

Manoj Kumar Vs. the State (Govt. of Nct)

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Court : Delhi

Decided On : Apr-21-2010

Judge : Sanjiv Khanna, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 164, 375, 376 and 506

Appeal No. : Crl.A. 469/2009

Appellant : Manoj Kumar

Respondent : The State (Govt. of Nct)

Advocate for Def. : Arvind Kumar Gupta, APP

Advocate for Pet/Ap. : A.J. Bhambhani,; Nisha Bhambhani and; Lakshita Sethi, A

Disposition : Appeal dismissed

Judgement :

Sanjiv Khanna, J.

1. The present appeal by Mr. Manoj Kumar is directed against judgment dated 3rd January, 2009 passed by the learned Additional Session Judge convicting him for offences under Sections 376 and 506 of the Indian Penal Code, 1860 (hereinafter referred to as the Code, for short). By order dated 7th January, 2009, the appellant has been sentenced under Section 376 to undergo rigorous imprisonment of 7

years with fine of Rs. 5,000/- with the stipulation that in case of default in payment of fine, the appellant will undergo one year rigorous imprisonment. For offence under Section 506 of the Code, the appellant has been sentenced to one year rigorous imprisonment.

2. The allegation against the appellant was that he was a neighbour of the prosecutrix and he had committed rape at about 11 p.m. on 28th April, 2005, while she was sleeping along with her two younger sisters on the roof of their house. After committing rape, the appellant ran away and absconded and came back to his house on 1st May, 2005, when father of the prosecutrix got in touch with the police and an FIR was registered and the appellant was arrested.

3. To prove the case, the prosecution has examined 14 witnesses. However, the evidence of PW-3, the prosecutrix, and her parents PW-4, Mr. Ram Prakash and PW-5, Ms. Devki is most relevant and material.

4. Prosecutrix PW-3 in her evidence has stated that the appellant was their neighbour and residing in an adjacent house. About 1 years back, the appellant had sent his wife and children to his native village and was living alone and he had an evil eye and used to make gestures after seeing the prosecutrix. On 28th April, 2005, in the morning, the appellant had made gestures by twinkling his eyes when the prosecutrix was standing in the courtyard. The prosecutrix informed her mother, who asked her to ignore the incident. On 28th April, 2005, the prosecutrix after meals went to the roof of their house along with two younger sisters to sleep. At night she found that the appellant was sleeping next to her and he started pressing the hand of the prosecutrix. The prosecutrix tried to call her mother but the appellant gagged her mouth with a blanket and threatened her that if she tried to make noise, he would strangle her. The appellant forcibly had sexual intercourse with her. Thereafter, the prosecutrix started weeping loudly and the appellant jumped and went to the roof of his house. On hearing the prosecutrix, her parents came to the roof and she narrated the whole incident. The appellant went missing and could not be seen till 1st May, 2005. On 1st May, 2005, father of the prosecutrix called the police and the accused-appellant was apprehended. On 4th May, 2005, statement of prosecutrix under Section 164 of the Code was

recorded by the learned Metropolitan Magistrate, which is Exhibit PW-3/B. The prosecutrix was also medically examined in Sanjay Gandhi Memorial Hospital, Delhi and her medical report is Exhibit PW-9/A. Her under garments Exhibit P-1 were also seized and sent to Forensic Science Laboratory for examination.

5. PW-4, Mr. Ram Prakash, father of the prosecutrix in his evidence recorded on 9th March, 2006 has stated that prosecutrix was about 13 years old on the said date and the appellant-accused was their neighbour. He has further stated that after dinner her daughter, the prosecutrix had gone to sleep on the roof of their house along with Soni and Moni and at about 11.30 p.m. he went to the roof and saw that the appellant was running from the roof of their house. The prosecutrix had stated to him that the accused had come to the roof of their house and had laid down besides her and had pressed her hand and gagged her mouth with the blanket so that the prosecutrix could not raise any alarm. The prosecutrix had informed him that the appellant had committed rape. They tried to trace out Mr. Manoj but he had run away.

6. PW-5, Ms. Devki, mother of the prosecutrix in her evidence recorded on 12th April, 2006 has stated that the prosecutrix was about 13 years old as on the said date and she knows the appellant-Mr. Manoj, who was their neighbour. She has stated that on 28th April, 2005 in the morning hours the appellant had teased the prosecutrix, who had complained about his behaviour but she had asked her daughter to ignore the same. On 28th April, 2005, after taking dinner, the prosecutrix along with her two sisters Soni and Moni went to the roof of their house for sleeping. At about 11/12 p.m., she heard the cries of daughter, the prosecutrix and she along with her husband rushed to the roof and saw that the accused had jumped on the roof of the adjoining house. The prosecutrix narrated that the appellant had come to the roof of their house and had committed rape. It was stated by her that the appellant was lying besides her and pressed her hand and had threatened to kill her in case she raised any alarm. Thereafter, the appellant was not traceable. On 1st May, 2005, the appellant was noticed in his residence and thereupon her husband informed the police. The prosecutrix was taken to hospital for examination and on the statement made by her daughter, a case was registered.

7. Learned Counsel for the appellant has submitted that there are material contradictions between the statement of the PW-3 prosecutrix, PW-4 Mr. Ram Prakash and PW-5 Ms. Devki. It is submitted that the prosecutrix in her statement before the court had stated that she had narrated the incident to her 'parents' who came to the roof on 28th April, 2005. However, in the statement recorded under Section 164 of the Code, Exhibit PW-3/B the prosecutrix had stated that her mother had come to the roof after she had cried and she had narrated the entire incident. It is also pointed out that the father of the prosecutrix, PW-4 Mr. Ram Prasad had stated that at about 11.30 p.m. on 28th April, 2005 he had heard the daughter Soni crying, whereas as per the prosecutrix and as per PW-5 Ms. Devki, the prosecutrix had cried and both Soni and Moni, the two younger daughters were sleeping.

8. The so-called discrepancies in the statement of PW-3, the prosecutrix, PW-4 Mr. Ram Prakash and PW-5 Ms. Devki are minor in nature. On the basic and material facts, the statement of the witnesses PW3 the prosecutrix and PW5, Ms. Devki is identical and similar. PW-3, the prosecutrix, who is the victim, has been clear and forthright in her statement under Section 164 Exhibit PW-3/B as well as her statement recorded on oath at the time of trial. Learned Metropolitan Magistrate, who had recorded the statement under Section 164 Exhibit PW-3/B, has mentioned that the prosecutrix was mature and fully understood what she was stating. PW-3, the prosecutrix has narrated the entire incident in the night of 28th April, 2005. The fact that she had gone to sleep on the roof top along with her two younger sisters is also stated and affirmed by PW-5, Ms. Devki her mother. In her examination in chief in the Court PW-5 Ms. Devki had stated that she heard the prosecutrix crying and thereupon went upstairs and her daughter thereupon informed her about the entire episode. PW-4, Mr. Ram Prakash in his statement had stated that he heard daughter Soni crying but this minor difference in the testimony does not make any material difference to the case of the prosecution. It is possible that the witness PW- 4, Mr. Ram Prakash may not have realized who was crying as he was down stairs. In his cross examination he has stated that he heard his daughter weeping. Even if we ignore the statement of PW-4 Mr. Ram Prakash, the father, the statements of PW-3 prosecutrix and PW-5, the mother is sufficient to prove and establish the charge. Moreover, the statement of the

prosecutrix victim herself, it is well settled, is sufficient to bring home and establish the charge against the appellant if the said statement is credible, reliable and trustworthy. Interestingly, in the cross-examination, Counsel for the appellant had suggested that the appellant had gone to the roof to advise the prosecutrix that he did not want to tease her and to explain that he did not have any bad intention. The suggestions given to prosecutrix PW-3 in the cross-examination suggest/shows that the appellant Mr. Manoj had accepted his presence on the roof at about 11 p.m. and that he had got in touch with the prosecutrix.

9. Both Soni and Moni did not get up at the time of said incident, though as per the case of prosecution they were sleeping on the roof along with the prosecutrix. This does not mean that the case of the prosecution is false or doubtful. Both Soni and Moni as per the judgment were of 7 years and 5 years old at the time of incident, and may not have woken up. Keeping view of their young age they would not have understood what had happened and had not produced and appeared as witnesses. Moreover, the prosecutrix has stated that her mouth was gagged with blanket. As noted above, in the suggestions given to the prosecutrix the appellant-accused has admitted his presence on the roof at night and that he had spoken to the prosecutrix.

10. As stated above, the prosecutrix was hardly about 13 years old at the time of the incident. There is no reason and cause for her to falsely implicate the appellant for the offence of rape, which in a conservative society unfortunately can have implications and affect on her personal and future life. It is difficult to believe and accept that she would have falsely implicated the appellant allegedly on the ground that there was a demarcation of property dispute between the appellant-Mr. Manoj and her father PW-4, Mr. Ram Prakash and for this reason, the prosecutrix had made a false allegation that she was raped. In *State v. Gurmeet Singh* : AIR 1996 Supreme Court 1393 the Supreme Court has observed as under:

12. ...Even if it be assumed for the sake of argument that there was some such litigation, it could hardly be a ground for a father to put forth his daughter to make a wild allegation of rape against the son of the opposite party, with a view to take revenge. It defies human probabilities. No father could stoop so low as to bring

forth a false charge of rape on his unmarried minor daughter with a view to take revenge from the father of an accused on account of pending civil litigation. Again, if the accused could be falsely involved on account of that enmity, it was equally possible that the accused could have sexually assaulted the prosecutrix to take revenge from her father, for after all, enmity is a double edged weapon, which may be used for false implication as well as to take revenge....

Similarly in *Wahid Khan v. State of Madhya Pradesh* : (2010) 2 SCC 9 it has been observed as under:

16. The law on the point is now too well settled. No doubt, it is true that Dr. B. Biswas, who had initially conducted the medical examination of the prosecutrix, has not appeared on behalf of the prosecution to depose. But, that alone is not sufficient to discard the prosecution story. Corroboration is not the sine qua non for conviction in a rape case. In this regard, the most celebrated observations of Justice Vivian Bose in *Rameshwar v. State of Rajasthan* may be quoted : AIR 1952 SC 54:19. 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....

17. It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing therefrom. If she is found to be false, she would be looked by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracized by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward looking as the western countries are.

18. Thus, in a case of rape, testimony of a prosecutrix stands at par with that of an injured witness. It is really not necessary to insist for corroboration if the evidence

of the prosecutrix inspires confidence and appears to be credible. However, in the case in hand, even without the examination of doctor, the evidence of prosecutrix stands fully corroborated by the evidence of P.W.3 - B.B. Subba Rao, Sub-inspector of the police station who had virtually caught the appellant red-handed. Thus, even if doctor had not been examined it would not throw or completely discard the prosecution story. The evidence of prosecution witnesses is fully trustworthy and there is no reason to doubt genuineness thereof.

11. Learned Counsel for the appellant has referred to statement of DW-1 Mr. Ram Singh, who has stated that one month prior to the incident there was a quarrel between the appellant and PW-4, Mr. Ram Prakash, father of the prosecutrix as Mr. Ram Prakash had encroached upon the plot of the appellant-Mr. Manoj by raising a wall. There was/is no civil litigation which is pending. It is difficult to accept the contention of the appellant that PW-4, Mr. Ram Prakash could have asked her minor daughter aged about 13 years to make a false allegation that the appellant had committed rape on her because of the alleged dispute.

12. The incident of 28th April, 2005 was reported to the police on 1st May, 2005. However, the prosecution witnesses and the complainant have been able to explain this delay by pointing out that the Appellant- Mr. Manoj was absconding after the incident and had come back to his house on 1st May, 2005. The complainant PW-4, Mr. Ram Prakash and PW-5, Ms. Devki have stated that after they saw the appellant on 1st May, 2005, a complaint was made and the police came and arrested the appellant. In Gurmeet Singh (supra), the Supreme Court has examined the question of delay in recording of FIR in cases of rape and has observed as under:

8. ...The courts cannot over-look the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged....

13. The testimony of PW-9, Dr. Poppy Hazarika, Senior Resident, who had examined the prosecutrix on 1st May, 2005 records that hymen was found to be torn. Learned Counsel for the appellant has stated that there can be several causes and reasons why hymen was found to be torn and this by itself does not establish or prove rape as defined in Section 375 of the Code. In this connection, reference can be made to the statement of the prosecutrix PW-3/B recorded under Section 164 of the Code in which she has stated that the appellant had raped her and did what a husband-wife do. She had made the same allegation of rape by the appellant in her examination in chief recorded on 22nd November, 2005. She has also stated that her salwar was forcibly removed. In her cross-examination, no questions with regard to the sexual intercourse were put to PW-3, the prosecutrix. Her statement in examination in chief to this limited extent was not challenged and questioned. The Supreme Court in the case of Wahid Khan (supra), has observed as under:

19. It was also contended by learned Counsel for the appellant that since hymen of the prosecutrix was found to be intact, therefore, it cannot be said that an offence of rape was committed on her by the appellant. This contention cannot be accepted as offence of rape has been defined in Section 375 of the IPC. Explanation to Section 375 reads thus:

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

It has been a consistent view of this Court that even a slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial.

20. It is appropriate in this context to reproduce the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty Second Edition) at page 495 which reads thus:

Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite

sufficient for the purpose of the law. It is therefore quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.

21. Similarly in Parikh's Textbook of Medical Jurisprudence and Toxicology, 'sexual intercourse' has been defined as under:

Sexual intercourse.- In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.

22. If the aforesaid facts are kept in mind, it cannot be disputed that the act of the appellant would certainly constitute an offence of rape and leaves no amount of doubt in our mind.

14. In view of the aforesaid, I do not find any merit in the present appeal and the same is dismissed.

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