

**Ajay Vs State**

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**Court :** Delhi

**Decided On :** Oct-05-2010

**Judge :** Mr.Shiv Narayan Dhingra. J

**Acts :** Code Of Criminal Procedure (CRPC) - Sections 107,151

**Appeal No. :** Crl. A. No. 513 of 2009, Crl. M. (Bail) No. 822 of 2009. ; Crl. A. No. 885 of 2009, Crl. M. (Bail) No. 1386 of 2009.

**Appellant :** Ajay

**Respondent :** State.

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

**Advocate for Pet/Ap. :** Mr Vikas Sharma ; Mr. Yogesh Sharma, Adv.

**Judgement :**

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the reporter or not?

3. Whether judgment should be reported in Digest?

1. These appeals have been preferred by the appellants/accused persons against the Judgment dated 20th April, 2009 and Order on the point of Sentence dated 9th June, 2009 whereby the appellants have been convicted for the offence of gang rape and sentenced to undergo Rigorous Imprisonment for a period of ten years

and to pay a fine of Rs. 5,000/- each.

2. Brief facts relevant for the purpose of deciding these appeals are that the prosecutrix in this case had gone to see her husband's elder brother namely Rajender at Harsh Vihar on 19th January, 2005 since he was not keeping well. She got late and was coming back to her house around 10 pm. She had caught a bus which went out of order at Loni Road Gol Chakkar. She saw a TSR parked there and enquired from the TSR driver if he would take her to Yamuna Vihar. The driver said yes but in his TSR there were 3 persons already sitting besides the driver. She was accommodated on the back seat of the TSR. When she reached in front of C-Block Yamuna Vihar, TSR driver asked her about her last destination. She told her that she has to go near Tripal Factory. The TSR driver told her that other persons sitting in the TSR had also to go to the same place so she would be dropped near Tripal Factory. When the TSR reached Tripal Factory the driver of the TSR did not stop the TSR there despite her asking, rather he increased the speed of the vehicle. When she tried to raise noise, two persons sitting in the back seat pressed her mouth and gagged her. She was taken to a place behind Gokul Puri police station and taken to first floor of a house where all the four accused persons, including the driver of TSR gang raped her. She learnt the names of three of them as they were calling each other by names. After gang raping her, they took her in the TSR at about 2 2.30 am and threw her in Gali No. 2, near Tripal Factory and fled away. She reached home and informed about the incident to her husband. Her husband asked if she could identify the house where she was gang raped. She told him that she would be able to identify the house. So at about 6 am, in the morning, she accompanied her husband and was able to identify the house where she was gang raped. They found only one accused namely Raj Kumar present there. They both caught hold of accused Raj Kumar. He was beaten and brought to police station Gokul Puri by the husband and wife at about 8-9 am. At police station the prosecutrix narrated the entire story as to how she was gang raped and gave names of three of the accused CrI. A. No. 513 of 2009 & 885 of 2009 Page 2 of 10 persons and handed over accused Raj Kumar, caught by her and her husband to police. However, the police was not in a mood to register a case of gang rape and spoil the record of police station. ASI Darshan Kumar was assigned the job of convincing the woman that it was not good for her

to lodge an FIR. So, ASI Darshan Kumar told the prosecutrix that she was a family woman, if she got FIR lodged, next day her name would appear in the newspaper and she would get defamed in the society and neighbourhood. She will have to undergo medical examination and suffer more at the hands of society and relatives, so she should not insist for registration of FIR. ASI Darshan Kumar assured her that accused Raj Kumar would be arrested in some other case. The prosecutrix was hence sent back. ASI Darshan Kumar, as such, prepared a kalandra u/s 107/151 Cr. P.C. and sent accused Raj Kumar to Special Executive Magistrate (SEM) u/Sec 107/151 Cr. P.C. so that bond be got executed from him. Summons of 107/151 Cr. P.C. proceedings were sent by SEM to the complainant/prosecutrix i.e. victim in the case and she appeared before the SEM on 16th February, 2005. Before SEM, she narrated that she was gang raped by the accused persons. The SEM was shocked. He seemed to be a sensitive person and called for an explanation of the SHO [SEM in Delhi is normally an officer of the rank of Additional Commissioner of Police, an officer senior in rank than SHO]. He sent a copy of statement of victim as recorded by him to the concerned SHO and asked the SHO for MLC of the prosecutrix. He also asked the SHO to report his Action Taken within two days. He forwarded a copy of his order to Deputy Commissioner of Police (DCP) as well. However, the SHO was still not prepared to register an FIR, as a police station is normally considered by the SHO as his personal fiefdom and he considers himself to be the king of this kingdom. He still did not record the FIR and a reply was sent to the SEM that the woman had not complained of rape. Rather, it was stated that she was accompanied by her husband and her husband had also confirmed her statement. The woman seemed to have CrI. A. No. 513 of 2009 & 885 of 2009 Page 3 of 10 given a false statement before the SEM at somebody else's instance. When the matter again came up before the SEM on 2nd March, 2005, the SEM found that no explanation was sent to him by the SHO, so he sent a reminder to the SHO as to why no action has been taken. It is only after the reminder was sent by the SEM that on 2nd March, 2005, an FIR was registered in this case by recording a fresh statement of the victim. In the fresh statement of the victim, all details regarding her approaching the police station with her husband on 20 January, 2005 along with accused Raj Kumar, handing over accused Raj Kumar to police, preparation

of kalandara and her making statement before the SEM, reminder having been sent by the SEM were missing and FIR was recorded as if the woman had made the complaint of gang rape for the first time on 2nd March, 2005 to the SHO. After registration of FIR, on such insistence, the investigation was done in this case and after completion of investigation, a challan was filed and accused persons were sent for facing trial.

3. The prosecutrix is the sole witness in this case. She, in her testimony, has narrated the entire story in detail as to how she had hired TSR and then she was forcibly taken to First floor of the house. Later on it was found that the house belonged to accused Raj Kumar, who was living there as a tenant. PW-7 Smt. Urmilla testified to the fact that Raj Kumar was her tenant in that House bearing No. B-502, Gokul Puri, Delhi, for about seven-eight months prior to the incident, in the year 2005.

4. The counsels for the appellants urged that the conviction of the appellants on the sole testimony of prosecutrix was not justified. It was submitted that there was no corroborative evidence in this case. Counsel for appellant Ajay submitted that appellant Ajay was not even named in the FIR while other three accused persons were named in the FIR. The conviction of appellant Ajay based on sole testimony of the prosecutrix was totally against law. It was argued that though conviction can be based on sole testimony of a prosecutrix, but, if the prosecutrix was not reliable, the Court must look for some corroboration. It was urged that in this case prosecutrix was not reliable because initially a report under Section 107/151 Cr. P.C. was recorded and no allegations of gang rape were made and the allegations of gang rape were made for the first time on 16th February, 2005 when she appeared before the SEM. It is further submitted that prosecutrix was accompanied, at that time, by an Advocate and there was possibility that she had falsely implicated the accused persons.

5. It has to be seen whether the prosecutrix falsely implicated the accused persons or she was truthful. For false implication, there must be some motive or previous enmity or a reason for which a woman would get somebody falsely implicated in a gang rape case putting her own honour at stake or the character of the prosecutrix

is proved to be such that there is possibility of her falling to such an extent.

6. In the present case, the prosecutrix did not even know the accused persons. She was totally a stranger to the accused persons when she boarded the TSR on the night intervening 19th and 20th January, 2005. On the very next day of the incident, she went with her husband to identify the house where the incident had taken place and she was able to identify the place where she was gang raped. She went there without help of police, with her husband. Only one accused namely Raj Kumar was found there. She and her husband took accused Raj Kumar to the police station. At police station instead of registering a report of gang rape, a kalandara under Section 107/151 Cr. P.C. was prepared. A perusal of kalandara would show that she had not given account of a street brawl, but, a case of gang rape was converted into street brawl. Kalandra shows that she told police that on 19th January, 2005 she had gone to see her ailing jeth Rajender at Harsh Vihar and she was coming back at 10 pm after seeing her jeth and when she reached near Loni Road Gol Chakkar, she hired a TSR there in which three or four persons were already sitting. This statement made by her on the very next day to the police corroborates her statement made to the SEM and the statement made on 2nd March, 2005 at the time of registration of FIR and her statement made in the Court. Thus, there is sufficient corroboration of her catching TSR on 19th January, 2005 in which the accused persons were already there. No suggestion has been put to this witness during her cross examination that she had not taken TSR on the night of 19th January, 2005 or in the TSR accused persons were not present or that the TSR driver had not told her that he would drop her near Tripal Factory as the other persons were also going to Tripal Factory. In her testimony she had stated that she and her husband, on the next day, i.e. on 20th January, 2005, at about 6 am, went to trace the house where she was gang raped and she was able to find that house and accused Raj Kumar was brought to police station. No suggestion was given to her that she had not gone to the house with her husband or accused Raj Kumar was not brought by both of them to the police station. There is no doubt that the FIR written on 2nd March, 2005 by the police does not mention sequence of events which had taken place and as narrated by her during evidence and she was confronted by the counsel for the accused persons with her statement dated 2nd March, 2005 to discredit her but in fact this confrontation

does not discredit her. This contradiction discredits the police machinery which did not record the sequence of events and her truthful statement. There was no reason for the SHO/DO not to record that she had approached the police on the morning of 20th January, 2005 along with accused Raj Kumar and handed over accused to police and narrated the incidents and instead of recording her truthful statement, a proceeding u/s 107/151 Cr. P.C. was initiated and an FIR was registered only when SEM insisted that an FIR should be registered.

7. There is another reason to believe her statement and to believe that the accused persons were the same who had raped her. In her very first statement made to the police on 20th January, 2005, she had given the names of the three accused persons whose names she had learnt during the conversation between the accused persons and she stated that she could not know the name of fourth accused person. She also seemed to be confused at the time of deposition about the number of rapists, but, it is apparent from a careful reading of her statement that there were four persons who gang raped her. In her statement she categorically stated that two accused persons sitting on the back seat of TSR gagged her mouth when she tried to cry and was forcibly taken in TSR after Tripal Factory. It is normally seen in Delhi that TSR driver make one person sit on the driver's seat itself and the back seats are occupied by more persons. Thus, in this case also it seems to have happened that three persons, apart from the driver, were in the TSR and they all knew each other. It has come in the testimony of the complainant that when she sat in the TSR she found that they were drunk. In order to accommodate the victim one of them would have shifted to and shared the driver seat and two remained on the back seat and that is how she was gagged by two persons sitting on the back seat. Her narrating the incident and giving names of three of the accused persons in her statement on 20th January, 2005 itself showed that her statement was truthful. In her statement she had stated that rapists included Pramod, Raj Kumar and Santosh and they seemed to be drunk. She also told that they had threatened her not to disclose the incident to anyone. It is different thing that police did not register FIR of gang rape and showed it a street brawl but this was also done in a very clumsy manner. In the statement of prosecutrix recorded on 20th January, 2005, as available on the kalandara under Section 107/151 Cr. P.C., it is categorically recorded that she boarded the TSR on

19th January, 2005 and the incident of misconduct with her had taken place on that very night. It is not understood how the police could have recorded happening of a street brawl on 20th January, 2005 around 4 or 5 pm.

8. Another argument which is raised by counsel for the accused persons is that accused persons, for the first time, were identified by the prosecutrix in the Court and no TIP was conducted of the accused persons and this identification was not good enough to convict the accused persons. This argument must fail. Accused Raj Kumar was apprehended by the prosecutrix and her husband on the very next morning i.e. after about 4-5 hours of the incident from the place of incident. His identification, therefore, cannot be in doubt. It has come in the testimony of prosecutrix that she had to spend around 4 hours in the room where she was gang raped by accused persons. She was taken there around 10.30 pm on 19th January, 2005 and was dropped on road around 2 2.30 am on 20th January, 2005. Thus, for around four hours she had been watching these accused persons consistently as her tormentors, raping her. She could not have forgotten their faces under any circumstance for years to come. She learnt the names of three of them and disclosed the same on the very next morning. Testimony of PW-4 Ct. Satpal shows two of the accused persons namely Mithilesh and Pramod Kumar were arrested on the identification of the victim. Thus, there was no question of holding TIP for the three accused persons. Fourth accused Ajay had surrendered before the Court and when his TIP application was made, he refused for TIP. It is submitted by the counsel for accused Ajay that the circumstance of refusal of TIP was not put to the accused Ajay under Section 313 Cr. P.C. and therefore an adverse inference should be drawn.

9. It is settled law that unless not putting of circumstance had prejudiced the accused, only not putting a circumstance to the accused cannot be a ground for acquittal. In this case, no doubt, the circumstance that accused had refused TIP was not put to him, but, the explanation as to why he had refused TIP was already given by the accused at the time of refusal and he had stated that he had been shown to the witness. Therefore his explanation was already there and it cannot be said that not putting of the circumstance prejudiced him. Since the accused had refused to join TIP and the victim had seen the accused so long at the time of

rape, the identification of the accused for the first time in the Court cannot be a ground of acquittal of accused.

10. There is no doubt that there is no medical evidence in this case to corroborate the oral testimony of the prosecutrix, but the valuable evidence was deliberately washed out by the police when police refused to register the FIR on the very morning on 20th January, 2005 and did not carry investigation. Had the police registered the FIR and taken action and gone to the room where the rape had taken place, the police would have been able to collect some documentary evidence of the rape. Even if there had been injuries on the person of the victim or accused of the resistance put by victim, all that evidence was washed out by the police when police registered this FIR delayed by about six weeks. All scratches and minor injuries get healed in six weeks time. Since the woman was a married woman, there would have been no other evidence available. Being married, she was used to intercourse and the only evidence which should have been available would have been her resistance which police did not collect and preserve.

11. No doubt that the Court has to be cautious at the time of convicting the accused for serious and heinous crime of gang rape since it involves imprisonment for a period of 10 years and the court must carefully consider the testimony of the victim, if the conviction is based on the sole testimony of the victim, but, in this case I have no doubt in my mind that the victim had truthfully testified in the Court and had not falsely implicated any of the accused persons. The victim from day one had been crying hoarse about her gang rape. She had been consistent in her statement before the SEM as well as before the Trial Court. No suggestion had been put to her that she or her husband inculcated any kind of enmity against the appellants. The prosecutrix had no motive to grind against the appellants. No suggestion was given to her that she, at any point of time, had tried to black-mail any of the accused persons or extended any threat to implicate them falsely or compromised her position.

12. Under these circumstances, I consider that the Trial Court rightly convicted the accused persons on the basis of sole testimony of the prosecutrix.

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

