

Mohd. Kallu Vs. State

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Court : Delhi

Decided On : Feb-21-2013

Judge : G.P. Mittal

Appellant : Mohd. Kallu

Respondent : State

Advocate for Def. : Ms. Jasbir Kaur

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

20. h February, 2013 Pronounced on:

21. t February, 2013 + CRL.A. 214/2010 .. Appellant MOHD. KALLU Through: Thakur Virender Pratap Singh Charak Advocate versus STATE Respondent Through: Ms. Jasbir Kaur, APP for the State. CORAM: HON'BLE MR. JUSTICE G.P.MITTAL JUDGMENT G. P. MITTAL, J.

1. This Appeal is directed against a judgment dated 25.09.2009 and an order on sentence dated 29.09.2009 passed by the learned Additional Sessions Judge(ASJ) in Sessions Case No.351/2007 FIR No.186/2007 P.S. Jahangir Puri whereby the Appellant was held guilty for the offences punishable under Sections 376, 342 and 506 IPC. He was sentenced to undergo RI for 10 years and to pay a fine of `7,000/- or in default to undergo SI for five months for the offence punishable under Section 376 IPC; he was sentenced to undergo RI for six

months for the offence punishable under Section 342 IPC; he was further sentenced to undergo RI for two years and to pay a fine of `3,000/- or in default to undergo SI for two months for the offence punishable under Section 506 IPC.

2. In nutshell, the case of the prosecution is that on 10.03.2007 a call was made to the PCR(No.100) and a DD No.21B was recorded at P.S. Jahangir Puri, ASI Vinod Kumar reached Jhuggi Shah Alam Bandh. He came to know that a girl aged about 11 years had been raped by his neighbour. W/ASI Renu Bala was summoned to the spot for further investigation. W/ASI Renu Bala reached the spot. She reached the spot and recorded statement of the prosecutrix. The prosecutrix R(name withheld to conceal her identity) disclosed to the ASI that on 07.03.2007 at about 3-4 pm, she was playing outside her house; Kallu(the Appellant) called her and asked her to get food for him from the house of his sister. When the prosecutrix went inside his jhuggi, the Appellant caught hold of her and took her to a nearby vacant jhuggi. When she tried to raise an alarm, the Appellant threatened to kill her. The Appellant pushed her on the ground, removed her salwar and his pant and committed rape on her. The prosecutrix further informed the IO that her mother Rashida also reached there. The Appellant threatened her(the prosecutrix) and her mother not to disclose the incident to anyone or to the police, otherwise they will be killed. The Appellant escaped from the spot. prosecutrix was brought back to her house by her mother (PW1). The 3. According to the prosecution version, the matter was not reported to the police or to anybody else out of fear. The prosecutrix had continued to have pain in her stomach and bleeding in her private parts. Rashida(PW1) was initially reluctant to get her daughter medically examined. Thus, the prosecutrix and her mother Rashida were brought to the Police Station. Since the prosecutrix was of tender age, PW1 had to be convinced about the necessary medical examination. The prosecutrix who was accompanied by her mother PW1 was again taken to Babu Jagjivan Ram Memorial Hospital (BJRM Hospital) where she (the prosecutrix) was medically examined. The prosecutrix was found to be conscious and oriented. There was no external injury to be found. The hymen was found to be torn. As per report of the doctor, vagina admitted 1 finger.

4. The Appellant was arrested. He was also medically examined and found to be fit to perform sexual intercourse.
5. On completion of investigation, a report under Section 173 of the Code of Criminal Procedure(Cr.P.C.) was presented against the Appellant to the Court of Metropolitan Magistrate.
6. In order to establish its case, the prosecution examined 16 witnesses. Rashida(PW1), PW2 prosecutrix (R), PW6 Dr. Sanjay Kumar, CMO, BJRM Hospital, PW7 Satish Kumar Goyal, Principal, MCD Primary School are the important witnesses examined by the prosecution. Smt. Rashida (PW1), mother of the prosecutrix testified as under: I have four children, two daughters and two sons. Reshma @ Roshini @ Bholu is my eldest daughter. She is aged about 11 years. She is studying in 3rd class in Nagar Nigam School in Adarsh Nagar. In School she was got admitted by me by the name of Roshini. I am working as house maid in houses in Shalimar Bagh. On 7.3.2007 when I returned from my work at about 4.00 p.m. I found my daughter Reshma @ Roshini missing from the house. I started searching for her. When I reached in front of the house of accused Kallu I saw accused had put off the clothes of my daughter and he was sitting on her and he was doing galat kam with her. By galat kam I mean rape. I saved my daughter from the accused and asked the accused what he was doing. I put the salwar of my daughter on her and when I was taking my daughter back to the home accused threatened me that if I would tell anything about the incident, he would kill me and my family. I took my daughter to my house. For two days I did not tell anything to anyone out of fear. When the condition of my daughter became worse as she was bleeding and was having pain in her stomach, I informed the police at numbe
7. In cross-examination, she denied the suggestion that no incident had taken place as it was a crowded area. She also denied the suggestion that her family was at loggerheads with the accuseds family.
8. To the same effect is the testimony of the prosecutrix R(PW2). PW2s testimony is extracted hereunder: On 7.3.2007 at about 3.00- 4.00 p.m. I was playing outside my house after coming from school. Accused Kallu lives opposite to my house. At

this stage accused was taken out from the curtain and witness has correctly identified the accused Kallu. Accused Kallu called me to his house and told me to take the utensil to fetch food for him from the house of his sister. On the request of the accused I went to his house. Accused took me to inside his jhuggi and accused pushed me on the ground. Accused removed my salwar and he also removed his pant. He did galat kam with me. C.Q. How do you specify galat kam? Ans. Balatkar (rape). He had put his urinating part in my urinating part against my wishes forcibly and without my consent. Accused shut my mouth with the help of his right hand and due to this reason I could not raise alarm at that time. In the meantime my mother also reached there as she was searching me. When my mother reached at the house of the accused he was committing rape upon me. My mother asked accused Kallu tu Ne yai kay kiya chhor meri bati ko. Thereafter accused ran away from the spot. I worn my salwar with the help of my mother. Accused Kallu threatened my mother and myself if we inform anyone about the incident, he will kill our family.

9. Dr. Sanjay Kumar (PW6) proved the MLC of the prosecutrix as Ex.PW9/A, whereas Satish Kumar(PW7) proved the prosecutrixs date of birth as 05.02.1995.

10. 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 appearing against him. He denied the prosecutions allegation and pleaded false implication on ground of enmity with the prosecutrixs family. The Appellant examined Smt. Shakti (DW1). She deposed that she did not notice Kallu in her house between 3:00 to 5:00 pm. She, however, stated that there was no quarrel between the families of the prosecutrix and the Appellant.

11. On appreciation of the evidence, the learned ASJ found that the prosecutrixs testimony was duly corroborated by her mother. He negated the plea of false implication on account of any enmity between the Appellant and the prosecutrixs family and thus held the Appellant guilty and convicted him as stated earlier.

12. It is urged by Thakur Virender Pratap Singh Charak, the learned counsel for the Appellant that there was delay of three days in lodging the FIR with the police; it is highly improbable that an act of rape will be committed by a person in broad

daylight in a crowded area and that too in presence of the mother of girl child. It is urged that the MLC Ex.PW9/A rules out the possibility of any forcible sexual intercourse with the small child. Thus, the prosecution had failed to establish its case against the Appellant beyond reasonable doubt. The learned ASJ erred in returning the verdict of guilt for a heinous offence like rape.

13. On the other hand, Ms. Jasbir Kaur, the learned APP for the State supports the impugned judgment. She urges that the Appellant failed to prove his defence of enmity between his(the Appellant) and prosecutrixs family by leading any evidence. Rather, the evidence produced by the Appellant in this regard was to the contrary. She urges that a mother would never level false allegation of rape of her minor daughter to settle personal score with a neighbour.

14. I shall deal with the contentions one by one. DELAY:

15. It is true that there is a delay of three days in lodging the FIR against the Appellant. The prosecution has given an explanation with regard to delay through PW1 and PW2s testimony. PW1 testified that while she was taking her daughter (the prosecutrix) back to the home, the accused threatened her that if she would tell anything about the incident he would kill her and her family. She deposed that for two days, she did not tell anything to anyone out of fear. When her daughters condition became worse and she continued to bleed and have pain, she informed the police. To the same effect is the testimony of PW2(the prosecutrix).

16. In several cases, the Supreme Court noticed the delay in lodging FIR in rape cases and took a view that delay in lodging FIR in such cases is a normal phenomena. A reference may be fruitfully made to Satyapal v. State of Haryana, AIR 200.SC 2190.wherein the Supreme Court echoed similar sentiments. Para 20 of the report is extracted hereunder:

20. This Court can take judicial notice of the fact that ordinarily the family of the victim would not intend to get a stigma attached to the victim. Delay in lodging the First Information Report in a case of this nature is a normal phenomenon..

17. In view of the explanation given by PWs 1 and 2 and the fact that the family of victim in such cases is initially reluctant to lodge an FIR, delay of two-three days in lodging the FIR is not material and this delay does not affect the case of the prosecution. ABSENCE OF MEDICAL EVIDENCE TO CORROBORATE FORCED SEXUAL INTERCOURSE:

18. The learned counsel for the Appellant drew my attention to the MLC Ex.PW9/A which shows that the doctor did not notice any external or internal injury. I have the MLC before me. It shows that that the hymen was torn and the vagina admitted 1 finger easily. It may be noticed that the incident of rape occurred on 07.03.2007 at about 3:00 - 4:00 pm. The prosecutrix was medically examined in the afternoon of 10.03.2007. The fact that the hymen was found torn corroborates that sexual intercourse was committed on the prosecutrix. It is true that the doctor did not notice any external injury. It is important to note that in this case, the prosecutrix did not allege any violent act of forced sexual intercourse. What she stated was that she was made to lie on the floor in the jhuggi and the Appellant put his male organ in her female organ without her consent. Thus, the absence of any external injury in such circumstances would not negate the allegations of sexual intercourse with the prosecutrix against her consent, particularly when she was medically examined after three days of the incident. In *State of Rajasthan v. N.K.*, (2000) 5 SCC 30, the Supreme Court held as under:

18. ..The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. In *Sk. Zakir [Sk. Zakir v. State of Bihar]*, (1983) 4 SCC 1.:

1983. SCC (Cri) 76 :

1983. Cri LJ 1285. absence of any injuries on the person of the prosecutrix, who was the helpless victim of rape, belonging to a backward community, living in a remote area not knowing the need of rushing to a doctor after the occurrence of

the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable. In Balwant Singh [Balwant Singh v. State of Punjab, (1987) 2 SCC 2.:

1987. SCC (Cri) 249 :

1987. Cri LJ 971. this Court held that every resistance need not necessarily be accompanied by some injury on the body of the victim; the prosecutrix being a girl of 19/20 years of age was not in the facts and circumstances of the case expected to offer such resistance as would cause injuries to her body. In Karnel Singh [Karnel Singh v. State of M.P., (1995) 5 SCC 51.:

1995. SCC (Cri) 977] the prosecutrix was made to lie down on a pile of sand. This Court held that absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse.

19. Thus, the absence of any external injury in the circumstance of the case would not belie the case of the prosecution. Moreover, the age of the prosecutrix was just about 12 years. Even if it is assumed that there was consent on the part of the prosecutrix for the sexual act committed by the Appellant, the consent was immaterial as the prosecutrix was incapable of giving any consent or even understanding the act committed by the Appellant. As per the case of the prosecution because of the threat the prosecutrix did not offer any resistance. Otherwise, also a girl of 12 years can hardly offer any resistance to a fully grown male. FALSE IMPLICATION ON ACCOUNT OF ENMITY:

20. No specific defence of false implication was taken by the Appellant. In cross-examination of PW1 (the prosecutrix's mother), it was suggested to her that the families of the prosecutrix and the Appellant were at loggerheads being neighbours which suggestion was denied by PW1. When the Appellant was examined under Section 313 Cr.P.C., he (the Appellant) stated that there was strained relations between the two families. The Appellant did not come forward with any reason for the enmity or strained relationship between the prosecutrix's

and Appellants family. Smt. Shakti(DW1) the solitary witness examined by the Appellant who was staying in the nearby Jhuggi falsified the defence version when she deposed that there was no quarrel between the families of the prosecutrix and the Appellant.

21. The Appellant was required to prove his defence at least by preponderance of probability which he has utterly failed to prove. The Appellant has, therefore, failed to show that he was falsely implicated because of enmity between the two families. Otherwise also, it is unbelievable that a mother of a girl aged 12 years would level false allegations of rape against a neighbour simply to settle scores with him. It is also difficult to believe that a mother would make false allegation of sexual assault involving her own daughter and thereby putting at stake the reputation of the family and also affecting the chances of her marriage.

22. Similarly, the contention that the offence of sexual intercourse against a child cannot be done in a Jhuggi Cluster or during day time is without any substance and is liable to be rejected.

23. In my view, the evidence of the prosecutrix(PW2) is duly corroborated by PW1s testimony as also by the MLC Ex.PW9/A. 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.

24. In the instant case, the testimony of the prosecutrix(PW2) was, by itself, sufficient to prove that the Appellant committed sexual intercourse with her without her consent. Moreover, her testimony, as stated above, is duly corroborated by the testimony of PW1 and the MLC Ex.PW9/A. There is no illegality in the Trial Court judgment holding the Appellant guilty of the offences with which he was charged. Keeping in view the fact that the Appellant committed rape on a female child aged just about 12 years, sentence imposed was the minimum which should have been awarded.

25. The Appeal is devoid of any merit; the same is accordingly dismissed.

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

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