

Ajay Kumar Vs. State

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Court : Delhi

Decided On : Mar-15-2013

Judge : Mukta Gupta

Appellant : Ajay Kumar

Respondent : State

Advocate for Def. : Mr. Mukesh Gupta

Advocate for Pet/Ap. : Mr. A.J. Bhambhani, Ms. Nisha Bhambhani, Ms. Bhavita Modi, Mr. Apurv Chandola

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. 113/2002 Reserved on:

28. h February, 2013 Decided on:

15. h March, 2013 % AJAY KUMAR Through: Appellant Mr. A.J.

Bhambhani, Ms. Nisha Bhambhani, Ms. Bhavita Modi, Mr. Apurv Chandola, Advocates versus STATE Through: Respondent Mr. Mukesh Gupta, APP for the State. Coram: HON'BLE MS. JUSTICE MUKTA GUPTA 1 By the present appeal the Appellant impugns the judgment dated 19th September, 2001 whereby the Appellant has been convicted for offence punishable under Sections 366/376 IPC and the order on sentence dated 20 th September, 2001 whereby he has

been directed to undergo Rigorous Imprisonment for a period of seven years and to pay a fine of Rs. 5,000/under Section 376 and Rigorous Imprisonment for a period of seven years and a fine of Rs. 2,000/- for offence under Section 366 IPC. Both the substantive sentences were directed to run concurrently.

2. Learned counsel for the Appellant contends that the testimony of the prosecutrix is not credible and thus the Appellant is entitled to the benefit of doubt. There are material contradictions in the statement of the prosecutrix. According to the prosecutrix herself she was living in a house along with the two sisters, father and other family members of the Appellant at Kanpur. However, as per the father of the prosecutrix he along with the father of the Appellant kept searching for the Appellant at night. There is no medical evidence to support the allegations of alleged assault. As per the MLC of the prosecutrix, the tear was old. There was no external injury and there was no evidence of recent intercourse. As per the CFSL result no semen was detected on the underwear or vaginal slides of the prosecutrix. The prosecutrix was 15 years old at the time of incident and had voluntarily gone with the Appellant and thus the ingredients of Section 366 IPC are not made out. In the alternative even if it is found that the Appellant committed the alleged offence in view of the fact that the prosecutrix was a consenting party for the reasons to be recorded the Appellant be released on the period already undergone. As per the FIR besides the prosecutrix, her maternal aunt had also gone missing with her however, no evidence has been adduced during the trial as to where the aunt was.

3. Learned APP for the State on the other hand contends that the testimony of PW6, the prosecutrix is consistent and is corroborated by the witnesses of recovery, the Investigating Officer PW8 and her father PW7. The age of the prosecutrix has been proved by PW5 to be less than 16 years and hence her consent is immaterial. Thus there is no merit in the appeal and the same be dismissed.

4. I have heard learned counsel for the parties.

5. FIR No. 432/2000 was registered at PS Shakarpur on the complaint of PW7, father of PW6/the Prosecutrix regarding her missing. Finally the Prosecutrix was

recovered from the bus stand and her statement was recorded. On a charge sheet being filed the Prosecutrix was examined before the learned Trial Court as PW6. In her testimony she stated that the Appellant was her neighbour and the Appellants sister was her friend. The Appellant used to visit their residence however, he never tried to meet her in absence of others. On 9th October, 2000 at about 2.00-2.30 p.m. the Appellant came to her house and told that his sister was unwell and had sent him to call her. At this the Prosecutrix accompanied him and instead of taking her to his sister he took her to railway station and from there to Kanpur. When they reached the railway station she inquired from the Appellant as to where he is taking her to which the Appellant replied that he was taking her to Kanpur. He further stated that the condition of his sister was serious in hospital at Kanpur. On reaching Kanpur, the Appellant did not take her to any hospital for meeting his sister rather took her to some house where he kept her for 3-4 days and during the said period indulged in sexual intercourse with her, despite her protest. The Appellant forcibly had sexual intercourse with her against her wishes. After 3-4 days the Appellant brought her back to Delhi in a train and from the railway station took her to the bus stand. At the bus stand her father met and she and the Appellant were apprehended and brought to the house.

6. In her cross-examination PW6, the prosecutrix has stated that they were staying at Kanpur in the house of other sister of the Appellant where his father, his two sisters and son of the elder sister were living. She further stated that she did not tell anyone else about the conduct of the Appellant except stating to the younger sister of the Appellant that he has brought her forcibly to Kanpur. She further stated that during her stay at Kanpur the Appellant had sexual intercourse with her only once. She stated that during her return journey she did not raise any alarm or told to anyone about the conduct of the Appellant. She further admitted that her maternal aunt Babita accompanied them upto the railway station and saw them off for Kanpur.

7. PW7, the father of the prosecutrix stated that on 9 th October, 2000 when he returned home at 9.00 p.m. he found his daughter was missing since 3.00 p.m. and she had not visited any of the relations. One of the neighbours told him that sister of the Appellant had gone somewhere to leave the Appellant and his

daughter. Thereafter he visited the residence of the Appellant and met his father and other relatives including his sister. PW7 and the father of the Appellant kept on searching for his daughter and the Appellant during night but in vain. Later the family members of Appellant informed that the Appellant and the prosecutrix were at Kanpur and thereafter the brother of the Appellant telephoned him and called him to Delhi 3-4 days later. After 3-4 days he noticed his daughter and the Appellant at Anand Vihar Bus stand at 4.00 a.m. in the morning and he took them both to the police station where the Appellant was arrested.

8. As per the MLC Ex. PW10/A the hymen was torn (old tear (+)) and vagina admitted two fingers easily. There was no external injury. From the medical evidence on record and the testimony of the prosecutrix it is evident that she was enticed away to Kanpur and sexual intercourse was committed. Even if assuming that the Prosecutrix had no external injury and she did not raise any alarm with regard to the alleged rape committed at Kanpur and thus was a consenting party, it may be noted that as per PW5 who has proved the original birth certificate of the Prosecutrix to the extent that the prosecutrix was born on 30th June, 1985, thus at the time of alleged offence starting from 9th October, 2000 the prosecutrix was 15 years old and her consent was immaterial.

9. As per the CFSL report the semen was not detected on the underwear and two glass slides of the prosecutrix. This is for the reason that according to the Prosecutrix the intercourse took place on 10th October, 2000 whereas she was medically examined on 14th October, 2000 after she returned back.

10. The explanation of the Appellant under Section 313 Cr.P.C. is that the prosecutrix visited her in the afternoon of 9th October, 2000 and told him that her maternal aunt was calling him and thus he accompanied her to her residence to meet her aunt. There the maternal aunt of the prosecutrix told him that she had to go somewhere with the Prosecutrix and requested him to drop them at the railway station and thus he accompanied them to railway station, Delhi however, came back after dropping the Prosecutrix and her aunt at the railway station. Thus, according to the Appellant, he went to the railway station with the prosecutrix and her aunt.

11. Further DW1 father of the Appellant has appeared in the witness box and has stated that he has four children and out of them two were married. He denied that any of his children was staying at Kanpur. He further stated that during the period alleged the Appellant was in Delhi with him. Even on Court question this witness reiterated that none of his son or daughter resided at Kanpur and all of his children were at Delhi. DW2 the sister of the Appellant also appeared in the witness box and reiterated that she was not staying in Kanpur and was residing in Delhi.

12. There appears to be some truth in the explanation rendered by the Appellant in view of the FIR lodged Ex. PW3/A. As per the FIR the prosecutrix and her maternal aunt were missing since 9th October, 2000 since 2.30 in the noon and two boys, that is, the Appellant and one Lalit have been mentioned therein. The testimony of PW6, the prosecutrix, PW7, her father/Complainant is wholly silent on this aspect. Further PW6 has admitted that her maternal aunt had accompanied her to the railway station. However, even assuming that the maternal aunt accompanied the prosecutrix to the railway station and thus was a party to this enticing away the same does not absolve the Appellant as the maternal aunt was not the guardian of the prosecutrix and further the consent of the prosecutrix was immaterial being below the age of 16 years.

13. In view of the evidence on record the prosecution has been able to prove beyond reasonable doubt the offence committed by the Appellant and hence I find no infirmity in the impugned judgment and order convicting and sentencing the Appellant. Appeal is dismissed. The Appellant who is in custody be sent a copy of this judgment through Superintendent, Tihar Jail. (MUKTA GUPTA) JUDGE
MARCH 15 2013 vn

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