

(2013) 05 DEL CK 0390
In the Delhi High Court
Case No : Criminal A. 472 of 2009

Hawaladar Ram

APPELLANT

Vs

State (Govt. of Nct of Delhi)

RESPONDENT

Date of Decision : 15-05-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 315
Penal Code, 1860 (IPC) — Section 302, 34, 376, 506

Citation : (2013) 05 DEL CK 0390

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Shailender Dahiya, for the Appellant; Rajdipa Behura, APP for State, Bhagwan Singh, Insp., ATO Bawana and Naresh Kumar, SI, PS Bawana, for the Respondent

Judgement

G.P. Mittal, J.—Appellant Hawaldar Ram stands convicted for the offences punishable under Sections 376 and 506 IPC. For the offence u/s 376 he was sentenced to undergo rigorous imprisonment (RI) for a period of seven years and to pay a fine of Rs. 4,000/-, in default of payment of fine he was sentenced to further undergo SI for a period of two months; and for the offence u/s 506 IPC he was sentenced to undergo RI for a period of two years. As per prosecution version, the prosecutrix (PW-1) is a widow. Her husband expired three years before the date of incident. The prosecutrix was residing in a 12 sq. yds. house which consisted of two small rooms on the ground floor, which did not have any door and had one temporary room and a toilet on the first floor. There is just one door on the ground floor which was used for entry to the house and both the rooms etc.

2. On the night intervening 11/12.11.2005 at about 2:15 A.M. prosecutrix's daughter Santra went upstairs to ease herself. Getting an opportunity, the Appellant who was known to the prosecutrix prior to the incident entered her house. Ms. Santra also returned after easing herself. The Appellant threatened the prosecutrix and also her daughter with a knife which he was holding in his

hand. The prosecutrix's daughter was sent outside. Thereafter, the Appellant threatened the prosecutrix and committed rape on her at knife point. Thereafter, the prosecutrix and her daughter raised alarm. The Appellant, however, escaped. A call was made on number 100, the police reached the spot, went to the house of the Appellant and arrested him. The prosecutrix and the accused were taken to the hospital for medical examination. No apparent evidence of rape or any forcible sexual intercourse was found on the MLC.

3. During the course of trial, the prosecution examined 13 witnesses. PW-1 the prosecutrix and PW-2 Ms. Santra are the witnesses of the actual occurrence. The Appellant in his examination u/s 313 Cr. P.C. denied the allegations of the prosecution. He came up with the plea that his real brother Sita Ram was murdered by Vijay Kumar son of the prosecutrix and a case FIR No. 255/2004, Police Station Bardah, District Azamgarh, U.P., u/s 302/ 34 IPC was registered against the son of the prosecutrix. Said Vijay Kumar was evading arrest. The prosecutrix approached him not to pursue the case. He, however, did not agree to the suggestion. On his refusal to agree to the unjust demand of the prosecutrix he was implicated falsely in the case just to put pressure on him. He also appeared as his own witness u/s 315 Cr. P.C. and proved the documents with regard to the registration of the criminal case against Vijay Kumar son of the prosecutrix which is not even disputed by the prosecutrix in her statement as PW-1.

4. By the impugned judgment, the Trial Court held that there were minor contradictions and discrepancies in the testimonies of PWs 1 and 2 and the prosecution version, which did not impeach the credibility of the prosecutrix. The Trial Court thus found the prosecutrix to be reliable and convicted and sentenced the Appellant as stated earlier.

5. The following contentions are raised on behalf of the Appellant:-

(i) There was strong motive to falsely implicate the Appellant. It was proved by the Appellant and admitted by the prosecutrix (PW-1) that Vijay Kumar prosecutrix's son was involved in the murder of Sita Ram, Appellant's real brother. The prosecutrix's son was evading arrest and had absconded. The prosecutrix was putting pressure on the Appellant not to pursue the case with the higher authorities to which the Appellant did not agree resulting into his false implication in the instant case.

(ii) As per the prosecution version the incident took place at 2:30 A.M. According to the prosecution Ms. Santra, the prosecutrix's daughter had opened the door to reach the toilet on the first floor to ease herself. Taking the opportunity the Appellant entered the house and committed rape by threatening the prosecutrix and Ms. Santra who had also returned after easing herself. It is urged that admittedly the Appellant was residing in a house at a distance of about 1.5 kms from the house of the prosecutrix. It is highly improbable and unbelievable that the Appellant would wait outside the house of the prosecutrix in the dead of

night to get an opportunity for the door to open and to enter the house to commit the act.

(iii) As per the prosecution version, Ms. Santra (PW-2) returned to the ground floor just after easing herself and found the Appellant present inside the room threatening her mother (the prosecutrix) to commit rape on her. Ms. Santra was asked to go out while the Appellant committed rape. It is highly improbable that a young girl would neither approach her brother who was sleeping on the first floor nor would raise alarm to rescue her mother from the clutches of the rapist.

(iv) The house where the incident took place measures just 12 sq. yds. The neighbouring houses are also of the same size. As per the prosecutrix when the Appellant tried to rape her she screamed "chhoro-chhoro" but none from the neighbourhood has been cited as a witness by the prosecution. If the incident had taken place as alleged by the prosecution the neighbours must have known of the same and would have been cited as witnesses by the prosecution.

6. On the other hand, learned Additional Public Prosecutor for the State argues that Ms. Santra (PW-2) could not raise alarm as she was under the fear that some harm may be done to her mother (the prosecutrix). She argues that in case of sexual assaults the testimony of the prosecutrix without any corroboration is sufficient to base conviction of an accused. The fact that prosecutrix's son was involved in the murder of Appellant's brother infact provided motive to him (the Appellant) to commit the heinous crime and was not a cause for his false implication.

7. It is well settled that in cases of sexual assaults the sole testimony of the prosecutrix can be taken into consideration to base conviction of an accused provided the same is reliable and convincing.

8. In Narender Kumar Vs. State (NCT of Delhi), the Supreme Court held that once the statement of the prosecutrix inspired confidence and is accepted by the Court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the Court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

9. In Sri Narayan Saha and Another Vs. State of Tripura, the Supreme Court held that if the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence.

10. Turning to the facts of the instant case, the prosecutrix (PW-1) admitted in her cross-examination that Sita Ram the Appellant's real brother was murdered.

She admitted that her son Vijay Kumar was arrested after 18 months from the date of murder of Sita Ram. The date of murder of Sita Ram as per the attested copy of the challan Ex. DW-1/B filed on record shows that the date of the incident is 26.06.2004. Thus, the prosecutrix's son was arrested in that case sometime in December, 2005. This incident took place allegedly on the night intervening 11/12.11.2005. Thus, it is proved on record that the prosecutrix's son was an accused in the murder of Sita Ram in case FIR No. 255/2004, Police Station Bardah, District Ajamgarh, U.P. and was absconding. The Appellant as his own witness (DW-1) deposed that he was pursuing the case with regard to his brother's murder with senior police officers as a result of which the prosecutrix became offended and asked him not to pursue the case against her son. This part of the Appellant's testimony was not challenged by the prosecution in cross-examination. Thus, there was a strong motive to falsely implicate the Appellant. Therefore, the prosecutrix's testimony would require greater scrutiny and the Court would also look for some assurance to her testimony if the Appellant has to be convicted on the charge of rape.

11. The medical evidence is neutral in as much as the prosecutrix was a grown up lady (aged 40 years) having three children. Thus, absence of any injury on the surface of vagina or fourchette would not necessarily exclude any sexual intercourse against her (prosecutrix's) consent. But at the same time, the absence of any injury and absence of sperm on the vaginal swab would show that there is no corroboration from the medical evidence.

12. As per the prosecution version the incident took place on 12.11.2005 at 2:30 A.M. It is admitted by the prosecutrix in her cross-examination that the house of the Appellant was at a distance of about 1.5 kms. from his house. I tend to agree with the learned counsel for the Appellant that it is highly improbable that the Appellant would wait outside the prosecutrix's house at a distance of 1.5 kms from his own house for an opportunity for the door to open so that he could enter the house to commit rape. Apart from the fact that there are contradictions in the testimony of the prosecutrix and her daughter PW-2 the prosecution version is highly improbable. PW-1 deposed that at about 2:30 A.M. her daughter went upstairs to ease herself. The Appellant entered her house from the main gate which was opened by her daughter. He showed her a knife and threatened her not to raise any alarm and raped her. In the meanwhile, her daughter (PW-2) also returned in the room while she was being raped. The Appellant threatened her daughter also with the same knife. She and her daughter raised alarm on this, the Appellant ran away.

13. It is not fathomable that a person will commit rape on a lady holding a knife in his hand and at the same time he is threatening the said lady as also the persons who were standing beside them. It shocks the judicial conscience to believe such a story. As against this, what is stated by Ms. Santra (PW-2) the prosecutrix's daughter is that when she returned and entered the room the Appellant threatened her that if she tried to enter the room she would be

stabbed with a knife. PW-2 deposed that she saw the Appellant using force upon her mother and her mother was trying to free herself. It is very strange that a person is holding a knife in one hand and he is committing rape on a grown up lady while his one hand is occupied and the grown up lady is not in a position to free herself.

14. As per the FIR (Ex. PW-1/A) when PW-2 returned to the room she was threatened with a knife and asked to go out and only thereafter the rape was committed on the prosecutrix. Thus, PW-2 had an opportunity not only to call her brother who was sleeping on the first floor in a small house of 12 sq. yds. but also the neighbours. In any case she was outside the room/house. It is against natural human conduct that a young girl of aged 14-15 years would not even call her brother who is just a few steps away from her while her mother was being raped.

15. It is urged by the learned counsel for the Appellant that this false case of rape was registered against the Appellant in collusion with ASI Rajinder Singh. It is urged that in rape cases the investigation is normally conducted by a lady police officer. In the instant case ASI Rajinder Singh took upon himself to conduct the investigation and preferred to inform lady SI Durga Kapri only at 9:00 A.M. I have before me the statement of SI Durga Kapri (PW-13). In her cross-examination she admitted that at the time of the incident she had a mobile phone and also a landline phone at her residence. She stated that she received the intimation of this case in PS Prashant Vihar only at 9:00 A.M. and then took over the investigation in this case. No explanation has been given by the prosecution as to why the lady SI was not informed of the incident immediately to take up the investigation of the case.

16. It is very strange that the investigation of the case started even without recording the statement of the prosecutrix. As per the prosecution version the statement of the prosecutrix was recorded by SI Durga Kapri (PW-13) only at 10:45 A.M. whereas DD No. 27 with regard to the incident was recorded at 2:40 A.M., that is, just after ten minutes of the alleged incident.

17. It is very intriguing to note that ASI Rajinder Singh proceeded to arrest the Appellant and take the Appellant and the prosecutrix to the hospital for their medical examination even without recording the statement of the prosecutrix. There appears to be some credence in the defence set up by the Appellant that he was implicated in the case falsely by the prosecutrix in collusion with ASI Rajinder Singh, as the story put forth by the prosecution is highly improbable and is unbelievable. The Appellant ought not to have been convicted on the basis of the evidence produced by the prosecution. The impugned judgment, therefore, cannot be sustained. The same is accordingly dismissed and the Appellant is acquitted of the charges.

18. Conduct of ASI Rajinder Singh needs to be enquired into. The Commissioner of Police is directed to get an inquiry into the conduct of ASI Rajinder Singh on

the following aspects:-

(a) Whether it was appropriate for ASI Rajinder Singh to have arrested the Appellant even without recording the statement of the prosecutrix; and

(b) If the statement of the prosecutrix was to be recorded by a lady police officer and information in respect of the same was received in the PS at 2:45 A.M. why the intimation was not given to SI Durga Kapri to immediately reach the PS and record the statement of the prosecutrix.

19. The report shall be transmitted to this Court by the Commissioner of Police within three months.

20. List on 19th August, 2013. A copy of the order be given dasti to the learned Additional Public Prosecutor for the State for transmitting it to the Commissioner of Police.