

Sanjay Vs. State

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Court : Delhi

Decided On : Oct-11-2006

Reported in : 134(2006)DLT155; 2006(92)DRJ296

Judge : S.N. Aggarwal, J.

Acts : Evidence Act - Sections 6; Indian Penal Code (IPC) - Sections 376 and 506; Code of Criminal Procedure (CrPC) - Sections 164, 173 and 313

Appeal No. : Crl. Appeal No. 958/2002

Appellant : Sanjay

Respondent : State

Advocate for Def. : Sunil K. Kapoor, APP for State

Advocate for Pet/Ap. : Nishad Kush, Adv

Disposition : Appeal dismissed

Judgement :

S.N. Aggarwal, J.

1. The appellant was tried before the sessions court for committing rape on a minor girl then aged 10 years (hereinafter to be referred as the 'prosecutrix') and at the conclusion of the trial against him, he was convicted by the sessions court

under Section 376/506 IPC and was sentenced to undergo rigorous imprisonment for ten years for offence under Section 376 IPC and to rigorous imprisonment for two years for offence under Section 506 IPC. He was also directed to pay fine of Rs. 10,000/- and in default to further undergo simple imprisonment for two months. Aggrieved from his conviction and sentence, the appellant has preferred this appeal and has challenged the impugned judgment of the court below on various grounds mentioned in the grounds of appeal.

2. The substratum of the prosecution case is as follows:

On 15.10.1999, the prosecutrix Along with her father went to the Police Station where her statement was recorded by the Police Officer. As per her statement, pursuant to which FIR under Section 376/506 IPC was registered against the appellant, she was studying in Class-IV in Sector-3, Municipal Corporation Primary School. On 02.10.1999 at about 6/7 PM, her parents were away to buy cake and her brother and sister were also with her parents and one brother Gaurav was playing outside. At that time, she was alone in the Jhuggi, one Sanjay (appellant) residing in the neighborhood entered her jhuggi. He was wearing a towel at that time. He came from behind and plugged her mouth. Thereafter, he opened her pyjama and made her lie on the bed. He inserted his male organ inside her female organ as a result of which she felt pain and some blood also oozed out. He threatened her that in case she would disclose this thing to any one, he would kill her. She further stated that out of fear she did not disclose the occurrence to any one. On 15.10.1999 in the morning at about 7:30 AM when her father had gone out to answer the call of nature, appellant Sanjay again peeped inside the Jhuggi from the window and threatened her. He was constantly chasing her and was threatening her. The previous evening he gave a slap blow to her near the lavatory and as such, she then stated the whole incident to her mother. Her mother in turn narrated the whole episode to her father. Thereafter accused Sanjay (appellant) was asked about this on which a quarrel between the two families took place.

3. On the above complaint of the prosecutrix, the Investigating Officer made an endorsement and sent a rukka to the Police Station for registration of the case. The case against the appellant was registered on 15.10.1999. The accused was

arrested on 16.10.1999 at 6 AM. The prosecutrix was medically examined in Safdarjung Hospital vide MLC No. 22983 dated 15.10.1999, as per which her 'hymen' was found torn. The appellant was also got medically examined in Safdarjung Hospital vide MLC STD Clinic No. 3951 dated 21.10.1999 and as per his MLC, he was found capable of performing the sexual act. Further investigation were carried out in the case. The ossification test was also got done on the prosecutrix. The ossification report suggested the age of the prosecutrix more than 10 years but less than 12 years. The statement of all the witnesses were recorded and statement of the prosecutrix was also got recorded under Section 164 Cr.PC on 29.10.1999 and thereafter, final report under Section 173 Cr. PC was filed in the court.

4. The appellant was charge sheeted under Section 376/506 IPC. He pleaded not guilty and claimed a trial. The prosecution examined total 16 witnesses against him and after statement of the appellant was recorded under Section 313 Cr.PC, the appellant also examined four witnesses in his defense. The learned court below after considering the entire evidence on record, recorded a finding of guilt against the appellant holding him guilty for committing rape under threat upon the prosecutrix.

5. The learned Counsel for the appellant has assailed the findings of the learned court below inter-alia on the ground that the case of the prosecution is extremely weak and according to the learned Counsel, the court below did not appreciate the inherent infirmities, contradictions and improbabilities in the testimony of the prosecution witnesses. The learned Counsel has further submitted that the learned court below did not consider the defense evidence produced on behalf of the appellant as there is no discussion in the judgment of any of the defense witnesses. The contention of the learned Counsel is that the defense evidence merit the same treatment as to be given to the witnesses of the prosecution. The infirmities and contradictions pointed out by the learned Counsel for the appellant in the testimony of prosecution witnesses are on the following aspects of the prosecution case:

(i) The testimony of the prosecution witnesses particularly of the prosecutrix (PW-3), her mother (PW-4) and her father (PW-5) is at variance regarding the information of occurrence revealed to them by the prosecutrix. It is submitted that the prosecutrix has stated in her cross-examination that she gave information of the occurrence to her brother Gaurav on 13.10.1999; prosecutrix's mother (PW-4) has deposed that she came to know about the occurrence on 15.10.1999 whereas prosecutrix's father (PW-5) has testified that he came to know about the occurrence on 14.10.1999.

(ii) It is contended that as per testimony of Constable Dayal Chand (PW-12), the statement of the prosecutrix pursuant to which FIR in question was registered was recorded in his presence on 15.10.1999 around 4/5 PM. It is contended that as per testimony of Head Constable Jagdish Singh (PW-13), the accused (appellant) was let off at 7:30 PM on 15.10.1999 in the absence of any allegation of rape against him till that time. The learned Counsel has contended that if as per testimony of the prosecution's own witness, the statement of the prosecutrix pursuant to which FIR was registered had been recorded at 4/5 PM and the police had come in possession of the allegation of rape against the appellant, then why he was let off at 7:30 PM on that day and this according to him, creates a serious doubt on the prosecution case.

(iii) The learned Counsel has contended that neither the clothes including undergarments of the prosecutrix were seized nor the bed-sheet on which the alleged rape took place was seized by the police during investigation of the case and this also, according to him, creates a hole in the prosecution case.

(iv) It was further contended that the medical evidence produced by the prosecution is not consistent with the testimony of the prosecutrix. The learned Counsel by reference to the MLCs of the prosecutrix and the accused has submitted that since no injury on the private part of the prosecutrix or on the male organ of the appellant was noticed at the time of their medical examination, the story of rape for which the appellant was tried falls to the ground.

(v) It was also contended that the prosecutrix's brother Gaurav was an important witness because as per testimony of the prosecutrix in her cross-examination, the

occurrence was witnessed by him by hiding and his non-examination casts serious doubt on the prosecution's version regarding rape alleged against the appellant.

(vi) The learned Counsel has also contended that the testimony of the prosecutrix and that of her parents is not trustworthy as the same is full of contradictions. The submission of the learned Counsel is that unless the testimony of the prosecutrix is corroborated from other independent evidence, it would not be safe to uphold the conviction of the appellant.

(vii) The learned Counsel has further contended that the delay of 13 days in lodging of FIR is fatal to the prosecution case, as according to him sufficient time elapsed between the date of occurrence and the date of registration of the FIR to tutor the prosecutrix for lodging a false FIR against the appellant.

6. The learned APP for the State appearing on behalf of the respondent has vehemently argued that there is absolutely no infirmity in the impugned judgment and according to him, the prosecution has proved the charge of rape against the appellant by trustworthy and unimpeachable evidence. He has taken me through the statement of the prosecutrix recorded before the court as well as her statement under Section 164 Cr.PC recorded before the Magistrate during investigation. He has contended that even if the court looks at the testimony of the prosecutrix alone, it is sufficient to uphold the conviction of the appellant for rape of the prosecutrix. The learned APP has dealt with all the contentions raised on behalf of the appellant in this appeal before me.

7. I have given my anxious consideration to the above rival submissions made on behalf of the parties in the light of the material available on record.

8. The contention of the learned Counsel for the appellant is that it would not be safe to act upon the solitary statement of the prosecutrix unless it finds corroboration from other independent evidence. In this regard, he has relied upon a judgment of the Supreme Court in *Rameshwar v. State of Rajasthan* 1952 CrL. L J 547, wherein it has been held as under:

The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the Judge, and in jury cases, must find place in the charge, before a conviction without corroboration can be sustained. The tender years of the child which is the victim of a sexual offence, coupled with other circumstances appearing in the case such, for example, as its demeanour, unlikelihood of tutoring and so forth, may render corroboration unnecessary but that is a question of fact in every case. The only rule of law is that this rule of prudence must be present to the mind of the judge or the jury as the case may be and be understood and appreciated by him or them. There is no rule of practice that there must, in every case, be corroboration before a conviction can be allowed to stand. Further, when corroborative evidence is produced it also has to be weighed and in a given case, as with other evidence, even though it is legally admissible for the purpose on hand, its weight may be nil.

It would be impossible, indeed it would be dangerous to formulate the kind of evidence which should, or would be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear:

(1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

(3) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.

(4) The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.

9. In *State of Uttar Pradesh v. Pappu @ Yunus and Anr.* reported as : 2005 CriLJ331 , the Supreme Court while holding that the court can rely upon the solitary statement of the prosecutrix without any corroboration held as under:

It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice would do.

10. In *State of M.P. v. Dayal Sahu* 2005 Cri. L.J. 4375, the Hon'ble Apex Court had an occasion to deal with the question as to whether the testimony of the prosecutrix, before it could be acted upon, require corroboration or not and while considering the said question, it was held as under:

Once the statement of prosecutrix inspires confidence and accepted by the courts as such, conviction can be passed only on solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the courts for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Non-examination of doctor and non-production of doctor's report would not be fatal to the prosecution case, if the statement of the prosecutrix and other prosecution witnesses inspire confidence.

11. It may be seen from the above judgments that the law is well settled that the court can safely act upon the solitary statement of the prosecutrix provided the court finds it to be trustworthy. The corroboration is required only in case court has some doubt about the version of the prosecutrix given in her evidence before the court and the nature and extent of such a corroboration is not of the type expected from an accomplice. In case the other evidence adduced by the prosecution lends assurance to the testimony of the prosecutrix then the same in my view, is a sufficient corroboration.

12. In *Rafiq v. State of UP* AIR 1981 SC 995, it was held by the Supreme Court as under:

The facts and circumstances often vary from case to case, the crime situation and the myriad psychic factors, social conditions and people's life-styles may fluctuate, and so, rules of prudence relevant in one fact-situation may be inept in another. We cannot accept the argument that regardless of the specific circumstances of a crime and criminal milieu, some strands of probative reasoning which appealed to a Bench in one reported decision must mechanically be extended to other cases. Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstance. Indeed, from place to place, from age to age, from varying life-styles and behavioral complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of presidential tyranny. The same observation holds good regarding the presence or absence of injuries on the person of the aggressor or the aggressed.

13. In view of the judgment of the Supreme Court in *Rafiq's* case (*supra*), it is evidently clear that the court has to consider each case on its own merits. No straight jacket formula can be laid down to search for corroboration. In the present case, the testimony of the prosecution recorded before the court finds ample corroboration from her previous statement under Section 164 Cr.PC recorded before the Magistrate on 29.10.1999. At the time of occurrence on 02.10.1999, the prosecutrix was a minor girl of 10 years age. She has told the Magistrate in her

statement under Section 164 Cr.PC (Ex.PW-3/B) that she was raped by the appellant after extending threats to her while her parents were away and she was alone in her Jhuggi. She has stood by her said version when examined during the trial as prosecution witness No. 3. She has categorically deposed that she was raped by the appellant on 02.10.1999. The testimony of the prosecution that she was raped by the appellant also finds corroboration from medical evidence in the form of her MLC wherein at the time of her medical examination, it was found that her 'hymen' was torn. PW-1 Dr.Pinki Saxena from Safdarjung Hospital who had medically examined the prosecutrix vide MLC Ex.PW1/A has deposed in her cross-examination as under:

Abrasions can be caused by hard and soft surface. It can be caused even by nails, rubbing of her clothes, scratching or by forceful intercourse etc. In the case of a child when forceful intercourse is attempted or done, besides the hymen is torn, the side area also sustain abrasion or other injury mark, there may be bleeding also. It is incorrect to suggest that while washing the clothes, the above said injury was not caused. It is further incorrect to suggest that such injuries can be self-inflicted. There is no difference between the hymen of an adult or a child.

xxx xxx xxx xxxIt is correct that hymen can be torn otherwise also like by using tempos during cycling or while doing any other physical activity but these were not the causes in this case.

14. It was not suggested on behalf of the appellant to the doctor (PW-1) who had medically examined the prosecutrix that hymen of the prosecutrix was torn on account of any physical exercise undertaken by her at any point of time. The doctor very candidly stated in her testimony that the hymen of the prosecutrix was torn on account of sexual intercourse done with her. The statement of the prosecutrix in her evidence before the court that she was raped by the appellant also could not be controverted by any cogent evidence to the contrary produced on behalf of the appellant. It was not even remotely suggested to the prosecutrix that the appellant was not present in her Jhuggi at the time of alleged occurrence. The plea of the appellant that in the absence of any injury on the private part of the prosecutrix or on the male organ of the appellant is fatal to the prosecution case is

meritless. The learned Counsel for the appellant has relied upon a judgment of the Supreme Court in *Rahim Begand Ors. v. State of UP* 1972 SCC 827 in support of his contention that when a 10-12 year old virgin girl with hymen intact is subjected to rape, injuries are likely to be on the male organ of the culprit and absence of any such injuries on the male organ points to the innocence of the accused. This judgment in my opinion, does not help the appellant in any manner. In the present case, the appellant was got medically examined vide MLC Ex.PW2/A on 21.10.1999 i.e. after 19 days of the occurrence. 19 days are good enough for healing up of any abrasion or minor injury that might have been caused on his male organ on account of forceful intercourse with the prosecutrix on 02.10.1999. In the same way, sufficient time had elapsed between the occurrence and the date of medical examination of the prosecutrix examined on 29.10.1999 and during this period, injury on her private part might have got healed up. Hence, I do not find any substance in the plea of appellant's learned Counsel that absence of injury on the private part of the prosecution or that on the male organ of the accused creates a doubt on the prosecution case. I find support for my this view from a judgment of the Supreme Court in *Dastagir Saband Anr. v. State of Karnataka* wherein in para 16 of the said judgment, it is held that absence of injuries on the person of the prosecutrix would not by itself be sufficient to discard the prosecution case. The testimony of the prosecutrix that she was raped by the appellant also finds support from the testimony of her parents viz. PW-4 & PW-5.

15. The appellant has examined four witnesses in his defense to show that the appellant was not present near the Jhuggi of the prosecutrix at the time of alleged occurrence. I have considered the testimony of all the four witnesses examined in defense by the appellant. They all have testified in a parrot like manner that the appellant was away for attending the birthday function of the daughter of his employer Virender (DW-4). All the witnesses examined by the appellant in his defense are interested witnesses. Their testimony does not inspire confidence and it would not be safe to act upon the same.

16. DW-1 Ramesh has deposed that he came to know from the prosecutrix's father that the appellant had been implicated in such a case that he cannot be released. It was alleged against him that on 02.10.1999, he had raped Shanker's

daughter but on that day, she was playing with his children. This testimony of DW-2 shows that he at least was aware that there was a whisper in the locality that the prosecutrix was raped by the appellant. This portion of the testimony of the defense witness is admissible in evidence as registered under Section 6 of the Evidence Act because the same shows that quarrel between the two families had taken place as the appellant was alleged of committing rape on the prosecutrix in the incident that took place on 02.10.1999.

17. As far as the contention of the learned Counsel for the appellant that there are contradictions regarding information of the occurrence that has come in the testimony of the prosecutrix and her parents is concerned, I am of the view that the same is of no consequence. In case witnesses are trustworthy then minor contradictions are bound to be there in their testimony. The alleged inconsistency in the testimony of the prosecution witnesses on the point of disclosure of occurrence by the prosecutrix to her parents is not that significant as to cast a doubt on the main case of the prosecution. Such inconsistencies can be ignored.

18. The plea that the prosecution case gets weak on account of non-seizure of the clothes of the prosecutrix and the bed-sheet on which rape allegedly took place is also without any substance. The information about the occurrence was given after about 13 days of the incident and therefore, the seizure of the clothes/bed-sheet would be of no consequence even if they were seized. The delay of 13 days in lodging of FIR stands fully explained in as much as the prosecution as well as her parents have all testified in their respective testimonies that the prosecutrix was under a threat from the appellant that in case she would reveal the incident to anybody then the appellant would kill her parents. The prosecutrix could dare to reveal the incident to her parents around 14.10.1999 as she was slapped by the appellant near lavatory on a day prior thereto. Hence the delay in lodging of the FIR stands fully explained and I find no infirmity in the prosecution case on that count. I am supported in my view from a judgment of the Supreme Court in *State of Punjab v. Ramdev Singh* : AIR 2004 SC1290 wherein on the point of delay, it has been held as under:

Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any Explanationn has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in the prosecution version on account of such delay, the same would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the same cannot by itself be a ground for disbelieving and discarding the entire prosecution version, as was done by the High Court in the present case.

19. In view of the above judgment of the Hon'ble Supreme Court in Ram Dev's case (supra), I have no hesitation in holding that the delay in lodging of FIR in the present case stands adequately explained and thereforee the case of the prosecution cannot be thrown over board merely on the ground of delay of 13 days in lodging the FIR.

20. On taking cumulative effect of all the facts and circumstances of the case and the evidence on record, I find that the statement of the prosecutrix is quite natural, inspire confidence and merits acceptance. In the traditional non-permissive bounds of India, no girl or woman of self-respect or dignity would falsely implicate somebody of ravishing her chastity by sacrificing and jeopardizing her future prospects of getting married with suitable match. Not only she would be sacrificing her future prospects of getting married and having family life but also would invite the wrath of being ostracized and outcast from the society she belongs to and also from her family circle. From the testimony of the prosecutrix and that of her parents, it is proved beyond doubt that the prosecutrix was raped by the appellant and there is no escape from the said conclusion.

21. In the facts and circumstances of the case as discussed above, I do not find any infirmity or illegality in the impugned findings of the court below convicting the appellant of charge under Section 376/506 IPC. His conviction is, thereforee, upheld.

22. The learned Counsel for the appellant has referred to a judgment of the Punjab and Haryana High Court in Rakesh Kumar v. State of Punjab reported as 2002 CrL.J. 2249 and has relied upon para 9 of the said judgment which is reproduced hereinbelow:

Faced with this position, learned Counsel for the appellant submits that the sentence passed upon the appellant be reduced. He submits that the sentence of 10 years imposed upon him is harsh as he is 22-23 years old. He will remain in jail for 7-8 years more and will thus spend much part of his youth there. Suffice it to say, he behaved like a savage and a brute. He committed rape on a girl aged 8 years whereby her vagina was torn. Hymen was torn. Her vagina bled profusely. She remained hospitalized for about 15 days for injury to her vagina. She was put on antibiotics and other medicines. At times, she was feeling severe pain in her vagina. Her vagina had to be stitched. No leniency can be shown to such a brute and a savage.

23. Relying on the above judgment, the learned Counsel has argued that since the appellant has already suffered imprisonment for more than 8 years, he should be released on sentence already undergone by him as according to him none of the aggravating circumstances mentioned in Rakesh Kumar's case (supra) exist in the present case. I could not persuade myself to agree with this submission made on behalf of the appellant. In State of Madhya Pradesh v. Babu Barkare @ Dalap Singh reported as : 2005 CriLJ3117 , it was held that when the statute prescribes the minimum sentence, then the court should not award sentence lesser than that. In case sentence less than the minimum prescribed by statute is to be given then adequate special reasons must be recorded. Since in the present case the appellant has been found guilty of committing rape on a minor girl then aged 10 years, I do not find any special reason to award sentence lesser than what has been awarded to him by the court below which is the minimum prescribed for offence of rape under Section 376 IPC. Hence the impugned order on sentence is affirmed.

24. Dismissed.

