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Suresh Vs. State of Delhi

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Court : Delhi

Decided On : Jul-16-2013

Judge : S. P. Garg

Appellant : Suresh

Respondent : State of Delhi

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI RESERVED ON : March 14, 2013 DECIDED ON :

16. h July, 2013 + CRL.A. 792/2001 & Crl.M.A.Nos.1734/2002, 638/2003 and 2825/2003 SURESH Through : ..... Appellant Mr.K.B.Andley, Sr.Advocate with Mr.M.L.Yadav, Advocate. versus STATE OF DELHI Through : ..... Respondent Mr.M.N.Dudeja, APP. CORAM: MR. JUSTICE S.P.GARG S.P.GARG, J.

1. The appellant-Suresh impugns a judgment dated 11.09.2001 in Sessions Case No.10/1999 arising out of FIR No.849/1998 under Sections 376 IPC registered at Police Station Sri Nivas Puri by which he was held guilty for committing offence under Section 376/506 IPC. By an order dated 14.09.2001, he was sentenced to undergo RI for ten years with fine `500/-.

2. Allegations against the appellant were that on 10.09.1998, he committed rape upon prosecutrix X (assumed name) aged six years inside her house. The appellant lived on the first floor of the premises in question. He had good terms

with prosecutrixs family and was a frequent visitor to the house. On 10.09.1998 when Aklimo Nisa (PW-2), prosecutrixs mother, returned to home at about 12.30 P.M., she found that her two children were playing outside the house and the room was closed from inside. When she knocked at the door, the appellant opened it. She saw that appellants pant and underwear were lowered down and he had put off chadhi of her daughter X. On seeing her, X started crying and the appellant pulled up his pant. X while pointing towards her private part, told her that Suresh uncle was doing batamizi with her. Aklimo Nisa (PW-2) lodged First Information Report with the police. X was medically examined. The appellant was arrested. The statements of the witnesses conversant with the facts were recorded. The exhibits were sent to Forensic Science Laboratory. After completion of investigation, a charge-sheet was submitted against the appellant for committing the aforesaid offence. The prosecution examined ten witnesses in all to substantiate the charges. In his 313 statement, the appellant pleaded false implication. He pleaded that Xs father had taken `10,000/- as loan from him and when he demanded back the loan, a quarrel took place and Xs father falsely implicated him in the case. He examined one witness in defence. After marshalling the facts and through scrutiny of evidence and considering the rival contentions of the parties, the Trial Court, by the impugned judgment convicted the appellant for the offences mentioned previously and sentenced him accordingly. Being aggrieved, the appellant has preferred the appeal.

3. Learned Senior Counsel 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 interested and partisan witnesses. They gave inconsistent and contradictory version. No injury on the private parts of the prosecutrix was noticed. MLC (Ex.PX) did not observe any fresh injury and the hymen had old tear. It did not record in categorical terms that the prosecutrix was ravished or raped. It merely recorded an attempt to sexually assault the prosecutrix. He further argued that the MLC (Ex.PW-3/A) was not proved following legal procedure and was exhibited without examining the doctor who prepared it. Learned Additional Public Prosecutor urged that there are no valid reasons to discard the cogent testimony of the child witness which requires no corroboration. The prosecutrix was exploited for sexual gratification by the appellant for the last one and a half year.

Crl.A.No.792/2001 prosecutrix and her parents had no animosity to falsely implicate their neighbour with whom they had no prior enmity or ill-will.

4. I have considered the submissions of the parties and have examined the record. The material testimony to establish the guilt of the appellant is that of the prosecutrix X. In her 164 Cr.P.C.(Ex.PW-5/B) statement on 11.09.1998, she named the appellant for committing rape upon her. She gave detailed account of the incident. She was examined as PW-4 before the court. The learned Presiding Officer put number of preliminary questions to the child witness before recording her statement to ascertain if she was competent to make statement and was able to give rational answers. The Trial Court was satisfied that she was a competent witness and understood the questions and was able to give rational answers to it. Her statement was recorded without oath as she did not understand its sanctity. In her deposition, she stated that Suresh committed rape upon her. She had bleeded from her vagina. She further disclosed that Suresh took out whitish material from his penis and applied it on her anus. When she cried, he said very good. On arrival of her mother suddenly, Suresh started putting on his pant. When her mother inquired as to what had happened, she told that Suresh uncle was doing bad thing with her and threatened to kill if she told anything to her parents. The prosecutrix apparently proved the version narrated by her at the first instance to the police and the Metropolitan Magistrate with no major variations. She was cross-examined at length but no material discrepancies emerged to disbelieve her. No ulterior motive was assigned to the child witness to make a false statement. Nothing was on record to infer that the statement was tutored to her by her parents. In Aslam Vs.State of Uttar Pradesh 2013 ALLMR (Cri) 1894 (Crl.A.No.2110/2008) decided on 13.02.2013 the Supreme Court held: This Court has held that if, upon consideration of the prosecution case in its entirety, the testimony of the prosecutrix inspires confidence in the mind of the Court, the necessity of corroboration of her evidence may be excluded. This Court in Rajinder v.State of Himachal Pradesh : (2009) 16 SCC 6.has observed as under: This Court in State of Punjab v. Gurmit Singh : (1996) 2 SCC 38.made the following weighty observations in respect of evidence of a victim of sexual assault: (SCC pp.395-96, para

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 along to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relyig upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of a sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons lust and is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as

if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realist diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.

5. PW-2 (Aklimo Nisa), Xs mother, corroborated her on material facts and deposed that Suresh was acquainted with them being a tenant in the premises. Sometime prior to 10.09.1998 X complained of pain in her vagina but she did not give due attention. On the day of incident, at about 12.30 P.M., she returned to the house and knocked at the door. Suresh opened it. She saw that Xs underwear had been removed and Sureshs pant and underwear were lowered down. X started crying on seeing her. She pointed at her vagina and told that Suresh was doing batamizi with her. She lodged FIR (Ex.PW-2/A) with the police. PW-1 (Mubarak Khan), Xs father, deposed on similar lines.

6. From the testimonies of PWs-1, 2 and 4 it stands established that when PW-2 (Xs mother) returned, Suresh was present inside the bolted room with X. He did not offer explanation for his presence in the prosecutrixs room without any sound reasons. He had no occasion to visit the prosecutrix, a child aged six years, when she was alone at her house. Again, he had no excuse to bolt the room from inside during daytime. These circumstances which have not been explained point an accusing finger at him. Under Section 106 Evidence Act, it was upon the accused to explain the facts which were within his special knowledge.

7. First Information Report was lodged without delay. Lodging of prompt FIR lends full credence to the version of the child witness. In the FIR the appellant was specifically named as culprit. Graphic account was narrated as to under what circumstances, he was found with the prosecutrix in the room. In the absence of prior animosity, Xs parents are not imagined to level false allegations of rape to bring their daughter X in disrepute. The ocular testimony of PWs is in consonance with medical/forensic evidence. FSL report shows that underwear and vaginal slides were found to have semen and human spermatozoa. At the time of

appellants medical examination, his underwear was seized by PW-3 (Dr.Milo Tabin) and handed over to the police in a sealed condition. It falsifies the appellants defence that underwear on which human spermatozoa was found was that of Xs father.

8. In the MLC (Ex.PW-3/A) PW-3 (Dr.Milo Tabin) noted one contused lacerated wound on the malar region of the accused. At the time of medical examination, smegma was found absent on the corona of the accuseds penis. Absence of smegma on the corona of penis in rape cases would show that the rape was committed. It is the best circumstantial evidence against the appellant. Suggestion was put to the Investigating Officer (PW-10) that he had asked the accused to wash his penis which was denied. This plea does not appeal to mind. The Trial Court has dealt with appellants relevant 9. contentions minutely in the impugned judgment with cogent reasons to discard them. The defence of false implication on non-payment of alleged loan of `10,000/- to Xs father has been disbelieved on valid reasons. I find no good reasons to deviate from the said findings. In sexual offences against minors there is no valid or tangible reason as to why the parents will tender false evidence against the accused. In the instant case, for a paltry sum of `10,000/-, prosecurtrixs parents are not expected to level serious allegations of rape with their minor daughter to put her honour at stake. It is true that MLC (Ex.PX) was not exhibited by the doctor who examined the prosecutrix. It is significant to note that when MLC (Ex.PX) was exhibited, Sureshs counsel did not object to it and consented to dispense with the formal mode of proof. After conviction, the appellant cannot be permitted to change his version and doubt correctness/genuineness of the contents recorded in the MLC. Crl.A.No.792/2001 the It is true Page 9 of 12 that no fresh injury was found at the time of medical examination of the prosecutrix. The law is clear on this aspect. In O.M.Baby (Dead) by L.Rs. V.State of Kerala 2012 Cri.LJ 379.the Supreme Court observed In any event, absence of injuries or mark of violence on the person of the prosecutrix may not be decisive, particularly, in a situation where the victim did not offer any resistance on account of threat or fear meted out to her as in the present case. Such a view has already been expressed by this Court in Gurcharan Singh V.State of Haryana (1972) 2 SCC 74.and Devinder Singh Vs.State of H.P. (2003) 11 SCC 488.Prosecutions case from the inception is that X was exploited for sexual

intercourse for the last about one and a half year by the accused. Whenever he got an opportunity finding the child alone in the house, he used to indulge in sexual activity with her. MLC (Ex.PX) records that hymen was torn and had old tear. Merely because MLC (Ex.PX) does not record rape, the cogent and reliable testimony of the prosecutrix cannot be discredited. The girl below 6 years of age was incapable to understand the consequences of the nefarious acts. There is overwhelming ocular and medical evidence to establish the guilt of the accused. I find no illegality or irregularity in the impugned judgment which is based on fair appraisal of the evidence. The conviction of the appellant under Section 376 IPC is confirmed.

10. The appellant has been sentenced to undergo Rigorous Imprisonment for ten year with fine of `500/- under Section 376 (2) (f) IPC which is a minimum sentence prescribed. However, there are mitigating circumstances to award sentence less than the prescribed one under Section 376 (2) (f) IPC. The incident is dated 10.09.1998. The appellant has already undergone five years, four months and sixteen days incarceration as on 27.10.2004. As per the nominal roll dated 27.01.2004, he also earned remission for eight months and 16 days. His jail conduct was satisfactory. He is not a previous convict. He is not involved in any other criminal activity. His substantive sentence was suspended on 14.07.2004. There is no indication of his deviant behavior/conduct during this period. The original Trial Court record is not traceable. Some documents and other materials were reconstructed. The appellant was aged about 20 years on the day of incident. Considering these facts and circumstances, the substantive sentence is reduced to Rigorous Imprisonment for eight years. Other terms and conditions of the sentence order are left undisturbed.

11. The appeal and all pending applications stand disposed of in the above terms. The appellant is directed to surrender and serve the remainder of his sentence. For this purpose, he shall appear before the Trial court 22nd July, 2013. The Registry shall transmit the re-constructed trial Court record forthwith along with a copy of this judgment to ensure compliance with the judgment. (S.P.GARG) JUDGE July 16, 2013 sa

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