

Dinesh Kumar Vs. State

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Court : Delhi

Decided On : Nov-10-2006

Reported in : 2009(93)DRJ652

Judge : J.M. Malik, J.

Acts : Indian Penal Code (IPC) - Sections 375 and 376

Appeal No. : Crl. A. No. 572/2002

Appellant : Dinesh Kumar

Respondent : State

Advocate for Def. : O.P. Saxena, Adv.

Advocate for Pet/Ap. : S.P. Batra, Adv

Disposition : Appeal dismissed

Judgement :

J.M. Malik, J.

1. In this case the appellant/accused was sentenced to undergo Rigorous Imprisonment for ten years and to pay a fine in the sum of Rs.20,000/- in default of which he was further sentenced to Simple Imprisonment for one year for raping a child aged about nine years under Section 376 IPC. Aggrieved by that order, the

present appeal has been preferred.

2. The key argument urged by the learned Counsel for the appellant has two prongs. He drew the attention of the Court towards the MLC of the prosecutrix, which was proved on the record as Ex.PW2/A. Its relevant extract is reproduced as hereunder:

Pt. Says she was playing outside her house when her neighbour whom she calls Dinesh Uncle gave her some sweets & called her inside his room. He allegedly raped her. This incident took at about 10 AM on 25.6.2000. The alleged rapist is her neighbour. She gives a history that the same person has tried to sexually abuse her twice before.

No external injuries over the body. Perineum - No pubic hair. No bleeding or discharge. Hymen intact. No fresh tear. No bleeding P/V.

3. The second limb of his argument was that Ex.PW9/A prepared by Dr. Rajender Kumar, SSO, PW9 clearly goes to show that no semen sample of the appellant could be taken to match it with the semen, which was recovered on his underwear. CFSL report further goes to show that the semen stains found on his underwear belong to 'A' group but semen stains found on the underwear of the prosecutrix gave no reaction. Again, the sample of blood which was sent to CFSL got putrefied and consequently no opinion could be given by the CFSL. Learned Counsel for the appellant vehemently argued that all these facts taken together do not prove that the appellant had committed the rape.

4. The next submission made by the learned Counsel for the appellant was that the story as narrated by the prosecutrix before the Duty Officer in Ex.PW3/A is false and improbable. In her statement Ex.PW10/A, the prosecutrix made the following statement on 25.06.2000. The prosecutrix was studying in First class. They and accused were tenants in the same building. At about 10-11.00 AM, she was playing with her sister Sweta. Accused Dinesh gave her a toffee and took both the sisters to his room and bolted it. The prosecutrix was made to lay down. He pulled down her underwear, removed his own underwear and inserted his penis in the vagina of prosecutrix. After sometime, he opened the door and went

away. When her father came to her house, she narrated the story to him. Learned Counsel for the appellant pointed out the fact that she was made to lay down and he committed rape is in itself improbable and impossible. It was also argued that the prosecutrix tried to exaggerate the version before the Doctor by stating that previously the accused/appellant had tried to assault her sexually twice. She has never repeated this version again. Again, there was delay in lodging the report by 7-8 hours. He finally submitted that at the most this is a case of attempt to rape.

5. The learned Counsel for the appellant kept on veering from the main topic. He has tried to make light of the evidence produced by the prosecution. CFSL report Ex.PW9/A puts the prosecution case in an impregnable position. It has removed all the layers of suspicions explained by the learned Counsel for the appellant. It clearly goes to show that underwears of both the prosecutrix and the accused/appellant contained human semen. The fact that no grouping of blood or semen could be affected does not turn the corner. The presence of semen on both the underwears in conjunction with testimony made by the prosecutrix, clearly goes to show that offence of rape was committed.

6. The statement given by the prosecutrix has an aroma of confidence. The witness stood her ground and did not move an inch. The defense counsel asked her a host of questions but nothing which may go to damage her credibility cropped up. It is well settled that the law does not strike a snap in convicting the accused solely on the basis of a child witness aged about nine years. In addition she is a victim and knows where the shoe pinches. She deposed that the appellant led her up the garden path by giving her toffee. She clearly and unambiguously stated that the appellant inserted his penis into her vagina. She deposed that she felt pain in her vagina and she cried. The accused/appellant removed some white material with dirty cloth. The accused also asked her not to tell this incident to anybody. In her statement made before the Magistrate, the prosecutrix has further supported the prosecution story.

7. The observations made by the Apex Court in celebrated case reported in *Madan Gopal Kakkad v. Naval Dubey and Anr.* : [1992]2SCR921 apply to this case on all fours. In this case, a minor girl aged about eight years was raped. It

was held that even slight penetration of penis into vagina without rupturing the hymen would constitute rape. The Supreme Court also referred to opinions expressed by Modi in Medical Jurisprudence and Toxicology (Twenty-first Edition) at page 369; Parikh's Textbook of Medical Jurisprudence and Toxicology; Encyclopedia of Crime and Justice (Vol. 4) at page 1356; Halsbury's Statutes of England and Wales (Fourth Edition) Volume 12; Harris's Criminal Law, (Twenty-second Edition) at page 465; American Jurisprudence, Code 263 of Penal Code of California and First Explanationn to Section 375 of Indian Penal Code which defines 'Rape' as under:

Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

8. In Karnel Singh v. State of M.P. AIR 1995 SC 2472, it was held:

If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. Applying the above test to the facts of the present case we are satisfied beyond any manner of doubt that the prosecutrix, a victim of the crime, had absolutely no reason whatsoever to falsely involve the appellant nor did her husband have any reason to do so or tutor his wife to involve the appellant. No such suggestion was made to the prosecution witnesses in cross-examination nor is there any evidence on record in that behalf.

It was further held:

The find of semen stains on the petticoat and in the vagina lend assurance to the story narrated by the prosecutrix.

It may also be mentioned here that in this case the semen was found on the underwears of both the appellant/accused and the prosecutrix. The prosecutrix has further explained that some white material was wiped out by the appellant from her vagina.

9. In State of Rajasthan v. Om Prakash : 2002 CriLJ2951 , it was held:

The evidence of a child witness is required to be evaluated carefully as the child may be swayed by what others may tell him or her as the child is an easy prey to tutoring. Wisdom requires that the evidence of a child witness must find adequate corroboration before it is relied on. In this case the evidence of the child (PW5) and the other evidence had been examined carefully and it had been found that the reasons given by the High Court for rejecting the said evidence were wholly unconvincing. It is unfortunate that what to talk of considering, the High Court has not even noticed the testimony of the prosecutrix in the judgment under appeal.

It was further held:

There is no force in the contention that if there was any forcible sexual intercourse, it would have resulted in some injuries upon the prosecutrix. Presence of injuries are not always a sine qua non to prove a charge of rape. It has to be kept in mind that the case under consideration is one of rape on a girl child aged eight years and not on a grown-up woman.

10. Now, I advert to the exaggeration made by the child witness. It must be borne in mind that whenever a person is excited, he talks nineteen to the dozen. Her version given before the Doctor that the appellant had made two previous attempts does not affect the warp and wool of the prosecution story. First of all, she may be telling the truth because there is no cross-examination to that point. Secondly, in *State of Maharashtra v. Jagmohan Singh Kuldeep Singh Anand and Co.* 2004 (VIII) A.D. (SC) 381, it was held that there may be some exaggerations of the version of the incident by the complainant as she said that she was given hundred slaps, such exaggerations does not falsify the happening of the alleged incident.

11. Although, there is a delay of 7-8 hours in lodging the FIR, yet, the delay has been explained. The prosecutrix stated that she apprised all these facts to her father when he returned to the house. The story as deposed by the prosecutrix appears to be quite probable.

12. The learned trial court has rightly rejected the defense story. On the one hand, the accused stated that he was not present in his house at the time of occurrence, had come back at 2.00 PM and he was present throughout with Prem Chand

Gupta. On the other hand, the sole witness produced by him, Prem Chand Gupta, DW1 contradicted him by stating that he went to the house of the accused Dinesh and remained there up to 11.00 AM. Secondly, Prem Chand Gupta stated that he had heard that accused had raped 10-12 years old girl and that he never expected this thing from the accused. It is clear that instead of approaching the higher authorities and telling them the truth, Prem Chand did not do the needful and rather accepted the prosecution story as gospel truth. Thus the defense has fizzled out faster than the morning fist.

13. From the facts detailed above, there is no hinge nor loop to hang a doubt regarding the complicity of the accused/appellant in this case. The case of the prosecution is clear. The trial court has awarded the minimum sentence prescribed under the law. The appeal is without merit and the same is dismissed.

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