

(1999) 09 DEL CK 0095
In the Delhi High Court
Case No : Criminal Appeal No. 43 of 1978

Hari Chand

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 30-09-1999

Acts Referred:

Citation : (1999) 6 AD 305 : (2000) CriLJ 414 : (1999) 82 DLT 356 : (1999) 51 DRJ 551 : (2000) 1 RCR(Criminal) 311

Hon'ble Judges : Dalveer Bhandari, J

Bench : Single Bench

Advocate : Ms. Reena Garg, amices Curia, for the Appellant; Mr. M.S. Butalia, for the Respondent

Judgement

Dalveer Bhandari J.

1. This appeal is directed against the judgment of the learned Additional Sessions Judge, Delhi dated 9.3.1978 by which the accused appellant was convicted u/s 376/511 IPC and sentenced to one year and six months rigorous imprisonment.
2. The accused appellant filed an appeal through Mr. R.K. Naseem, Advocate, who appeared at the time of admission of the appeal on 14.3.1978. This appeal has remained on Board for quite some time but no one appeared for the appellant. In this view of the matter, Ms. Reena Garg, Advocate, was appointed as amices Curiae in this case.
3. Brief facts which are necessary for disposal of this appeal are recapitulated below.
4. Hari Chand, appellant, who was then about 20-22 years of age was employed as nursing orderly in Willingdon Hospital. The prosecutrix, aged about 23 years (unmarried) was admitted in the second floor emergency ward of the Willingdon Hospital as an in door patient. She was suffering from Asthma. Her mother used to stay with her in the Hospital. It is stated that on 9.4.1977 at about 1.30 a.m.

The prosecutrix wanted to use the toilet. There was on toilet attached to her room but she chose to go to the gents toilet which was 10 to 15 yards away. The prosecutrix stated that as she was coming out of the toilet an old woman was ahead of her. At that point of time the appellant came and put a hand over prosecutrix's mouth and took her to the pantry room by the side of the said gent's toilet. He bolted the door from inside. There was no light in the pantry. It is further mentioned that she could not shout or cry being an asthmatic patient. It is also stated that the appellant tried to rape her by removing her salwar and underwear. The appellant also removed his pant and underwear. She was made to lie on the ground and he laid over her. After about 2-3 minutes there was some noise outside the door and some people assembled there. The appellant opened the door. The prosecutrix told them about what had happened to her. The police was informed and police which came there about 5.15 a.m. and recorded her statement which constituted the FIR. In the cross-examination she stated that the accused was working in that ward and on several occasions he had put her on oxygen. The prosecutrix had offered tea to the appellant many occasions. The prosecution had examined the prosecutrix and 23 other witnesses.

5. Learned amices Curiae submitted that there are inherent contradictions in the prosecution version and no conviction can be based on the evidence produced by the prosecution in this case. She has invited my attention to the statement of Dr. Gupta, PW-23 in which he had stated that her room had an attached toilet. The patients of that room generally used only that toilet. He also stated that the toilet by the side of the pantry was meant for general public and that was a gent's toilet. It is beyond comprehension why the prosecutrix did not use the toilet attached to her room and had gone to use the toilet which was 10-15 yards away and that too a gent's toilet at about 1.30 a.m. According to the learned amices Curiae all these facts to to show that the prosecution version suffers from inherent contradiction and lacks credibility.

6. Learned amices Curiae submitted that when the prosecutrix's mother was staying in the ward with her ailing daughter then why did she not accompany her to the toilet at 1.30 a.m. This part of the prosecution version does not seem to be plausible.

7. The prosecution examined the mother of the prosecutrix, Smt. Kailash P.W. 4 She stated in her statement that she used to sleep with her daughter in the hospital. On that night she heard some noise and somebody enquired from her if the girl wearing red clothes was her daughter. She replied in the affirmative. She further stated that there was a room by the side of the toilet, which was locked from the outside. The door was opened by the person only when the mother of the prosecutrix reached at the spot. When the door was opened the prosecutrix and the accused were found inside. This was done to show to the mother of the prosecutrix, in what kind of activities her daughter was indulging? When she was literally caught red-handed, she had no option but to give the entire episode the colour of attempt to rape in order to save her own honour.

8. Learned amices Curiae submitted that the prosecutrix had gone with the accused on her own to the pantry room and she was a consenting party.

9. The prosecutrix did not raise an alarm, cry or shout when she was taken by the appellant to the pantry room. She did not raise an alarm or shout or offer any resistance even when her clothes were removed. Admittedly, there was no scuffle nor any injury marks were found on the prosecutrix's body. Learned amices Curiae submitted that all these circumstances lead to irresistible conclusion that the prosecutrix was a consenting party.

10. According to the prosecutrix she was a 23 years old unmarried student studying in college. She was medically examined by Dr. Lakshmi Rao. She (Dr. Rao) stated in her statement that the hymen of the prosecutrix was not intact and her vagina admitted two fingers. She further stated that the prosecutrix was used to sexual intercourse. The medical examination also lends support to the defene version.

11. Learned amices Curiae also placed reliance on the statement of the appellant recorded u/s 313 Cr.PC in which the appellant stated that the prosecutrix remained in the hospital for 22-24 days before the incident and she used to give him tea. Four days before the incident she told him to come to the pantry as she wanted to have a talk with him and there she told him that her younger sisters were married and because of her illness she could not get married. She also stated that perhaps there was no happiness in her life. The accused consoled her and said that she was alright and could get married. He further mentioned that then she caught hold of his hand and said that if he joined her she would remain with him all his life. The appellant further stated that she used to talk with the prosecutrix after mid-night when he was free and the patients were asleep and her mother did not object to that. He also mentioned that he had sexual intercourse with her.

12. The arguments which have been advanced by the learned amices Curiae create doubt about the credibility of the prosecution version, particularly, her submission that when there was an attached toilet why had the prosecutrix chosen to go to another gent's toilet which was 15-20 yards away? This shows that the prosecutrix had voluntarily gone to the pantry room adjoining the gent's toilet where the alleged incident had taken place.

13. Another significant factor is that when the prosecutrix was taken to the pantry room she did not raise an alarm or resist the molestation. She did not even raise an alarm or shout when her clothes were taken off. Both these submissions of the learned amices Curiae lead to the conclusion that the Prosecutrix was a consenting party. The prosecutrix was an unmarried girl, but the medical evidence shows that her vagina admitted two fingers and her hymen was not intact. Dr. Rao in her statement also stated that the prosecutrix was habitual to sexual intercourse. This fact also leads to the conclusion that the prosecutrix was a consenting party.

14. According to the settled principles of criminal jurisprudence, the prosecution has to prove its case beyond any shadow of doubt. The prosecution version suffers from many contradictions and lacks credibility.

15. On consideration of aforesaid facts and circumstances, it is clear that the prosecution has failed to prove its case beyond the shadow of doubt and the defense version, as borne out from the prosecution evidence, is more probable and consistent with the innocence of the appellant.

16. Accordingly, the appeal is allowed and the appellant is acquitted of the charges under Sections 376/511 IPC and the judgment of the Additional Sessions Judge dated 9.3.1978 is set aside. The bail bonds of the appellant shall stand cancelled.

17. Before parting with the judgment, I would like to place on record my deep appreciation for the able assistance provided by the learned amices Curiae, Ms. Reena Garg.

18. The appeal is allowed and disposed of.