he did not ask any public person to join the investigation. He however deposed that when the pyjama was seized the accused was in his custody and in his house and his wife and his small child was also present. He deposed that he had cut the nails of the accused in the hospital at about 2 PM.

17. The appellant in his statement under Section 313 denied the incriminating evidence put to him as incorrect. He also gave an explanation that he had picked up the girl from a shop in Gali No. 5 where she was crying. According to him he enquired about the parents of the girl, but as he was not able to gather any information regarding them, he brought her to his house. At his house, she had passed stool so he threw her pyjama and gave her a pyjama of his daughter who was 6 years old. He stated that many people who came to his house were drunk and snatched the girl from him and that he has been falsely implicated in this case. He contended that the police made him wash the pyjama of that small girl and after drying the same, it was seized from him.

18. From the arrest memo exhibit PW.1/G it is apparent that the appellant was arrested at 4 AM on 29.11.1999 and at that time his wife Smt. Raj Kumari was the person to whom intimation about his arrest was given. The MLC report of the prosecutrix, exhibit PW.7/C, also discloses that scratches were present on her

abdomen. From the FSL report, exhibit PW.8/A, it is apparent that no skin tissues were detected from the nail clippings of the accused and even the garments of the prosecutrix had no semen. However, on the dirty underwear, Ex.P4, of the appellant, semen stains were found. From the FSL report, exhibit PW.8/B, it is apparent that there was no semen on the clothes of the prosecutrix.

19. From the perusal of the evidence and some of the relevant documents it is clear that there is no evidence which will show conclusively that the appellant had raped the prosecutrix. It is no more *res integra* that to base a conviction on circumstantial evidence alone, not only the chain must be complete but the evidence should point inevitably to the conclusion that it was the accused and the accused alone who was the perpetrator of the offence and any other evidence which is brought on record should be incompatible with the innocence of the accused. For bringing home the conviction on the basis of circumstantial evidence, the facts on the record should be consistent with the guilt of the accused and should be incapable of being explained on any other reasonable hypothesis other than that of his guilt.

20. No doubt the prosecutrix was found in the room of the appellant at 9.45 PM and at that time she was wrapped in a blanket and she was bleeding from her vagina, which is one of the solitary piece of circumstance against the appellant but there is no other incriminating evidence which would connect the appellant to the commission of the crime. Missing links or evidence in this case are absence of semen stains either on the garment or the undergarment of the prosecutrix or on her private parts. Absence of forensic evidence to connect the appellant with the injuries found on the abdomen of the prosecutrix despite taking the nail clippings of the appellant and analyzing them for any skin tissues and/or blood of the prosecutrix. Not associating any person from the public with the recovery or the arrest of the appellant despite the fact contended by the prosecution that about 30 to 40 persons had gathered at the spot. Prosecution failing to establish that the appellant was alone at that time and his wife and daughter were not present at the time of alleged commission of offense. No conclusive evidence to show that the girl was with the appellant from 7.00 P.M when she was allegedly lost till 9.45 P.M when she was recovered from his room. The appellant has contended that he

found the girl crying on the road and as he could not trace her parents he brought her home. Though the parents of the girl have denied that the wife and the child of the appellant were present when they went to pick up the girl after hearing her cries, however, from the arrest memo and the testimonies of SI Tejpal Singh, it is apparent that the wife and one small child of the appellant were present at the place of incident around the time when the offence is purported to have been committed. This is not the case of the prosecution that the wife and child of the appellant came later on. The witness PW.1 in his statement did not say that the accused wife and child were not present but only denied the suggestion to this effect in the cross examination. The other witnesses PW.2 and PW.3 did not say that the wife and child of the appellant were not present. From the testimony of the PW.3 other fact which emerges is that the appellant was living in one room tenement with his wife and child and there were no complaints of any type against the appellant in the past. None of the witnesses could say that the appellant had raped the prosecutrix. The consistent testimony of these witnesses is that girl Pooja was recovered from the house of the appellant at about 9.45 P.M and at the time of recovery she was wrapped in the blanket and she had bled from her vagina. The blanket in which she was found wrapped was not seized by the prosecution.

21. This is also no more res integra that examination of the accused under Section 313 of the Code is not a mere formality and the answers given by him have a practical utility for the criminal Courts. The statement under Section 313, apart from affording an opportunity to the accused to examine incriminating circumstances against him, also help the Court in appreciating the entire evidence adduced in the Court during the trial. It also cannot be doubted that it is permissible for the Court to rely on a portion of the statement of the accused inconsistent with other evidence against him led by the prosecution, but his statement has to be considered in the light of the evidence adduced by the prosecution and weighing his statement with the probability of the case. The accused/appellant in his statement under Section 313 has categorically stated that he had picked up the prosecutrix from near a shop in Gali No. 5 where she was crying and as he could not find out about her parents and he brought her to his house. He also stated that he had to change her pyjama as she had passed stool

in it. He has also deposed that many persons who came to his house to take the girl were drunk and falsely implicated him. He also deposed that police made him wash the pyjama of the small child which after drying was seized from him by the police.

22. On a perusal of the evidence of PW.1, PW.2, PW.3 and the police constable, the version propounded on behalf of the appellant, that he found the girl crying on the road and as he could not ascertain about her parents he brought her home where his wife and daughter were present does not appear to be ex-facie improbable. The evidence adduced by the prosecution is not sufficient to discard this version of the appellant. This fact that his wife and daughter were present has been acknowledged by the police officials. The appellant is staying in a one room tenement and it is improbable that the wife and the child of the appellant were not present at the time he had brought the prosecutrix home. This is not the case of the prosecution that the wife and the child of the appellant had come later on after the prosecutrix was recovered from his house. Though there were nail marks on the abdomen of the prosecutrix, however, no skin tissues or blood of the prosecutrix were found from the nail clippings of the appellant. In the circumstances, it cannot be inferred that the scratch marks on the abdomen of the prosecutrix were on account of any act imputable to the appellant. The vaginal swab of the prosecutrix also does not show the presence of semen of the accused. The garments and undergarments of the prosecutrix also does not have semen marks and of course not of appellant.

23. Merely because the semen stains were present on the dirty underwear of the appellant, nothing adverse can be inferred against him who is a married person and capable of having sexual intercourse. For an adult male who is married and who was living with his wife, it will not be abnormal to have semen stains on his underwear, nor can it be inferred on account of it that he had sexual intercourse with the girl as no semen was found in her vaginal swab or the garments including undergarment of the prosecutrix. Semen stains on the underwear of a married man can be for a number of reasons. How old these stains were has not been established on the basis of the report of FSL. In *Rahim Beg and Anr. v. State of U.P.* : 1972 CriLJ1260 the Apex Court in para 25 had held that semen stain on the

langot of a young man can exist because of variety of reasons and it would not necessarily connect him with the offense of rape.

24. The FSL reports also completely exonerate the appellant. Even their probative value is not sufficient as they have not been proved to the satisfaction of the Court as they have been proved by a record clerk. In *Sher Singh (Supra)* it was held that before the documents like post mortem report and other reports are proved by a person other than the person who had prepared them, a thorough enquiry is to be done by the investigating officer by going personally to the concerned hospital and making efforts to trace the addresses of the doctor. Even if the persons who had prepared the documents are not traceable, it was held, that it is not proper to examine a clerk or a record keeper. In such cases another doctor working in the hospital who is acquainted with the handwriting and signatures of the doctor who prepared the same should have been examined. In the present case only a record keeper was examined and the said person was again examined for proving the back of the medical report. He has simply stated that he can identify the signatures and handwriting of the concerned doctors. No semblance of effort seem to have gone into tracing the doctors who had recorded the MLC and conducted the gynecological examination of the prosecutrix. Prosecution witness simply making the statement that the said doctor is not available or has left the service is not sufficient. Invariably before a doctor or for that matter any other person is employed he is enjoined to give permanent address to the employer. Same must have been the case here but the prosecution as usual has chosen a short cut of adducing the record keeper to prove the documents like MLC, medical examinations by simply stating that doctors are not available. This affects the probative value of these documents.

25. There is no evidence that before the appellant picked her up, no one else had picked her up. Two year old girl had gone missing at about 7 PM. With whom prosecutrix was till she was allegedly picked up by the appellant when he found her crying on the road has not been established. The girl had nail marks on her abdomen, which nail marks were not of accused. The vaginal swab of the prosecutrix did not have the semen of the accused. Merely because when the girl was recovered from the house of the accused she was bleeding from her vagina,

no such inference can be drawn conclusively that she was subjected to rape by the appellant. The other probable hypothesis which was explained by the appellant in his statement under Section 313 of the Criminal Procedure Code cannot be ruled out completely on the basis of the evidence adduced by the prosecution. In the circumstances, the incriminating facts and circumstances as alleged by the prosecution do not fully establish the guilt of the appellant. In order to justify the inference of guilt, the inculpable facts alleged must be incompatible with the innocence of the accused and incapable of any other explanation.

26. These facts as has been discussed hereinabove leave a reasonable doubt about the guilt of the accused. In order to arrive at the conclusive guilt of the appellant, the chain of the evidence is to be so complete as not to leave any reasonable ground for the conclusion inconsistent with the innocence of accused.

27. The trial court has held that the accused had no business to take a child he found on the road to his house and he should have immediately taken her to the nearest police station and lodged the report with the police. This cannot be termed as a normal behavior. Different persons react differently in similar circumstances. Another assumption relied on by the trial Court is that the normal behavior of any male person would be to hand over a small girl who has passed urine or stool to his wife for cleaning and therefore it stood proved conclusively that he was alone in the house. This assumption has no legal basis, nor can such an inference be drawn in the facts and circumstances nor such a presumption can be drawn in law. The appellant was living in a single room with wife and child. At the time of arrest, his wife and child were present which is proved from the statement of his Pw 14, SI Tej Pal Singh. This is not the case of the prosecution that the wife and child of the accused came later on. None of the witnesses in their statements have stated that the wife and child of the accused were not present or came later on, except PW1 denying the suggestion. It was not for the appellant to prove his innocence beyond reasonable doubt but for the prosecution to prove the guilt of the accused beyond reasonable doubt. Even if the appellant, who was represented by a legal aid counsel during his trial, has not examined any defence evidence, no adverse inferences can be drawn about his guilt in absence of conclusive evidence of his guilt by the prosecution. Absence of semen on the vaginal swab of the prosecutrix;

nail clippings of the accused not connected with the scratch marks on the abdomen of the prosecutrix; lack of conclusive proof of the absence of the wife and child of the appellant who were living with him in one room tenement at the time when the appellant was apprehended; explanation of the appellant that he was asked by the police to wash the undergarment (pyjama) of the girl as it was soiled, which after drying was seized by the police and other factors discussed hereinabove are missing links in the version of the prosecution.

28. For the foregoing reasons, it is to be held that the circumstances relied on by the prosecution do not establish the guilt of the accused/appellant beyond reasonable doubt and so the impugned judgment convicting the appellant and sentencing him for alleged rape of Pooja, the prosecutrix cannot be sustained and needs to be set aside. The accused/appellant deserves to be acquitted.

29. Therefore, this appeal is allowed and the judgment dated 30th August, 2001 convicting the appellant for the offence under Section 376 and sentencing him to life imprisonment and fine of Rs. 10,000/- by order dated 1st September, 2001 are set aside and the appellant is acquitted of charge under Section 376 of the Indian Penal Code against him for which he was tried. Appellant/Accused presently is lodged in Jail and since he has been acquitted of charge against him, he be set at liberty forthwith, if not required to be detained in any other case. A copy of this judgment be sent to the Superintendent of the concerned Central jail for immediate compliance and for delivering a copy thereof to the appellant.