

(2010) 08 DEL CK 0153

In the Delhi High Court

Case No : Criminal Appeal No. 958 of 2009

Ganesh and Another

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 20-08-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 311, 313
Penal Code, 1860 (IPC) — Section 363, 376

Citation : (2010) 08 DEL CK 0153

Hon'ble Judges : A.K. Pathak, J

Bench : Single Bench

Advocate : Rajender Kumar and Ranbir Singh Kundu, for the Appellant; M.P. Singh, APP and Bangali Babu, ASI, for the Respondent

Judgement

A.K. Pathak, J.—Appellants Ganesh and Ajay Chauhan have been convicted u/s 376 IPC and sentenced to undergo rigorous imprisonment for a period of seven years and to pay fine of Rs. 10,000/- each and in default of payment of fine to undergo simple imprisonment for six months. It may be noted here that co-accused Puneet has also been convicted u/s 363 IPC as well as u/s 376 IPC; whereas accused Indeever has been convicted u/s 363 IPC by the same judgment. However, it appears that they have not challenged their conviction.

2. In brief, prosecution case as emerges from the record is that the prosecutrix aged about fourteen years went to Lajpat Nagar Market on 11th March, 2002 at about 4 pm where accused Puneet, who was known to the prosecutrix, met her and asked her to come to his home at about 6 pm. Prosecutrix went to meet Puneet at his house at about 6 pm and found him drinking liquor. When prosecutrix told him that she wanted to go back he told her that he would drop her at her house. Thereafter, Puneet took her to a hotel in Lajpat Nagar after enticing her. He also called his friend Ajay Chauhan there. Both Puneet and Ajay Chauhan forcibly had sex with her. Thereafter, Puneet took her to some other place. He was under the influence of liquor at that time. On the way, Indeever

met them. Puneet requested him to drop them at Faridabad. Indeever agreed and gave them lift on his scooter. However, on the way, his scooter broke down. Thereafter, they hired a three wheeler scooter and reached Faridabad where Police officials apprehended them. They were released by the Police on 12th March, 2002. Due to fear, prosecutrix could not disclose anything to the Police officials. After they were released by the Police, Puneet took her to Lajpat Nagar and again consumed liquor. When prosecutrix told him that she wanted to go home he did not allow her to leave. In the meanwhile, Appellant Ganesh, who was friend of Puneet, arrived there. He took them to his friend's house whose name was Sanjay. There Puneet and Ganesh again forcibly had sex with her. They allowed her to leave only on 13th March, 2002. Due to fear she did not go to her house. Instead she went to her aunt's house. In the evening she went to a park where her brother met her and took her to home.

3. On 13th March, 2002 at about 9 pm Ms. Neelam, mother of the prosecutrix arrived at Police Station Lajpat Nagar along with accused Puneet. She made a statement that her daughter aged about 14 years was missing from the house since 6 pm of 11th March, 2002. In fact, she had gone to a park near her house and had not returned. She made efforts to search her daughter but could not find her. On 12th March, 2002 she came to know that her daughter, along with Puneet and Indeever, was arrested by the Police officials of Sector 37, Police Station Faridabad and thereafter, they were released. Despite this, her daughter had not returned home. She suspected that Puneet and Indeever had taken her daughter after enticing her. Since Puneet was not disclosing whereabouts of her daughter, she was producing him before the police officials.

4. On the basis of above statement, of Ms. Neelam, FIR No. 167/2002 u/s 363 IPC was registered While Investigating Officer was making inquiry from accused Puneet, regarding whereabouts of the prosecutrix, complainant Neelam returned back to her home. However, after about one hour she again came to the Police Station along with the prosecutrix. Immediately thereafter, statement u/s 161 Cr.P.C. of the prosecutrix was recorded by the Investigating Officer wherein she narrated the incident in the manner as has been described in the para 2 hereinabove.

5. Prosecutrix was medically examined at All India Institute of Medical Sciences (AIIMS). No external injury was noticed on her person. Hymen was absent. Vaginal smear was taken, sealed and handed over to Investigating Officer. Underwear and jeans of the prosecutrix were taken in possession and sealed. Accused Puneet was also got medically examined at AIIMS. Doctor opined that there was nothing to show that he was incapable of performing sexual intercourse. His blood sample was taken. Subsequently, Appellants and Indeever were also arrested, however, they were not medically examined to find out as to whether they were potent to perform sexual intercourse nor their blood or semen sample was taken. Later on case property was sent to CFSL for chemical analysis and its report was obtained.

6. After completion of investigation, Appellants along with co-accused were sent up to face trial. Charge u/s 376 IPC was framed against the Appellants on 9th October, 2002 to which they pleaded not guilty and claimed trial. Separate charges were also framed against Puneet and Indeever under different provisions of the Indian Penal Code which has no relevance for disposal of present Appeal, therefore, not referred.

7. Prosecution examined fifteen witnesses to substantiate its story. Prosecutrix was examined as PW1. Her mother Neelam was examined as PW9. Official of the Municipal Corporation of Delhi, Central Zone, Lajpat Nagar, who produced the birth certificate of the prosecutrix, was examined as PW2 to prove the age of the prosecutrix. SI Anil Malik, Investigating Officer was examined as PW12. Dr. Suman Meena was examined as PW10 and she had proved the MLC of the prosecutrix as Ex. PW10/A. She admitted that she had not examined the prosecutrix nor had prepared her MLC. All the other witnesses are formal in nature being other Police officials who had participated in the investigation at one stage or the other. After prosecution closed its evidence, statements of Appellants u/s 313 Cr.P.C. were recorded, in which all the incriminating material, which had come on record, was put to them. Their case was that of simple denial. The Appellants did not lead any evidence in their defence. However, it may be noted that co-accused Puneet had examined SI Kishan Lal as DW1 and Ahlmad of court of SDM, Faridabad as DW2 to prove that he along with Indeever and prosecutrix was arrested by the Faridabad Police and released from the court of SDM, Faridabad on 12th March, 2002.

8. Learned Trial Court found the testimony of prosecutrix trustworthy and reliable and sufficient enough to conclude that Appellants had committed rape upon the prosecutrix. Thus, Appellants were convicted u/s 376 IPC. Learned Counsel for the Appellants has vehemently contended that the prosecutrix is not a truthful and reliable witness. She has taken different stand during the investigation as also while deposing in the court. There are material inherent inconsistencies in her statement making her totally an unreliable witness. Trial Court has committed a patent error in accepting her testimony which had remained uncorroborated by any medical or scientific evidence to convict the Appellants u/s 376 IPC.

9. Counsel has drawn my attention to various statements of the prosecutrix recorded during the investigation as also her deposition in the court and on perusal thereof, I am convinced that prosecutrix is not a trustworthy and reliable witness. I find that her statements recorded during the investigation as also in the court are at variance on material points with regard to the role of the Appellants. In her statement u/s 161 Cr.P.C., with which she was confronted during her statement recorded in the court, the prosecutrix had stated that it is Puneet who had taken her to a hotel at Lajpat Nagar on 11th March, 2002 after enticing her. He called Ajay Chauhan in the hotel. Thereafter, Puneet and Ajay Chauhan forcibly had sexual intercourse with her. Thereafter, Puneet took her to

Faridabad. On their way to Faridabad, Indeever met them and gave lift to them on his scooter at the request of Puneet. On the way, scooter broke down thereafter, they hired one three wheeler scooter and reached Faridabad where they were apprehended by the Police and released on next day i.e. 12th March, 2002. Puneet brought her back to Lajpat Nagar where Ganesh met them. He took her to his friend's house namely Sanjay where Puneet and Ganesh had forcible sex with her. Subsequently, she gave another story to the doctor who medically examined her and which is recorded in the MLC i.e. Ex.PW10/A. She stated that Puneet and Ajay Chauhan took her to a hotel in Lajpat Nagar at about 9 pm. She introduced the name of one Naveen also in her this statement. She further stated that she had drinks with them and had sexual intercourse willingly. Thereafter, Puneet and Naveen left the hotel room and Puneet took her to Faridabad where they were apprehended by the Faridabad Police and released on 12th March, 2002. In the evening they went to Sanjay's house where she was raped by Ganesh and Puneet. Yet another story was propounded by her in her statement u/s 164 Cr.P.C. recorded by the Metropolitan Magistrate. This statement was recorded on 16th March, 2002. In this statement she has not named Ajay Chauhan and Ganesh. Before Metropolitan Magistrate she had stated that she went to Krishna Market for purchasing samosas where Puneet met her. He took her to his house. Later on he forcibly took her to a hotel and threatened her that in case she raised alarm, he would kill her father and younger brother. He had sex with her two-three times against her wishes. At about 12:30 am he took her to Lalsai Market where Indeever met them. Puneet requested Indeever to drop them at Faridabad. On the way, scooter broke down and they hired three wheeler scooter and reached Faridabad where they were apprehended by the Police. Uncle of Puneet and mother and brother of Indeever came to the Police Station and only thereafter, Puneet and Indeever were released. Thereafter, Puneet took her to Lajpat Nagar. Due to fear she did not come to her house and went to a park where her brother met her. Though, she had named Appellants in her earlier statement u/s 161, but in her statement u/s 164 Cr.P.C. she did not name the Appellants. During trial her statement was recorded on 12th November, 2002 wherein she turned turtle and did not name any of the accused. She deposed that on the fateful day she had a quarrel with her mother and went to her mausi's house who was living in Faridabad. On way, Indeever and Puneet met her as their two wheeler scooter had broken down. Puneet and Indeever were apprehended by the Faridabad Police. She was also arrested. In the morning they were released from Faridabad Thana. Thereafter, all of them returned to Delhi and by that time her mother had lodged the complaint with the Police. She was cross-examined by the Public Prosecutor for the State but nothing could be elicited from her which could go against the Appellants. It appears that prosecution filed an application u/s 311 of the Code of Criminal Procedure for recalling the prosecutrix as her clothes could not be put to her for identification on 12th November, 2002 when her examination-in-chief and cross-examination was concluded. This application was allowed and prosecutrix was recalled and pursuant thereof, she appeared in court on 24th September, 2004

and her statement was again recorded. Though, she was called only for identification of case property but her statement on other aspects was also recorded as she stated that she was threatened by the accused persons on 12th November, 2002 when her statement was recorded in the court, therefore, she did not support the prosecution. This time she came up with another story. She deposed that she was taken by Puneet and her friends namely Ganesh and Ajay Chauhan and one more person whose name she did not remember to a hotel. They offered her liquor with tablets and forcibly made her to drink the same. After taking liquor, she lost her sense. All of them raped her. In the night at about 1 pm they took her to Faridabad where they all were apprehended. Next day they were let off by the Police officials. She was again brought to a hotel at Lajpat Nagar and raped. Since, by that time report had already been lodged with the Police, accused Ajay Chauhan brought her back to her house and handed her over to his brother. Her this statement is also at variance with her statement recorded earlier by the Police on 13th March, 2002. Be that as it may, since prosecutrix has taken shifting stand, with regard to the role of Appellants, at different stages her version qua them cannot be accepted as a gospel truth. In view hereof, it would not be safe to convict the Appellants on the sole testimony of the prosecutrix.

10. It is well settled that conviction of an accused on the basis of the testimony of the prosecutrix alone is possible. In other words, where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful same would be sufficient to base the conviction. In such an eventuality corroboration of the testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law. However, in this case with regard to the role of Appellants, testimony of the prosecutrix is at material variance vis-?-vis her earlier statements and it would not be safe to convict the Appellants on her sole testimony without any corroboration from the medical/scientific evidence.

11. There is nothing on record to suggest that semen or clothes of the Appellants were sent to FSL for chemical analysis. Even the MLC of the Appellants is not on record. No evidence was available on record to suggest that the Appellants can be linked with the offence of rape of prosecutrix by way of medical and scientific evidence. The prosecution has failed to prove its case against the appellants beyond the shadow of reasonable doubt that the Appellants had raped the prosecutrix.

12. For the foregoing reasons, Appellants are acquitted. Appellants be released forthwith, if not wanted in any other case.