

Guddu Rathore Vs. State

Guddu Rathore Vs. State

SooperKanoon Citation : sooperkanoon.com/957506

Court : Delhi

Decided On : Apr-17-2013

Judge : S. P. Garg

Appellant : Guddu Rathore

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON : February 14, 2013 DECIDED ON : April 17, 2013 + CRL.A.267/2000 GUDDU RATHORE Appellant Through : Mr.Sumeet Verma, Amicus Curiae. versus Respondent STATE Through : Ms.Fizani Husain, APP for the State. CORAM: MR. JUSTICE S.P.GARG S.P.GARG, J.

1. Appellant-Guddu Rathore challenges correctness of the judgment dated 16.11.1999 in Sessions Case No.87/1997 arising out of FIR No.78/1996 registered at Police Station Mandir Marg by which he was held guilty for committing offence punishable under Section 376 IPC. He was sentenced to undergo Rigorous Imprisonment for ten years with fine of `500 by an order dated 24.11.1999.

2. Daily Dairy (DD) No.17-A (Ex.PW-11/A) was recorded at 08.00 P.M. on 18.02.1996 at Police Station Mandir Marg to the effect that a girl aged 7/8 years has been raped and a boy has been apprehended. The investigation was assigned to SI Ranbir Singh who with Constable Jalbir Singh went to the spot. SI Samarjeet Singh (PW-11), Divisional Officer, was also sent to the place of

incident. Guddu Rathore was found present there. The victim/prosecutrix X (assumed name) had already been taken to the hospital. SI Samarjeet went to RML hospital and collected her MLC. He recorded Pyare Lals statement (Ex.PW-1/A) and lodged the First Information Report. During investigation, statement of witnesses conversant with the facts were recorded. The accused was arrested and pursuant to his disclosure statement (Ex.PW1/B), a pant, a shirt and a piece of cloth were recovered. The exhibits were sent to Forensic Science Laboratory. On completion of investigation, Guddu Rathore was charge-sheeted for committing offence under Section 376 IPC. He was duly charged and brought to trial. The prosecution examined 13 witnesses to substantiate the charges. In his 313 statement, the appellant pleaded false implication. He, however, did not prefer to lead evidence in defence. On appreciating the evidence and considering the rival contentions of the parties, the Trial Court by the impugned judgment held the appellant perpetrator of the crime and sentenced him. Being aggrieved, the present appeal has been preferred.

3. Learned counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the testimonies of PW-1 (Pyare Lal) and PW-2 (Mashal Kumari) who were interested witnesses. There was no direct evidence against the appellant and the prosecution case was entirely based on circumstantial evidence. The Trial Court overlooked the fact that Jhuggi not C-77/408, Tailor Square, Kali Bari Marg, New Delhi was not in the exclusive possession of the accused. The prosecution did not establish that the appellant was living alone in the said jhuggi on the relevant date. Testimony of PW-1 (Pyare Lal) and PW-2 (Mashal Kumari) is of no consequence being a hearsay evidence. There is no evidence that the victim was seen going in the accuseds Jhuggi any time. No independent Public witness from the locality was associated. Vital discrepancies and contradictions in the testimonies of the prosecution witnesses regarding the manner in which the appellant was arrested and clothes were recovered from his Jhuggi were ignored. The Trial Court heavily relied upon Section 6 of Evidence Act and did not consider huge time gap between the incident and disclosure of occurrence by the prosecutrix to her parents. Semen was not found on the victims clothes. Accuseds underwear did not have bloodstains. Expert witnesses in sign language were not examined by the

prosecution. Dr.Khan who administered two injections to X before lodging report with the police was not examined. Counsel relied upon citation Chander Dev Vs.The State I 15.(2009) DLT 32.(DB) (Delhi). Learned APP urged that there was no delay in lodging the report with the police. The accused was apprehended at the spot. Blood group of the victim was AB+ whereas it was B+of the accused. The accused did not explain how victims blood AB+ happened to be on his clothes.

4. I have considered the submissions of the parties and have examined the record. It is relevant to notice that the prosecution has not claimed that the rape was witnessed by anyone and no direct evidence regarding the same was adduced before the Court. Admittedly, the whole case against the appellant rests on circumstantial evidence. It is also not disputed that victim X a deaf and dumb girl of seven and a half years of age was not examined.

5. Testimony of PW-1 (Pyare Lal) and PW-2 (Mashal Kumari), Xs parents, is very crucial. PW-1 deposed that when X returned to the jhuggi at about 07.00 P.M., she was bleeding and her underwear was completely blood-stained. X took him and his wife to Guddus jhuggi and pointed out towards him. She also pointed out towards bedding where he saw lot of blood on the gadda. He and his wife took X to the police station. CrI.A.No267/2000 Thereafter, they went to RML hospital. He lodged Page 4 of 16 complaint (Ex.PW-1/A). PW-2 corroborated her husbands testimony on material aspects. She also deposed that when her daughter returned to jhuggi at about 07.00 P.M. she was smeared in blood (in khoon se lathpath condition). She was bleeding from her private parts. When she fainted, she took her to a doctor who gave two injections. On inquiries from X as to what had happened, she pointed out the jhuggi of the accused. She also saw lot of blood on the bedding in the jhuggi. Many persons collected at the spot and the accused was apprehended. Both were cross-examined at length but no material discrepancy emerged in their cross-examination to disbelieve their version. The prosecutrix X reached the jhuggi soon after the incident and narrated the occurrence to her parents. She took them to the jhuggi of the accused and pointed out towards him indicating that he was the culprit. Her parents noticed lot of blood on the bedding/gadda inside the jhuggi. The occurrence happened at about 07.00 P.M. Daily Diary (DD) No.17/A (Ex.PW11/A) was recorded at police station Mandir Marg

at about 08.00 P.M. where there is a mention that a girl aged about 7/8 years was raped and the rapist was apprehended at the spot. Statement of PW-1 (Pyare Lal) was recorded at RML hospital and First Information Report was lodged at 10.50 P.M. In his statement (Ex.PW1/A), PW-1 (Pyare Lal) gave detailed account of the incident as to how and under what circumstances his deaf and dumb girl aged 7 years returned to the jhuggi smeared in blood. He further gave vivid description as to how on enquiry X took them to the nearby jhuggi of the accused, his cousin, and pointed out towards him and her private parts. They saw blood on the gadda in the house. There was no delay in lodging report with the police. The accused was named in the First Information Report. There is no variance in the version given to the police at the first instance and the one given by the witnesses in the court. In the cross-examination, the accused did not confront PW-1 (Pyare Lal) on material aspects and his deposition remained unchallenged. He admitted that initially X was taken to Dr.Khan who administered an injunction but refused to provide medical aid. There is no suggestion that X had not taken her parents to his jhuggi and pointed at him to be the person responsible for the occurrence. No suggestion was put in the cross-examination that PWs-1 and 2 did not notice any blood on the gadda in his jhuggi. No ulterior motive was assigned to PWs-1 and 2 for false implication. The accused was PW-1s (Pyare Lal) cousin. There is no history of hostile relations between the two. In the absence of any prior enmity or hostile relations, Xs parents would not implicate their own relative for the heinous crime committed upon their daughter.

6. The ocular testimony of PW-1 and PW-2 is in consonance with medical evidence. There is no conflict between the two. X was medically examined by PW-5 (Dr.Indu Chawla) on 18.02.1996 at 10.30 P.M. at RML hospital. profusely. She deposed that the patient was bleeding. She was taken to operation-theater after she collapsed in shock. She had extensive tears of the rectum and vagina which required suturing under general anesthesia. She was hospitalized for eight days. She proved the endorsement (Ex.PW-5/A) on the MLC. In the crossexamination, she disclosed that the injuries were very deep and could not be sustained due to striking against a corner. She fairly admitted that it was not possible to comment about semen on private parts due to profuse bleeding. PW-6 (Dr. D.Behl) had earlier prepared her MLC (Ex.PW-6/A) when she was taken to RML hospital at

about 08.25 P.M. with the alleged history of sexual assault. She was bleeding from vagina. He referred her to senior gynecologists for the needful. MLC (Ex.PW-6/A) shows that her hymen was torn. Apparently, X was a victim of sexual assault and had not sustained injuries on her private parts including vagina from any other source.

7. PW-1 (Pyare Lal) identified gadda/bedding (described as gudries) (Ex.P-3 and P-4 respectively) seized vide memo Ex.PW1/D from the accuseds Jhuggi. It had brown blood stainings. He also identified shirt (Ex.P-5), Pant (Ex.P-7) and cloth piece (Ex.P-6) of the accused. Ex.P-8 is the underwear. The accused did not deny that these articles were not recovered from his house or did not belong to him. He also did not deny that these articles were not stained with blood. The prosecution proved FSL report (Ex.PW-11/F and G). Xs blood (AB+ group) was detected on Ex.1a (Gudri), 1b (Gudri), 2a (Shirt), 2b (Piece of cloth), 2 c (pants), 3a (frock), 3b (underwear). Blood group of the accused was B+ as depicted in the MLC (Ex.PW-6/B). The accused did not explain as to how and under what circumstances blood group AB+ of the prosecutrix (as reflected in Ex.PW-4/A) stained his clothes. These facts were within the special knowledge of the accused and under Section 106 of Evidence Act he was expected to divulge it. Adverse inference is to be drawn against the accused for not revealing as to how AB+ blood group of the prosecutrix happened to be on his clothes and on the bedding in his house. The Forensic Science Laboratory report connects the accused with the commission of the crime and proves that the incident happened inside the jhuggi on the bed which was also found stained with blood. Prosecutrixs conduct is natural and reasonable. Soon after the incident, she narrated the entire incident to her parents and took them to the place where she was ravished. Her conduct is relevant under Section 8 of the Evidence Act. The Trial Court committed no error by placing reliance on the principal of law known as the rule of res gestae under Section 6 of the Evidence Act. The essence of this doctrine is that a fact which though not in issue, is so connected with the fact in issue, as to form part of the same transaction, becomes relevant by itself. The rule is an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or that in relation to the fact in issue

but it is necessary that such facts or statement must be a part of the same transaction. Such a statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. If there is an interval, however slight it may be, which is sufficient enough for fabrication then the statement cannot be part of *res gestae*. In the instant case, the prosecutrix X narrated the incident to her parents without any long time lag and took them to the jhuggi of the accused where he was apprehended after X pointed at him and her parents saw blood on the bedding. The accused did not explain how the bedding in the jhuggi was stained with blood. Merely because the prosecutrix was taken to Dr.Khan, it cannot be said that there was time gap to negate the principal of *res gestae* under Section 6 of the Evidence Act.

8. This Court in *State vs. Sanjay Dass*, 164 (2009) Delhi Law Times 596 (DB), discussing principle of law embodied in Section 6 of the Evidence Act held : The eighth feature is that the parents of the children deposed that X and Y deposed that immediately after the occurrence X and Y came to their room and told them that the accused has committed the crime. It is also relevant to note that Gurpreet Singh PW-5 deposed that he went to the place of occurrence on hearing the alarm raised by the parents of the children, which alarm was raised by them soon after the occurrence. In this regards, reference be made to following observations of this Division Bench of this Court in Criminal Appeal No. 453/2005 *Sunny @ Bhola v. State* decided on 18.09.2009: The principle of law embodied in Section 6 of the Evidence Act is usually known as the rule of *res gestae* recognized in English law. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue as to form part of the same transaction. that it becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be a part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of *res*

gestae.(See the decisions of Supreme Court reported as *Gentela Vijayavardhan Rao v. State of A.P.* 1996 (6) SCC 24.and AIR 199.SC 388.*Sukhar v. State of Uttar Pradesh*) The principles relatable to the rule of res gestae are four in number:

1. The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous.
2. The declarations must be substantially contemporaneous with the fact and not merely the narrative of a past.
3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and by- standers. In conspiracy, riot and the declarations of all concerned in the common object are admissible.
4. Though admissible to explain or corroborate or to understand the significance of the act, declarations are not evidence of the truth of the matters stated. Tested on the aforesaid anvil of law, it is apparent that there is spontaneity and immediate proximity as also continuity between the occurrence and the statements made by X and Y to their parents as also the statement made by the parents of the children to Gurpreet Singh. Therefore, the statements of the parents of X and Y and the statement of Gurpreet Singh are admissible under Section 6 of the Evidence Act. The necessary corollary of the above conclusion is that the fact that X and Y implicated the accused as the assailant too soon after the occurrence attaches a ring of truth to their evidence. Observations of the Supreme Court in *Krishan Kumar Malik 9. vs. State of Haryana*, (2011) 7 SCC 130.are relevant on this aspect : Section 6 of the Act has an exception to the general rule where-under, hearsay evidence becomes admissible. But as for bringing such hearsay evidence within the ambit of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there could not be an interval which would allow fabrication. In other words, the statements said to be admitted as

forming part of res gestae must have been made contemporaneously with the act or immediately thereafter.

36. Admittedly, she had met her mother Narayani and sister soon after the occurrence, thus, they could have been the best res gestae witnesses, still the prosecution did not think it proper to get their statements recorded. This shows the negligent and casual manner in which prosecution had conducted the investigation then the trial. This lacunae has not been explained by the prosecution. The prosecution has not tried to complete this missing link so as to prove it, beyond shadow of doubt, that it was Appellant who had committed the said offences.

10. PW-2 (Mashal Kumari) in the cross-examination stated that she had seen X going with the accused in the evening of 18.02.1996 at about 3 or 4 P.M. The accused did not challenge her statement. There is no denial that on that day prior to the incident, X was not in his company.

11. During the course of investigation, efforts were made to understand the victim in her own language. She was taken to Shri Onkar Sharma, Honorary General Secretary and Ms. Shashi Bala from All India Federation of the Deaf, 18 Northern Complex, R.K. Ashram Marg, New Delhi. However, it was of no significance as she was unable to speak any language and did not know sign language. The Investigating Officer collected letter dated 17.04.1996 in which there is mention that X was born deaf and she did not know sign language and could not speak any language. It was further noted that she was communicated by her mother and from their gestures and signs it was confirmed that the statement of her mother was correct. The prosecution, however, dropped Shri Onkar Sharma and Ms. Shashi Bala, cited as witnesses, as the victim was not conversant with sign language.

12. The Trial Court dealt with all the contentions minutely in the impugned judgment and there are no good reasons to deviate from the findings recorded by it. Mere marginal variations in the statements of the witnesses highlighted by the counsel above cannot be dubbed as improvements as the same are elaboration of the statements made by the witness earlier. Omissions which go to the root of the case or materially affect trial or core of the prosecution case render testimony of

witnesses liable to be discredited. Exaggerations per se do not render the evidence brittle. Normal discrepancies do not corrode the credibility of a party's case. In the absence of examination of the prosecutrix, the statements of other witnesses can be considered and relied upon to examine the guilt of the accused.

13. In *Bantu Vs. State of Uttar Pradesh* (2008) 11 SCC 11, the Supreme Court held that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must in all circumstances be proved by direct ocular evidence by examining before the court those persons who had seen its commission. Offence can be proved by circumstantial evidence also. Principle fact or factum probandum may be proved indirectly by measures of certain inferences drawn from factums probans, that is, the evidentiary facts. It further held: A reference made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra* 1984 CriLJ1738. Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established; (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty; (3) the circumstances should be of a conclusive nature and tendency; (3) the circumstances should be of a conclusive nature and tendency; (4) they should exclude every possible hypothesis except the one to be proved; and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

14. In *Manga v. State of Haryana* 1979 Cri LJ 93, it was held: The victim of rape was a deaf and dumb girl of 13 years and she was not examined. However, the prosecution evidence against the accused consisted statement of an eye witness, which was corroborated by blood stained Salwar of the prosecutrix and the

medical evidence of the doctor, who had examined the victim at the time of the rape and found that Tier hymen was torn and ruptured. It was held by the Apex Court that mere circumstance that the doctor did not find redness or inflammation around bruises of the victim would not be sufficient to put the prosecution case out of court because the fact that there was a rupture of the hymen and a bruise around the hymen was sufficient to prove the act of rape. It was further held that since the prosecutrix was deaf and dumb girl of only 13 years of age, no useful purpose would have been served by examining her and moreover, if there was any infirmity in the prosecution case for her nonexamination, the same was removed by the testimony of PW-4.

15. The accused did not give plausible explanation to the incriminating circumstances proved against him. He did not adduce any evidence that the jhuggi did not belong to him and he never resided therein. He did not examine any witness to prove false implication due to any ill-will or enmity with the prosecutrixs parents.

16. In the light of the above discussion, the impugned judgment needs no interference. The appeal filed by the appellant lacks merit and is dismissed. The conviction and sentence of the appellant are sustained.

17. The appellant is directed to surrender and serve the remainder of his sentence. For this purpose, he shall appear before the Trial court on 25.04.2013. The Registry shall transmit the Trial Court records forthwith to ensure compliance with the judgment. (S.P.GARG) JUDGE April 17, 2013 sa

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