

Tribhuwan Vs. State

Tribhuwan Vs. State

SooperKanoon Citation : sooperkanoon.com/957126

Court : Delhi

Decided On : Feb-21-2013

Judge : G.P. Mittal

Appellant : Tribhuwan

Respondent : State

Advocate for Def. : Ms. Jasbir Kaur

Advocate for Pet/Ap. : Mr. R.P.S. Tomar

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

21. t February, 2013 + CRL. A.845/2009 TRIBHUWAN Through: Appellant Thakur Virender Pratap Singh Charak with Mr. R.P.S. Tomar, Advocates versus STATE Through: Respondent Ms. Jasbir Kaur, APP for the State. CORAM: HON'BLE MR. JUSTICE G.P.MITTAL JUDGMENT G. P. MITTAL, J.

(ORAL) 1. This Appeal is directed against a judgment dated 27.05.2009 and an order on sentence dated 29.05.2009 passed by the learned Additional Sessions Judge(ASJ) in Sessions Case No.47/2007 FIR No.258/2007 registered at P.S. Model Town whereby the Appellant was held guilty for the offences punishable under Sections 376/363 IPC. He was sentenced to undergo RI for 05 years and to pay a fine of `500/- or in default to undergo RI for 06 months for the offence punishable under Section 376 IPC; he was further sentenced to undergo RI for 03

years and to pay a fine of `100/- or in default to undergo RI for one month for the offence punishable under Section 363 IPC.

2. The prosecution version, in brief, can be noted from paras 1 to 4 of the impugned judgment as under:

1. On 12.04.07 SI Rajesh, Ct. Sandeep and Ct. Randhir of P.S. Model Town were patrolling the area and were present in Lal Bagh. The prosecutrix Mamta (PW1) with her mother Kamla (PW2) met SI. The accused Tribhuwan was handed over to SI and SI recorded the statement of prosecutrix.

2. The prosecutrix stated before SI that on 12.04.07 at about 6:30 p.m she was present at her house. Because of electricity failure in the area she was playing outside of her house. At that time her neighbour Tribhuwan called her and asked her to accompany him. She objected but Tribhuwan forcibly took her to his house. There he removed her underwear. When she tried to raise alarm then Tribhuwan closed her mouth with his hand and committed 'galatkaam' with her. As soon as she was freed from his clutches, she ran away to her mother and narrated the entire incident. Tribhuwan was caught with the help of other persons.

3. On the statement of prosecutrix, an endorsement was made by SI and it was sent to P.S for registration of the case. Further investigation was entrusted to women ASI Poonam. The Women ASI got the prosecutrix medically examined and after medical examination parcels sealed with the seal of hospital were received by her. Inquiries were made from accused and he was arrested and was sent for medical examination and after his medical examination also, parcels were received which were seized. On 25.04.07, the statement of prosecutrix was got recorded u/s.164 Cr.PC. Further investigation was taken over by ASI Renu Bala who sent the exhibits to FSL.

4. After completion of the investigation, the final report was filed in the Court of Ld. MM who after completing the formalities committed the case to Court of Sessions for trial.

3. In order to prove its case, the prosecution examined 14 witnesses before the learned ASJ.

4. On closing of the prosecution evidence, the Appellant was examined under Section 313 Cr.P.C. to afford him an opportunity to explain the prosecution evidence against him. The Appellant denied the prosecutions allegation and pleaded false implication. He stated that he returned from his work and was sleeping on the roof, the Police arrested him and implicated him in the case falsely. The Appellant declined to produce any evidence in defence.

5. On appreciation of evidence, the learned ASJ found that the prosecutrixs testimony was consistent and reliable which was corroborated by the testimony of the prosecutrixs mother (PW2) and the testimony of Dr.Ruchi Singh (PW14), Consultant, BL Kapoor Memorial Hospital. The Appellant was accordingly convicted and sentenced as stated earlier.

6. Thakur Virender Pratap Singh Charak, the learned counsel for the Appellant raised the following contentions: (i) As per the testimony of PW1(the prosecutrix), the Appellant did wrong acts twice or thrice earlier also but no details of the date, time and place were given by the prosecutrix which makes the prosecutrixs testimony to be suspicious. (ii) The act of rape was allegedly committed on a wooden chowki, the same was not seized by the police which makes the prosecution version doubtful. (iii) As per the testimony of the prosecutrix, when she was called by the Appellant she was playing with her sister (Pushpa didi). However, Pushpa was neither cited nor examined as a witness in this case which makes the prosecution version doubtful. (iv) As per the testimony of PW2 Kamla, the prosecutrixs mother, when she(the prosecutrix) informed about the offence of rape committed by the Appellant on her, she raised an alarm whereupon people residing in the colony gathered and apprehended the Appellant. None of the said persons was examined by the prosecution. (v) As per prosecution version, the offence of rape was committed when there was failure of electricity in the jhuggi cluster. But, whenever there is failure of electricity, all the people come out. At such time, the Appellant could not have ventured to entice the prosecutrix to his house.

7. On the other hand, Ms. Jasbir Kaur, the learned APP for the State argues that discrepancies pointed out are not at all material. There was no reason whatsoever for the prosecutrix or her mother(PW2) to have falsely implicated the Appellant. The prosecutrix's testimony was duly corroborated by the MLC Ex.PW7/A which indicated there was a hymen tear and presence of some white fluid in the vagina.

8. It is true that the prosecutrix has not given the details of the earlier acts committed by the Appellant, but the same will be immaterial considering the age of the prosecutrix who was hardly 10 years old at the time of the offence. Children of such tender age are unable to know the nature of the act and, that is why, the consent of a girl for sexual intercourse with a male, when the girl is less than 16 years is immaterial.

9. The non-seizure of the wooden chowkhi on which the offence of rape was committed by the Appellant is immaterial because seizure of the earlier said chokki would not have, in any way, proved or disproved the factum of sexual intercourse by the Appellant with the prosecutrix. Of course, examination of Pushpa would have corroborated the prosecutrix's version that she was enticed by the Appellant to his house. It is important to note that the factum of her playing with Pushpa came for the first time in the cross-examination of the prosecutrix. She did not state this fact in her statement Ex.PW1/A made to the police leading to the registration of the case and even in the examination-in-chief in the Court. Thus, the IO could not have known that the prosecutrix was playing with Pushpa at the time she was called by the Appellant. In the circumstances, her nonexamination is of no significance when there is ample evidence on record to prove that the Appellant did commit sexual intercourse with the prosecutrix.

10. Kamla(PW2), the prosecutrix's mother, of course, testified in her examination-in-chief that she raised an alarm whereupon people of the colony gathered and apprehended the Appellant. The non-examination of any such neighbour or resident of the colony was totally immaterial as their evidence was not relevant for the offence committed by the Appellant. As per the prosecution's version, when the Appellant committed rape upon the prosecutrix and she reached her house after freeing herself from the Appellant, the prosecutrix's mother raised an alarm. Thus,

raising of an alarm by PW2(the prosecutrixs mother) was not relevant under Section 60 of the Indian Evidence Act, 1872. The IO is expected to join the witnesses who are necessary to unfold the prosecution version and not all and sundry, who may not have any knowledge of the offence. Thus, none of the persons gathered by the alarm of the prosecutrixs mother is not at all material and does not make the prosecution version doubtful.

11. A perusal of PW2s testimony reveals that at the time of the incident, the electricity in the colony had gone off. She also stated that when the electricity goes off, people do not stay in the jhuggi and come out. It may be true that the people in the street may gather in some corner or at some place in the colony to gossip or to while away the time when the electricity is off. That would not necessarily mean that the Appellant could not get the opportunity to entice the prosecutrix. This fact, by itself, does not negate the case of the prosecution. This accident took place on 12.04.2007. The prosecutrix was about 10 years old at the time of the offence. Immediately after the incident, an alarm was raised by PW2(the prosecutrixs mother) and the Appellant was apprehended and was handed over to the police who was on patrol duty. The Appellant has not come forward with any explanation as to why he was implicated in this case falsely. The prosecutrix(a small girl of 10 years) will never level a false charge of rape against a neighbour and her mother would not ordinarily subscribe to a false story of sexual assault involving her own daughter and thereby putting at stake the reputation of their family and jeopardising the marriage prospects of her own daughter. In case of *Wahid Khan v. State of M.P.*, (2010) 2 SCC 9.the Supreme Court observed that in Indian society any girl or woman would not make false allegation of rape against any person as she would be aware of the repercussions and the stigma attached to such accusations. Para 17 of the report is extracted hereunder:

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 at 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 ostracised by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forwardlooking as the western countries are.

12. It is no longer *res integra* that testimony of a victim of sexual assault cannot be put on par with the testimony of an accomplice. It can very well be relied upon without any corroboration if the same is found to be consistent and convincing. In *State of Punjab v. Gurmit Singh & Ors.*, (1996) 2 SCC 384, the Supreme Court laid down that normally no self respecting woman would come forward to make false allegation of rape. Relevant portion of the report is extracted hereunder:

8. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

13. In the instant case, the testimony of the prosecutrix(PW1), by itself, is sufficient to prove that the Appellant committed sexual intercourse with her without her consent. Even if there was consent, the same was immaterial as the prosecutrix was just aged 10 years. The prosecutrix's testimony is corroborated by the statement of her mother(PW2), prompt lodging of the FIR and medical examination which showed fresh hymen tear and presence of white fluid in vagina. There cannot be any manner of doubt that the prosecution established its case

against the accused beyond all reasonable doubt.

14. Before parting with the judgment, I may note that in spite of the fact that the offence of rape against a small child of 10 years was duly established and was corroborated by medical evidence by finding fresh hymen tear, yet the learned ASJ was swayed by unnecessary sympathy and awarded a sentence of 05 years of RI instead of a minimum imprisonment of 10 years provided under the law simply on the ground that the prosecutrix and the convict belonged to the poor strata of the society and were jhuggi dwellers or that the Appellant had done few wrong acts with the prosecutrix on two-three earlier occasions also but there were no complaints from her. Sexual assault of children, particularly below 12 years is a most heinous crime and, that is why, the legislature has provided the minimum sentence of 10 years of RI. It is only for adequate and special reasons that a sentence of less than 10 years can be imposed. There was no such reason in the instant case. However, the State has not preferred any Appeal against inadequacy of sentence awarded. Moreover, the Appellant has already been set at liberty after serving his sentence.

15. The Appeal is devoid of any merit. It is accordingly dismissed.

16. Pending Applications stand disposed of. (G.P. MITTAL) JUDGE FEBRUARY 21 2013 pst

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com