

Ashish Kumar Pal and Prashant Kumar Pal Vs. State

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Court : Delhi

Decided On : May-08-2007

Reported in : 2007(96)DRJ371

Judge : Shiv Narayan Dhingra, J.

Acts : Indian Penal Code (IPC) - Sections 120B, 342, 376 and 506; Code of Criminal Procedure (CrPC) - Sections 161 and 164

Appeal No. : Crl. A. Nos. 502 and 529 of 1999

Appellant : Ashish Kumar Pal and Prashant Kumar Pal

Respondent : State

Advocate for Def. : Richa Kapoor and ; R.K. Sehrawat, Adv.

Advocate for Pet/Ap. : Mohit Mathur, Adv

Disposition : Appeal dismissed

Judgement :

Shiv Narayan Dhingra, J.

1. This appeal has been preferred against the judgment of the Additional Sessions Judge, Karkardooma, Delhi whereby the appellants were convicted under Sections 376/506/342 and 120-B of IPC and against order of sentence whereby the

appellants were sentenced to 7 years of R.I. and a fine of Rs. 2,000/- each under Section 376 and R.I. for one year each for offence under Section 120-B IPC and R.I. for three years each for offence under Section 506 and R.I. for 6 months each for the offence under Section 342 IPC.

2. Both the appellants are real brothers and used to live as tenants in the house of Smt. Santosh Duggal at house no. 26, Shankar Vihar, Delhi. Smt. Santosh Duggal was also an accused in this case. However, she died during trial. Km. Priya Jain, who is prosecutrix used to live in the adjoining house i.e. in house no. 24, Shankar Vihar with her parents. She was a student of 10th standard at Riyan International School at the time of incident.

3. The facts leading to registration of this case against the appellants as narrated by the Trial Court are as under:

Kumari Priya Jain is resident of H.No. 24 Shankar Vihar, Delhi. In the year 1994 she was a student of 10th standard at Riyan International School Karkardooma, Delhi. Smt. Santosh Duggal (now deceased) used to reside at H.No.26, Shankar Vihar, Delhi. Her daughter, namely, Kavita @ Baby was of the same age as that of Priya Jain. Ashish Kumar Pal and Prashant Kumar Pal were tenants of Smt. Santosh Duggal. The prosecutrix made a report to the police on 2.12.1994 alleging therein that about three months ago she was called by Smt. Santosh Duggal at her residence through her daughter Kavita @ Baby. She made her to sit in the room and offered sweets to her with love and affection. After sometime Kavita called their tenants, namely Ashish Pal and Prashant Pal downstairs. They sat with her. At that juncture Smt. Santosh Duggal and her daughter Kavita got up and went outside and bolted the room from outside. She was forcibly raped by Ashish Pal and Prashant Pal, after extending threats to her. First she was raped by Ashish and thereafter by Prashant. They extended threats to her saying that she would not disclose facts to any one. They knocked the door and got it opened from Smt. Duggal. Kavita had also criminally intimidated her of dire consequences in case she would disclose the facts to anyone. She went to her house quietly, since she was over-powered by fear. She had not disclosed the factum of her being raped to any one. In this manner she was called at the house of Santosh Duggal for about

20-25 times. She was constantly raped by Ashish and Prashant Pal. On 29th November, 1994 she informed Santosh Duggal that she had become pregnant. Santosh Duggal called Ashish and Prashant Pal and asked them to get her aborted. On 30th of November, 1994 at 2.30 p.m. when she alighted the school bus near Coffee Home, Prashant and Ashish made her to sit in their Maruti Car No. DAC-4803 and forcibly took her to a Nursing Home. She was taken to Mrs. (Dr.) Oberoi Clinic at Priya Darshini Vihar, Delhi where she was aborted. She was discharged from there at about 7.00 p.m. and was brought by Ashish and Prashant to the same point in front of Coffee Home and made her to alight the car. They again extended threats to her saying that they would put her father and brother to death in case she would disclose the factum of her abortion to any one else. She was also told that they had her blue prints with them and in case she would open her mouth, they would circulate the same in her school and the locality where she is residing. Under that fear she had not disclosed the factum of her being raped and her abortion to any one else even in her house. That day she informed her mother and father about the rape and had approached the police along with them to lodge the report. On her report case FIR Nos. 312 of 94 was registered at P.S. Preet Vihar for the offences punishable under Sections 376, 506 and 342 read with Section 120-B of the Penal Code.

4. The prosecution examined victim of the offence Km. Priya Jain (PW-1) as the prime witness. The other witnesses are either formal witness or corroborative. PW-1 supported the prosecution case which resulted into conviction of the appellants.

5. The counsel for the appellants Mr. Mohit Mathur argued that the story narrated by the prosecutrix that she was raped up to 20-25 times by the appellants and she did not report the matter to anyone looked quite unnatural. The prosecutrix was a student of a very reputed school. She was aware of her rights. She was of the age of understanding, if not major and living in an atmosphere of metropolitan city like Delhi. It cannot be said that she could not muster courage to report the matter after the alleged first incident of rape on her only because she was threatened by the appellants. He submitted that the entire version of prosecutrix that she was called to the room in a similar fashion about 25 times by Smt. Santosh Duggal and subjected to same ordeal every time, only raises doubt about the credibility of her

version. The other argument advanced was that the prosecutrix gave her age falsely as 14 years. She refused to undergo ossification test despite court orders and an adverse inference should have been drawn against her by the court that her real age was being concealed. He submitted that she was a major and her repeated visits to the room of the appellants, who were living in her neighborhood would only show that she was a consenting party, supposing that the incident had taken place as alleged, and it was not a case of rape. He further argued that the prosecutrix was regular in attending her classes and she used to visit the house of Santosh Duggal with a gap of 2-3 days, there could have been no use of force on her and she could have been under no threat. She was going to school by school bus and coming back by the same bus. She had many classmates and she was in touch with many of her friends, teachers and it was not possible that she always remained under constant threat and could not disclose about the rape to anyone. He also submitted that she was in love with one of the appellants namely Prashant Pal. She had sent greeting cards to him and these greeting cards clearly show that she had an infatuation towards Prashant Pal and it is quite possible that she had voluntarily entered into sexual relationship with Prashant Pal and become pregnant and later on she got herself aborted with the help of Prashant Pal. But, somehow her abortion came to the notice of her parents and on this she made a false story implicating both the brothers in a false case of rape at the instance of her parents. He submitted that the conviction of the appellants was based on sole un-corroborated testimony of the prosecutrix and therefore was illegal. The Trial Court failed to consider that there were material contradictions in the testimony of the prosecutrix and she was not a truthful witness. She made improvements in her statement before the Court from her earlier statement made to police and made before Metropolitan Magistrate under Section 164. He submitted that medical evidence does not show that she was forcibly raped as there were no injuries on any part of her body. There was no physical evidence of rape. The vagina of prosecutrix admitted two fingers easily which only showed that she was used to sexual intercourse. This fact does not prove rape by appellants. The prosecution also failed to prove that the prosecutrix was the same person who was aborted on 30th November 1994 by Dr. Parminder Oberoi at Ashok Clinic. Neither, it was proved that it was the accused/appellants, who had taken her for abortion. He,

therefore, argued that the conviction of the appellant be set aside.

Age of Prosecutrix

6. Although the defense of the appellants had been that of a total denial of the incident, however, considering the circumstances, it would be appropriate to consider as to what was the age of prosecutrix on the date of incident and whether an adverse inference can be drawn against the prosecution for not undergoing ossification test by the prosecutrix.

7. An adverse inference can be drawn against the prosecution only where the prosecution withholds best evidence from the court. Ossification test for determining the age is not the best evidence of the age. Ossification test is a guess work based on the fusion of joints in the human body and it is admitted by all the medical experts that there can be an error of 2 in the age determined by the ossification test. The best evidence in case of determining the age is always the birth certificate and not the ossification test, therefore no adverse inference can be drawn against the prosecution for not subjecting the prosecutrix to ossification test since the prosecution in this case produced the best evidence i.e. the birth certificate from the MCD.

8. The prosecutrix gave her date of birth as 16th April 1980. To prove her date of birth, prosecution proved school record as Ex. PW 14/A, from her initial school Bal Bhawan Public School where she had studied during her initial years. Mr. G.C. Lagan, who proved the certificate was the Principal in Bal Bhawan Public School. Prosecution also proved birth certificate issued by MCD as Ex. PW 17/A. The birth certificate showed that a female child was born to Mrs. Urmil Jain w/o Rakesh Jain on 16th April, 1980 at St. Stephen Hospital, Delhi and the intimation about the birth was given by the hospital authorities to MCD office. It was also mentioned that this was the second child of Smt. Urmil Jain. The birth was registered in the office on 24th April, 1980. It is argued by the counsel for the appellants that in the birth certificate Ex.PW 17/A no name of the girl child is given, therefore, there is no presumption that this birth certificate was of the prosecutrix. No child takes birth with a name engraved on him/her. In India 'Namakaran' of a child is not done before the birth of a child. Normally, 'Namkaran' is a religious ritual, which is

performed by parents, in most of the communities, a few days after the birth of child, in presence of relatives and friends, at a function. Merely because name does not appear in the birth certificate, it cannot be said that the birth certificate is not of the prosecutrix. The date of birth as given in the birth certificate i.e. 16th April, 1980 is the same date of birth which is given in the school record of the prosecutrix and this has also come in evidence that prosecutrix was the second child of her parents. thereforee, there was no reason of doubting the date of birth of the prosecutrix by the Trial Court and the Trial Court rightly came to the conclusion that the date of birth of the prosecutrix was 16th April, 1980 and no adverse inference can be drawn because of non-performance of ossification test.

Consent of the Prosecutrix

9. There is no doubt that prosecutrix seemed to have sent greeting cards as Ex. PW 1/D4 to appellant Prashant pal but these greeting cards have been sent on some occasions; one is sent on Holi, other on Diwali, one on birth day and one on new year. There is one greeting card which depicts 'I have fallen in love with you'. Sending of these cards by the prosecutrix to the appellant Prashant Pal does not show that the prosecutrix had given a license to the appellants to sexually outrage her or sexually assault her. These cards only show an attraction between the prosecutrix and appellant Prashant. A girl of tender age can get attracted or fall in love with someone. The responsibility of the person, to whom, she is attracted, or she falls in love becomes greater and more onerous if the girl is a minor. If the person really loves her then it becomes a duty of the person/ boy to protect her and to keep her on right path. He is to protect her from going astray and see that she is not subjected to sexual assault and she does not become a prey even of his own lust. Love does not give a license for sexually assaulting the loved ones. Love cannot be treated as a consent for sexual assault even if the girl is major. However, legislature has laid down that if a girl is below 18 years, her consent is immaterial and consent cannot be a defense in case of sexual assault or rape. Here, the age of the girl at the time of occurrence of the incident was hardly 14 -15 years thus, her consent had no bearing on the case even if it was there. But it is a case where no consent is pleaded nor any question has been asked to the prosecutrix regarding her consent.

Contradictions

10. It is settled law that some inconsistencies do creep in in the testimony of the witnesses who were examined in the courts from their earlier statements. It is a natural phenomenon and human tendency. A witness, who repeats one version 'parrot like' at different occasions without there being any change in version is not considered as a natural witness. Only an audio tape can be replayed time and again and it will give the same version every time. If a person is asked to describe an incident 10 times at different occasions, every time there is bound to be some embellishments, some additions, some omissions, in his testimony; what the Court has to see is that on the material points, which affect the case and which constitute the offence, the witness's statement is not deviating every time and every time witness is not giving a different version about the case itself. If the version about the material facts remains same and there are deviation in respect of some fringes or some details which are not material, the testimony of the witness cannot be rejected. Normally, it is seen that in cross examination, the defense counsel asks certain aspects of the circumstances about which the witness has not spoken in examination-in-chief and on the basis of these answers in cross examination, it is tried to show that there were contradictions because these details were not given in examination-in-chief. A witness is not supposed to imagine what would be asked from him in cross examination and give a statement in examination-in-chief or the statement to the police or Magistrate under Section 164 by such imagination. When a witness gives statement under Section 164 or Under Section 161 Cr.P.C, the witness states only those facts which he/she considers material and all other facts which are extracted from the witness during cross examination are those facts which are considered by the defense as material. A witness is not a person, who can be considered as a person well versed in law, who has to think before his deposition in the Court or before making statement before the police or magistrate under Section 164 and to consider all aspects and niceties of the law and give every minute detail of all circumstances surrounding the incident. Contradictions and deviations cannot be pointed out in respect of answers and elucidations obtained during cross examination. Contradictions and deviations can be pointed out only when the witness in his examination-in-chief gives different version at different times and when he is

confronted with earlier version, he is not able to explain how he gave earlier version different from the later version. If a witness is not confronted with the earlier version, nor asked to explain the difference in the two versions, such deviation cannot be made basis for argument that witness is not credit-worthy. In the present case, prosecutrix had been consistent as far as the incident of repeated rape on her was concerned, she has been consistent about the threats being received by her. Inconsistency is pointed out about the switching on the radio, about the presence of third accused Santosh Duggal, about her going for abortion, her reporting the matter to mother etc. No deviation is pointed out by the counsel as far as sexual assault and threats are concerned. The testimony of prosecutrix cannot be rejected on this ground.

11. The plea of the appellants that the conviction cannot be based on sole uncorroborative testimony of the prosecutrix also must fail. It is now well established by a catena of apex court's judgments that prosecutrix cannot be treated as an accomplice and if the prosecutrix is treated trustworthy and a reliable witness, the conviction can be based on the sole testimony of prosecutrix.

12. Considering the age of the prosecutrix being only 14 years and considering that she was subjected to repeated assaults of sexual intercourse by the appellants and she was threatened not to disclose about the sexual assault to anyone on the ground that the appellants had prepared some nude photographs of her with the help of which they would defame her in school, in society and in mohalla, I consider that the Trial Court rightly convicted the appellants under Sections 376/506/120-B and 342 IPC.

13. I find no force in the appeals. Both the appeals are hereby dismissed.

14. A copy of this judgment may be sent to Superintendent, Central Jail, Tihar.