

(2016) 02 DEL CK 0289
In the Delhi High Court
Case No : Crl. A. 1034 and 1035/2011

Irfan and Others

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 10-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 311
Penal Code, 1860 (IPC) — Section 34, Section 376(2) (g), Section 506

Citation : (2016) 3 ADDelhi 205 : (2016) 4 CriCC 852 : (2016) 2 JCC 844 :
(2016) 3 RCRCriminal 111

Hon'ble Judges : S.P. Garg, J.

Bench : Single Bench

Advocate : Megha, Pramod K. Dubey and Shiv Chopra, Advocates, for the Appellant; Meenakshi Dahiya, APP and Jagbir Singh, SI, for the Respondent

Final Decision : Disposed Off

Judgement

S.P. Garg, J.—1. The appellants - Irfan (A-1), Salim Khan @ Sallu (A-2) and Laeek Ahmad (A-3) have preferred the instant appeals to challenge the legality and correctness of a judgment dated 19.07.2011 of learned Addl. Sessions Judge in Sessions Case No. 03/2010 arising out of FIR No. 132/2009 PS New Usmanpur whereby A-1 and A-2 were held guilty for committing offence punishable under Sections 376(2) (g) /506/34 IPC and A-3 was convicted under Section 506 IPC. The appellants were awarded various prison terms with fine.

2. Briefly stated, the prosecution case as reflected in the charge- sheet was that on 14.04.2009 and 16.04.2009, A-1 and A-2 committed rape upon the prosecutrix "X" (changed name), aged around 14 years, at a toilet on the ground floor at Anish Thelawal's house, Gali No. 8, Jagjeet Nagar, Usman Pur. After the incident, A-3 and their relatives criminally intimidated the victim and her parents to prevent them from approaching the police. The incident was reported to the police on 25.04.2009 and the Investigating Officer after recording victim's statement (Ex.PW-9/A) lodged First Information Report. During investigation,

"X" recorded her 164 Cr.P.C. statement; she was medically examined. Appellants were arrested and medically examined. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellants in the Court. The prosecution examined eleven witnesses to prove its case. In 313 Cr.P.C. statements, the appellants denied the allegations and pleaded false implication. DW-1 (Naresh Kumar Saini) and DW-2 (Mohd.Rashid) appeared in their defence. The trial resulted in their conviction as mentioned previously. Being aggrieved and dissatisfied, the instant appeals have been preferred.

3. I have heard the learned counsel for the parties and have examined the file. Appellant's conviction is primarily based upon the solitary statement of the prosecutrix "X" which has not been corroborated by any other independent source. Needless to say, conviction can be based on the sole testimony of the prosecutrix provided it lends assurance of her testimony. In case, the Court has reasons not to accept the version of the prosecutrix on its face value, it may look for corroboration.

4. Undisputedly, A-1 and A-2 were working in a factory run by A-3 on the ground floor. The victim and her parents lived on the first floor of the house and were acquainted with them (the appellants).

5. In the initial version in complaint (Ex.PW-9/A), "X" informed that on 14.04.2009, when she had gone to fetch water from a hand-pump installed on the ground floor at around 06.00 a.m., A-1 who lived on the ground floor in the said house dragged her forcibly to a nearby latrine where A-2 was already present. They both committed rape upon her there turn-by-turn. Since she was criminally intimidated, she did not disclose the incident to anyone. On 16.04.2009, again, when she went to fetch water, A-2 after shutting her mouth dragged her towards the latrine. When she attempted to raise alarm, A-1 threatened to kill her by a vegetable knife. Again, she was ravished by both A-1 and A-2 in the latrine. After sometime, her mother arrived down-stairs and called her. On that, both A-1 and A-2 fled the spot. She apprised her mother about the incident. She further informed that on 16.04.2009, A-3 had threatened to kill her entire family if matter was reported to the police.

6. In her 164 Cr.P.C. statement (Ex.PW-6/A) recorded on 29.04.2009, "X" disclosed to the learned Metropolitan Magistrate that A-1 and A-2 lived in her neighbourhood. One day at about 06.00 a.m. when she had gone to fetch water on the ground they both dragged her to a latrine and closed its "gate" from inside. A-1 threatened her with a knife and A-2 disrobed her there. Thereafter, they both committed rape upon her. In the meantime, her mother arrived on the ground after searching her. On hearing her sound / voice, both (A-1 and A-2) fled the spot. Her mother took her to the hospital. A-3 had threatened her father to kill if he reported the incident to the police.

7. On scanning the two versions one before the police vide complaint (Ex.PW-9/A) and other in 164 Cr.P.C. statement (Ex.PW-6/A), it reveals that there are material discrepancies and inconsistencies. In 164 Cr.P.C. statement, "X" claimed to have been raped by both A-1 and A-2 only on one occasion. She also talked about her mother's arrival at the spot soon thereafter. The material inconsistencies between the two statements have remained unexplained.

8. In her Court statement as PW-9, "X" deposed that in the year 2009, it was Wednesday, when she had gone to fetch water from the hand- pump at 06.00 a.m. A-1 and A-2 dragged her to the latrine; removed her clothes and committed rape upon her. On Friday i.e. Jumeraat, A-3 threatened her to kill her with knife if she disclosed the incident to anybody. She further deposed that after about ten days of the incident, she again went to fetch water at the hand-pump. A-2 caught hold of her by hand and dragged her. On her calling, A-1 and A-2 escaped the spot. No wrong act was committed upon her by anyone that day. Next day, she went to police station along with her parents and lodged the complaint (Ex.PW-9/A). She further deposed that since she was threatened by a knife by A-1, she refrained from disclosing the incident. After two days of the first occurrence, she was again raped by both A-1 and A-2 after taking her forcibly in the latrine. In the cross-examination, the victim took somersault and completely exonerated the appellants to have committed rape upon her. She was declared hostile by the learned Addl. Public Prosecutor and was cross-examined. She admitted that the matter was compromised with the appellants. It is true that in the cross-examination recorded after a gap of about six months on 05.05.2011 on appellants' moving application under Section 311 Cr.P.C., the victim opted to resile from her previous statement and did not implicate the appellants for the crime. In view of the law laid down by the Hon'ble Supreme Court in "Khujji @ Surendra Tiwari vs. State of Madhya Pradesh", , 1991 CrL.J.2653, the statement given in the cross-examination was rightly and correctly ignored or discarded. The Trial Court observed that there was possibility of the appellants to have won over the prosecutrix and for that reason, she did not opt to implicate them.

9. On scrutinising the testimony of the victim in the examination-in-chief, it reveals that she has deviated from her earlier versions given before the police and the learned Metropolitan Magistrate. She has improved her version at different stages of the investigation and trial and her statements are not consistent. In the FIR, she alleged commission of rape on 14.04.2009 and 16.04.2009. In the MLC (Ex.PW- 7/A), "X" informed the examining doctor about sexual assault on 14.04.2009 and 15.04.2009. PW-7 (Dr.Monica) deposed that there was no complaint of physical assault. No visible external injuries were found on her body including private parts. In 164 Cr.P.C. statement (Ex.PW-6/A), "X" did not give any specific date when she was defiled by the appellants. She claimed to have been raped only on one occasion by the appellants in the latrine. In her Court statement, she did not specify the date of crime. She is not clear as to on which dates she was sexually assaulted. For the first time, she informed

that after about ten days of the previous incident when she was ravished, A-1 had attempted to drag her to the latrine but could not do so due to her father's arrival.

10. The story presented by "X" seems improbable. The crime place is a latrine situated on the ground floor of the victim's house. In summer days, it is highly unbelievable that no individual in the neighbourhood would get any inkling of the ghastly crime being committed in the latrine measuring about 2'6" x 2'11". It has come on record that the latrine had no "door". Slightest sound / cry of the victim must have alerted her family members and neighbours. Even after the rape incident, "X" did not raise any alarm. She maintained silence and did not inform her parents soon after the incident. It is highly unbelievable that after two days of the crime, both A-1 and A-2 would dare to again commit rape upon "X" at the same place in similar manner. Possibility of "X" being a consenting party to physical relation can't be ruled out. Only when the victim's parents got suspicious and came down-stairs to find out her whereabouts, the appellants fled away from the spot and were so noticed by them. The victim was then compelled to tell them about the physical relations.

11. Inordinate delay in lodging the FIR has remained unexplained. It appears that when, after ten days of the previous episode again an attempt was made by the appellants to have physical relations with "X" in similar manner, X's father found A-1 and A-2 escaping from the spot. X's parents came to know about the appellants' involvement in the crime and lodged the report with the police or else there was no plausible explanation to delay the lodging of the FIR for ten days. Daily Diary (DD) No. 9A (Ex.PW-3/A) records that on 25.04.2009 at around 03.00 p.m. an information was received that informant's daughter had been raped by two individuals (A-1 and A-2). The prosecutrix and her mother even opted to exonerate the appellants in their cross-examinations recorded on 05.05.2011.

12. PW-10 (Shakila Khatun), victim's mother did not corroborate her version in entirety. Her statement is not in consonance with the victim's account. She deposed that when her daughter "X" did not return for long. She became suspicious and came down-stairs. She saw A-1 and A-2 to be running away after coming out of latrine. When she went to the latrine, she saw her daughter without her inner garments. On enquiry, "X" informed her that two days before, A-1 and A-2 had committed rape upon her and had threatened to kill if she disclosed the occurrence to anyone. PW-9, the victim did not state if her mother had arrived at the spot and had found her without clothes in the latrine. In the cross-examination, she denied the suggestion that there was love affair between her daughter and A-2. She volunteered to add that after the incident, A-2's father wanted to marry him with her daughter but she declined the proposal.

13. The investigation carried out by the Investigating Officer is not up to the mark. No cogent document was collected to establish the victim's age on the day of incident. The prosecution did not examine any witness to prove if the victim

was below 16 years of age and her consent for physical relations was of no relevance. Contrary to that, as per ossification reports (Ex.PW-11/D & Ex.PW-11/E) on record, age of the prosecutrix was ascertained in between 16 to 18 years. Exact age of the prosecutrix has not been surfaced on record. She has given different dates of birth at different stages. In the complaint (Ex.PW-9/A), MLC (Ex.PW- 7/A) and her 164 Cr.P.C. statement (Ex.PW-6/A), she disclosed her age 14 years. In her Court statements neither PW-9 nor PW-10 gave specific date of birth of the prosecutrix. PW-10 (Shakila Khatun) admitted that she was not aware of X's date of birth. Considering the age ascertained in the ossification reports, the victim was above 16 years of age on the day of incident.

14. Settled legal position is that conviction can be based upon the sole testimony of the prosecutrix provided it is reliable and is of sterling quality.

15. In "sadashiv Ramrao Hadbe vs. State of Maharashtra & Anr.", , 2006 (10) SCC 92, the Apex Court while reiterating that in a rape case, the accused could be convicted on the sole testimony of prosecutrix if it is capable of inspiring the confidence in the mind of the Court, put a word of caution that the Court should be extremely careful while accepting the testimony when the entire case is improbable and unlikely to have happened. This is what has been stated :

"It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

16. In "Abbas Ahmed Choudhury v. State of Assam", , (2010) 12 SCC 115, observing that a case of sexual assault has to be proved beyond reasonable doubt as any other case and that there is no presumption that a prosecutrix would always tell the entire story truthfully, the Hon"ble Supreme Court held :

"Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1."

17. In another case "Raju v. State of Madhya Pradesh", , (2008) 15 SCC 133, the Supreme Court stated that the testimony of a victim of rape has to be tested as if she is an injured witness but cannot be presumed to be a gospel truth.

"It cannot be lost sight of that rape causes the greatest distress and humiliation

to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

18. In "Rai Sandeep @ Deepu vs. State of NCT of Delhi", , (2012) 8 SCC 21, the Supreme Court commented about the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused. It held :

"In our considered opinion, the "sterling witness" should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a "sterling witness" whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

19. In "Tameezuddin @ Tammu v. State (NCT of Delhi) ", , (2009) 15 SCC 566,

the Supreme Court held :

"It is true that in a case of rape the evidence of the Prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

20. X's testimony tested on the above settled principles, is wholly unreliable due to inherent infirmities therein.

21. In the light of above discussion, I am of the considered view that the prosecution has miserably failed to prove its case against the appellants beyond reasonable doubt. They deserve benefit of doubt. The appeals filed by them are allowed. Conviction and sentence are set aside. The appellants (A-1 and A-2) shall be released forthwith if not required to be detained in any other criminal case. Bail bond and surety bond of A-3 stand discharged.

22. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information / compliance.