

Joginder Vs. State

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Court : Delhi

Decided On : Jan-05-2012

Appellant : Joginder

Respondent : State

Advocate for Pet/Ap. : Mr. Manish Kumar Singh, Mr. Mukesh Gupta, Mr. Sunil Chaudhary

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Reserved on: 25th November, 2011 Decided on: 5th January, 2012 + CRL.A. 1039 and CrI.M.B. 1227/2010(Bail) JOGINDER Petitioner Through: Mr. Manish Kumar Singh, Advocate versus STATE Respondent Through: Mr. Mukesh Gupta, APP for the State with SI Premvir Singh. AND + CRL.A. 1082/2010 and CrI. M.B. No. 1228/2010(Bail) RAJ KUMAR @ RAJU and ANR Petitioner Through: Mr. Sunil Chaudhary, Advocate versus STATE Respondents Through: Mr. Mukesh Gupta, APP for the State with SI Premvir Singh. Coram: HON'BLE MS. JUSTICE MUKTA GUPTA.

1. By the present appeals the Appellants Joginder, Rajkumar and Brijesh Kumar lay a challenge to the judgment dated 29th July, 2010 convicting them for offences punishable under Section 376(2)(g) IPC and order dated 3 rd August, 2010 sentencing them for Rigorous Imprisonment for a period of ten years and a fine of rupees fifty thousand each and in default of payment of fine to further undergo

2. The prosecution case in a nutshell is that the prosecutrix got recorded a statement on 3rd July, 2000 that she was a student of 9th Class in Sarvodaya Kanya Vidyalaya, Village Nithari and had developed friendship with one S s/o Sh. Satpal Singh for the last 2/3 months. They used to meet each other. On 3rd July, 2000 at about 11:30 a.m. S met her on the way and made her sit on his bicycle. He took her to Karala Balaji Temple and thereafter forcibly to a vacant house in Sector 22 and committed rape on her against her consent. When she wept, on hearing her sound, three persons aged about 25, 30 and 45 years came there. They asked her the reason of her crying on which she told that S committed rape on her forcibly. On this, all those three persons also committed rape on her against her consent. She stated that she could point out the place where S and other three persons raped her. They released her at about 3:00 p.m. and also threatened her not to inform the police or else they would kill her. She reached home and on the way one person aged about 45 years accompanied her to her house and on her father asking him as to why he daughter is weeping, he stated that the police was coming..

3. On this statement of the prosecutrix, FIR No. 593/2000 under Sections 363/376/506/34 IPC was registered. The prosecutrix was medically examined and on 4th July, 2000, on her pointing out S and the three others i.e. the Appellants herein were arrested from Sector.

22. On pointing out of the prosecutrix, Ramchander and Baljeet were also arrested who have finally been acquitted by the learned Trial Court and there is no State appeal against the said acquittal. The Appellants and S were sent for medical examination and the exhibits were seized. Case property was deposited with MHC(M). The bicycle used in the incident was also seized. However, before the *Page 2 of 12* charge-sheet could be filed, the prosecutrix died on 13 th August, 2000 as she committed suicide on 12th August, 2000. On completion of the investigation, a charge-sheet was filed under Section 363/376(2)(g)/506/120B/34 IPC. Since S was found to be a juvenile, his charge-sheet was separated and sent before the Juvenile Justice Board. Charges against the Appellants were framed

under Section 376(2)(g) IPC whereas against Baljeet and Ramchander charges were framed under Section 109 read with Section 376 IPC. With regard to the suicide of the prosecutrix, FIR No. 300/2001 was registered separately on 12th August, 2000. Statement of the father of the prosecutrix was recorded who stated that the prosecutrix was not eating well those days. After taking dinner, they all went to the roof to sleep and the prosecutrix went downstairs to sleep. According to the father of the prosecutrix, the Principal of the school of the prosecutrix had called him and stated that her name had been struck off as she had not attended school for more than 15 days, their school has got a bad name due to the incident, so he should obtain a transfer certificate of the prosecutrix and get her admitted somewhere else. When the father of the prosecutrix asked his daughter in the CAT Ambulance, the prosecutrix stated that she committed suicide due to the shame as she was raped in the last month and her name was also struck off from the school. The father also stated whenever the prosecutrix or any member of the family used to pass in front of the house of S the mother of the S Urmila (since expired) and Sister P used to taunt them by saying that they were not in favour of seeing the face of such a girl and she should die by putting herself on fire. He further stated that to go anywhere they had to pass from in front of the house of S. Thus, according to the father, his *Page 3 of 12* daughter committed suicide due to taunting of mother and sister of S The prosecutrix had also left a suicide note..

4. Vide order dated 17th April, 2004 charge under Section 306 IPC was also framed against accused Urmila and P. However, since P was a juvenile her case was referred to the Juvenile Justice Board. Charge under Section 306 IPC was also framed against the Appellants, Rajkumar and Baljeet. Ultimately, by the impugned judgment the Appellants and all other accuseds were acquitted for offence under Section 306 IPC. The said acquittal is not impugned in the present appeal and the present appeals are only confined to the conviction and sentence of the Appellants for offence under Section 376(2)(g) IPC..

5. Learned counsel for the Appellant contends that though it is stated that the Appellants were arrested on 4th July, 2000 at the instance of the prosecutrix, but as per the statement of PW10 it is evident that the Appellants were arrested on 3rd July, 2000 itself. Though they were purportedly arrested at the instance of the

prosecutrix however the arrest memo does not bear her signature. The suicide note allegedly written by the deceased had been seized vide seizure memo Ex. PW5/C which has not been witnessed by any independent witness. Though, the suicide note has been exhibited as P1 however no report of the handwriting expert was called for to prove that the suicide note was in the handwriting of the prosecutrix, despite her handwriting being available. The same has been proved only by recording the statement of the father. Though the clothes of the Appellants and prosecutrix were seized however as per the FSL report semen was found on Ex.1, 2A and 10 and could not be detected on Ex.2B, 4 and 8 i.e. the semen was detected on underclothes of the prosecutrix and Appellant Joginder and *Page 4 of 12* not on others exhibits. Further the blood group could not be ascertained according to the serological report. The MLC Ex.PW/17A also does not prove that the prosecutrix, a minor girl was raped by four men continuously as there would have been injuries in such a case on labia majora and minora. No injuries were found on the body of the prosecutrix and even the hymen of the victim was found to be old torn and not freshly torn. The co-accused Baljeet and Ramchander have been acquitted on the same ground however the Appellants have been erroneously convicted. Learned Trial Court erroneously concluded that the statement of the prosecutrix is corroborated by the MLC/FSL report and the post-mortem report. Further, the statement of the prosecutrix Ex.20B that led to registration of FIR No. 593/2000 cannot be used under Section 32 of the Indian Evidence Act (in short the Evidence Act) as the same does not relate to the cause of death of the prosecutrix or any of the circumstances of the transaction which resulted in the death. Reliance is placed on *Narain Singh vs. State of Bihar, 1961 Crl.L.J.*.

137. It is stated that in the initial statement, the prosecutrix did not name anyone except S however subsequently she has falsely implicated the Appellants also. The father of the prosecutrix PW3 has admitted that in the first instance the prosecutrix only named S as a wrong doer. It is, thus, contended that since there is no legal evidence against the Appellants they be acquitted..

6. Learned APP for the State, on the other hand, contends that the statement of the prosecutrix Ex. PW20/B on the basis of which FIR No. 593/2000 was

registered and the suicide note relate to the circumstances leading to the death of the prosecutrix and are thus admissible under Section 32 of the Evidence Act. Reliance is placed on *Sandy @ Ved Prakash and Ors Page 5 of 12 vs. State* 167(2010) DLT 341(DB) wherein in similar facts, the Division Bench of this Court held that such a statement of the prosecutrix was admissible under Section 32(1) of the Evidence Act as it led to the circumstances leading to her death. The Appellants have been clearly named in the FIR and they were arrested on the pointing out of the prosecutrix. Further the version of the prosecutrix was corroborated by the MLC and the FSL report as per which semen was detected on the clothes of the prosecutrix. The learned Trial Court committed no error in convicting the Appellants for offence punishable under Section 376(2)(g) IPC..

7. I have heard learned counsels for the parties and perused the record..

8. PW Roop Kishore, father of the prosecutrix stated that his daughter aged 14 years was a student of 9th Class in Rajkiya Sarvodaya Senior Secondary School, Nithari. It was the first day of the school after summer vacation and his daughter stated that she would come early as there would not be much studies. His daughter went along with her sisters however at about 1:00 p.m. her two sisters came back from the school but the prosecutrix did not return. At about 2:30 p.m. his daughter came back from the school while weeping. She told PW3 that one S of the colony and several other persons raped her. Thereafter they went to the police station where facts stated by her were recorded by the Police. S was arrested on the same day and the medical examination of his daughter was also conducted. After her medical examination, she pointed out the place of occurrence. In the meantime, S disclosed names of the other accused persons as well and also they were to meet in the next morning at a site in Rohini. On the identification of his daughter the Appellants and Baljeet were arrested. After 8-10 days his daughter started going to the school and *Page 6 of 12* after about a month of the incident she committed suicide by setting herself on fire. He also identified the handwriting of his daughter in the answer sheets marked as Ex. PW 3/1-4. This witness was cross-examined however nothing material could be elicited in the cross-examination. PW20 Vimala Yadav, Principal of the school also proved the answer-sheets to be that of the prosecutrix..

9. PW-21 Dr. Deepa Verma, Senior Scientific Officer, FSL, Delhi tendered her opinion and exhibited her report as Ex. PW21/A as per which there were similarities in the signature of the prosecutrix on Fard Makboojgi Vaginal Swap, Fard Makboojgi Kapde Fard Iksaf of six person, Q11 and Q12 i.e. the suicide note. PW-22 Sh. Dharmesh Sharma, the then learned Link Magistrate was also examined who stated that an application for recording of the statement of the prosecutrix under Section 164 Cr.P.C. was moved however in view of the fact that the FIR was registered on the statement of the prosecutrix, he did not think it fit to record the statement of the prosecutrix under Section 164 Cr.P.C..

10. The suicide note left by the deceased reads as under :- "Main khudkhushi karne ja rahi hun galti ho to maaf karna. Main majboor hokar or kissi na kar sakti thi yadi mujhe bachane ki bhi koshish ki to achha nahi. Aap sabne mujhse yeh baat chipa kar rakhi thi lakin mujhe malum ho chukka tha ki main maa banne wali hu. Paap ki duniya main main nahi reh saki. Main apni himmat haar chuki thi. Duniya se naata todkar main shiv se naata jod chuki jahan mere jeevan ki leela yahin samapat hoti hai. Jinhone mere saath balatkar kiya wah kanoon se bach sakte hai lakin mere shivji unhe saza diye bina nahi chhodenge. Jail main se ek bhi insaan jeevit nahi aayega yeh mera viswas hai. Naam surrender, brijesh, rajkumar, jogender, ramchander, baljeet mera muh kaala karne wale nahi bachenge. Balatkar ke doran main nahi *Page 7 of 12* rehna chahti hun bhagwan unhe saza jarur denge mere bhagwan par.....".

11. The suicide note recovered after 2-3 days from the temple of the house states that the prosecutrix committed suicide because of the humiliation due to rape and also due to deletion of her name from the school. Further, the version of the prosecutrix that she was raped is corroborated by the fact that her clothes recovered and the vaginal swab gave positive of human semen..

12. The prime issue raised by the learned counsels for the Appellants is whether the statement of the prosecutrix to the police on the basis of which FIR No.593/2000 was registered at police station Sultanpuri can be used as evidence under Section 32 of the Evidence Act. This Court in *Sandy vs. Ved Prakash*(supra) while dealing with a similar situation held as under: - "68. It thus stands crystal

clear that the second limb of Section 32(1) of the Evidence Act 1872 is not restricted by the fact that in the cases before the Court, with reference to the cause of the makers death, the death has to be a fact in issue i.e. the death is not an ingredient of the offence. In whatever manner the cause of death comes into question, in a proceedings where the circumstances of the transaction have a proximate and a direct cause with the persons death, whatever be the offence under enquiry, the statements would be admissible in evidence..

69. This goes on to evince the fact that learned Judges and fraternity of Jurists could not have been impervious of the fact that there are two distinct expressions used in Section 32(1), and there are two distinct limbs of the said Section; obviously, the second following the first and thus neither the two limbs nor the two expressions could be given a meaning which is but the same; the learned Judges and Jurists have been conscious of the fact that the two limbs and the two expressions embody two distinct *Page 8 of 12* meanings. They were conscious that any interpretation which disregarded the aforesaid had to be discarded as unacceptable..

70. As in the instant case, where the victim of rape, due to the perceived social stigma, moved by passion and in the heat of the passion, consumes a poisonous substance propelled by the thought that death is the only panacea to wriggle out of the shame of being raped, there obviously would be an organic relationship between the act of rape and the suicide; the bond being the shame caused by the act of rape and the panacea of being freed from the shame by dying..

71. Section 32(1) can be looked at from another angle. The expression used by the legislature is "cases in which the cause of his death comes into question" and not the expression "offences in which the cause of his death comes into question". The use of expression "cases" in Section 32(1) of Evidence Act is suggestive of the fact that it was the intention of the legislature that the admissibility of statements under Section 32(1) of the Evidence Act 1872 is not to be restricted to only for offences where death is an integral part of an offence. In all cases where the death of a person comes into question (not in issue) such statements would be admissible in evidence..

72. The view which we have taken after elaborately noting the precedents, finds a confirmation by us, in the decision of the Division Bench of the Allahabad High Court reported as 2002 Cri.L.J.

301. Santosh Kumar and Ors. Vs. State of U.P. where the accused were charged for having raped and murdered a young girl. The charge of murder failed. It was proved that the young girl committed suicide. The statements of the young girl pertaining to her being raped were held admissible under Section 32 of the Evidence Act. Incidentally, we may also note that the Petition for Special Leave to Appeal against the aforesaid decision of the Allahabad High Court being SLP (Crl.) No.1975/2002 was dismissed in limine vide order dated 12.7.2002..

73. The death of the deceased in the instant case and her being raped is a frozen reality. A criminal trial is a voyage of discovery in which truth is the quest. It is the duty of a Court to identify the *Page 9 of 12* culprit with reference to the evidence brought before it and in the evaluation of evidence whenever barriers of legislative enactments are encountered, law must witness dynamic evolution to respond to the challenge i.e. the challenge of identifying and discovering the offender at law..

74. In the backdrop of above discussion, we proceed to consider whether the dying declarations made by the deceased fulfil the conditions of Section 32(1) of Evidence Act 1872..

75. The dying declarations made by the deceased can be conveniently divided into following two parts: - (i) I consumed sulphas tablets; (ii) because I was raped and I cannot stand the humiliation of being raped. The statements certainly relate to the circumstances of the transaction pertaining to her death and thus in view of the law afore-noted, the same has to be treated as admissible as a dying declaration..

76. It need hardly be re-emphasized that the transaction which has resulted in the death of the deceased is the act of consumption of sulphas tablets by the deceased. The same was when the passion of being the victim of a crime was burning within the deceased, who consumed sulphas in the heat of the moment, immediately upon returning to her house. In Sharad Birdhichand Shardash case (supra) it has been held that the circumstance which has even a casual connection

with the death of the deceased is the "circumstance of the transaction which has resulted in death of the deceased"..

13. Thus in view of the Division Bench judgment of this Court reliance by the learned counsel for the Appellants on a Single Bench decision of Patna High Court is of no help to him. Further, the facts of the present case clearly prove that the prosecutrix committed suicide due to humiliation of being raped and her name being struck off from the school. The statement certainly relates to the circumstances of the transaction pertaining to her death and thus can be treated as admissible as a dying declaration. Page 10 of 12.

14. In view of the fact that statement of the deceased is admissible in evidence, the next issue which is to be considered is whether the testimony of the father and other evidence on record is reliable and proves beyond reasonable doubt the offences committed by the Appellants. Case FIR No. 593/2000 was registered on the statement of the deceased (prosecutrix). The same is a signed statement. The signatures on the said statement and the seizure memos have been proved to be in the handwriting of the deceased by PW8 Ms. Deepa Verma, the handwriting expert/Sr. Scientific Officer, FSL. According to the suicide note, the prosecutrix committed suicide because she came to know that she was pregnant. She has further written that she was raped by Brijesh, Raj Kumar, Joginder, Ramchander and Baljit. The prosecutrix in her earlier statement had clarified that Raj Kumar and Baljeet only abated the offence as they were standing outside to guard. Further, the testimony of PW-3, the father of the deceased also proves the statement of the deceased made to him immediately after the incident. The deceased stated that she was raped by S of the colony and several other persons. The witness PW-3 had identified the Appellants Brijesh and Raj Kumar during his testimony. There is no reason attributable to PW-3 for false implication of the Appellants nor was any such thing put in the cross-examination or in the statement under Section 313 Cr.P.C. The factum that rape was committed on the prosecutrix, is further proved by the fact that her undergarment and vaginal swab gave positive of human semen. Much has been stated by the learned counsel for the Appellants regarding the blood-grouping *Page 11 of 12* however, in such a case of gang rape, the blood groupings cannot be conclusively attributable..

15. Learned counsel for the Appellant has strenuously contended that as per the MLC of the prosecutrix there were no marks of fresh injury or bleeding and the same was not possible in case she was raped by four persons. It may be noted that the MLC Ex.PW8/A observes superficial abrasions over her left cheek and Doctor PW17 has stated that rape could not be ruled out. Much has been sought to be emphasized by the learned counsel for the Appellants on the statement of doctor in cross- examination that if a minor girl is raped by four men continuously in that event she must sustain injuries on labia majora and minora. The prosecutrix was above 16 years of age. It may be noted that this averment of the doctor is general in nature. In the present case the finding is that the hymen of the victim was found to be old torn and not freshly torn. In such a situation, it is not necessary that on repeatedly being ravished there would have been injuries on the labia majora and minora. From the evidence on record, I find that the prosecution has proved beyond reasonable doubt, the offence under Section 376(2)(g) against the Appellants..

16. In view of the discussion above, I find no infirmity in the impugned judgment convicting and sentencing the Appellants. The appeals and applications are, accordingly, dismissed. (MUKTA GUPTA) JUDGE JANUARY 5, 2012/'ga' Page 12 of 12