

(2014) 02 DEL CK 0188
In the Delhi High Court
Case No : Criminal A. 967 of 2001

Krishan

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 12-02-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164 293 293(4) 313 428
Penal Code, 1860 (IPC) — Section 323 34 376 376(2) 376(2)(g)

Citation : (2014) 1 JCC 843

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Siddhartha Aggarwal and Mr. Adit S. Pujari, for the Appellant; Fizani Hussain, APP, for the Respondent

Final Decision : Allowed

Judgement

Indermeet Kaur, J.—The appellants before this Court are Gopi and Krishan. They had been convicted u/s 376(2) for the offence of gang rape and Section 506 Part-I read with Section 34 IPC vide judgment dated 01.5.2001. Vide order of sentence dated 04.5.2001 Gopi had been sentenced RI for 11 years for the offence u/s 376(2)(g) IPC and a fine of Rs. 2000/- in default of payment of fine to undergo SI for six months; for the offence u/s 506 Part-I he had been sentenced to undergo RI for two years. Accused Krishan had been sentenced to undergo RI for 10 years and to pay fine of Rs. 2000/- in default of payment of fine to undergo SI for six months for the offence u/s 376(2)(g) IPC and for the offence u/s 506 Part-I he had been sentenced to undergo RI for two years. Benefit of Section 428 Cr.P.C. had been granted to them. Version of the prosecution unfolded in the version of Smt. "D" examined as PW-3. Incident is dated 02.9.1993; time of incident was about 10:00-10:30 p.m. The first information about this incident was received by SI Hari Chand (PW-10) posted at the police control room on 03.9.1993 at 100 number. This information was conveyed in the local police station to H.C. Rattan Lal (PW-4), the then duty officer, at the police station who had recorded this information at 7:10 a.m.

which was recorded in DD No. 26-A (Ex. PW-4/A). Investigation was marked to SI Hari Singh (PW-13) who along with constable Krishan Kumar (PW-6) reached the spot i.e. the jhuggi behind the Saint Mark School, GH-5 & 7 Block, Paschim Vihar. PW-3 met them there. Her statement Ex. PW-3/A was recorded. In this version, she had disclosed that on the previous night at about 10:00 p.m. while she was sleeping in her own jhuggi along with her children accused Gopi at the point of a knife threatened her that he would kill her child unless she accompany him to his jhuggi; she was forced to accompany him to the nearby jhuggi of Krishan where Krishan and Ram Niwas were present. All the aforementioned three persons committed rape upon her. She was asked to make tea in the morning; since she got a chance she slip out the jhuggi and reported the matter. It was in this statement that the endorsement Ex. PW-13/A was made by the investigating officer and the rukka was dispatched through PW-6 pursuant to which at 8.30 a.m. the present FIR No. 493/1993 u/s 376 ,506 ,323 read with Section 34 IPC was registered by SI Amar Singh (PW-2) and proved as Ex. PW-2/A.

2. At the scene of crime, the investigating officer seized a vegetable cutting knife which was lying at the spot and which PW-3 had stated that was used by Gopi to threaten her. Its sketch Ex. PW-3/C was prepared which was taken into possession vide memo Ex. PW-3/B. Site plan Ex. PW-13/B was prepared. The torn clothes of the prosecutrix which included her jampher, her maxi and a salwar were taken into possession vide memo Ex. PW-1/A in the presence of a neighbor Smt. Savitri Devi (PW-1). The prosecutrix was medically examined at the DDU hospital by Dr. Jitender Singh vide MLC Ex. PW-9/A on 03.9.1993. No external injury was noted. There was swelling on the right chick and abrasions on both the breasts; her other parameters were found normal.

3. The accused Gopi and Krishan who had been arrested from the spot i.e. from the jhuggi of Krishan; they were medically examined on 03.9.1993 vide their MLCs proved as Ex. PW-9/B and Ex. PW-9/C. The under garments of both the accused were also seized vide memo Ex. PW-6/B.

4. On 06.9.1993 the statement of the prosecutrix u/s 164 Cr.P.C. was recorded by Ms. Raj Rani Mitra learned M.M. (PW-14) proved as Ex. PW-14/A. The third accused Ram Niwas surrendered in the court on 13.9.1993 and he was medically examined on 14.9.1993 by Dr. Suresh Khurana (PW-7); he was also arrested.

5. On 08.10.1993 the seized articles which included the clothes of the prosecutrix, under garments of the accused Gopi and Krishan as also the vaginal swab of the prosecutrix sealed in pullands were sent to the CFSL Chandigarh through constable Sri Bhagwan (PW-8). The CFSL vide its report Ex. EX detected semen on three articles i.e. on the light green coloured gown of the prosecutrix Ex. Bio/A3, blue coloured under wear Ex. Bio/C (of Krishan) as also in the vial Ex. Bio/F.

6. This is the gist of the version of the prosecution.

7. Statement of the accused persons u/s 313 Cr.P.C. was recorded; they pleaded

innocence. Submissions being that they have been falsely implicated.

8. No evidence was led in defence.

9. On the basis of the aforementioned evidence collected both oral and documentary the accused persons had been convicted and sentenced as aforementioned.

10. On behalf of appellants arguments have been addressed by Mr. Siddhartha Aggarwal, Advocate. Attention has been drawn to the statement of prosecutrix "D" recorded on 03.9.1993; her statement recorded u/s 164 Cr.P.C. (Ex. PW-14/A) recorded on 06.9.1993 and thereafter her deposition on oath in court. Submission being that all these versions are different; they are, in fact, irreconcilable. In her first statement Ex. PW3/A she has stated that accused Gopi had come to her jhuggi; he was accompanied by co-accused Krishan and Ram Niwas; she was coerced to go to the jhuggi of Krishan where she had been threatened with a knife. It is pointed out that in her statement u/s 164 Cr.P.C. her version has become different. In this version she had stated that it was Gopi alone who had come to her jhuggi when she was sleeping and at the point of a knife threatened to kill her and her children; she had been forced to accompany Gopi to the jhuggi of Krishan where Krishan and Ram Niwas were also there. Attention has been drawn to her deposition on oath in court wherein she has stated that Gopi had put his hand on her mouth and gagged her from shouting and pressurized her to accompany him to the jhuggi. It is stated that all these aforementioned versions are irreconcilable. Further submission being that in her statement Ex. PW-3/A she had stated that she did not know Ram Niwas and only Gopi was known to her; however, in her deposition on oath she admitted that there were interse dealings between Ram Niwas and her brother on purchase of a jhuggi and Ram Niwas was known to her. Attention has also been drawn to the site plan; submission being that there was several juggis on the way and if PW-3 really wanted to get out of the clutches of Gopi nothing prevented her from shouting and screaming to save herself. The entire route from her jhuggi to the jhuggi of Krishan had jhuggis lined on either side. Further submission being that the report of the CFSL cannot be read into evidence; it necessarily has to be ignored. Attention has been drawn to the orders of the Court dated 30.10.2000 wherein as the CFSL report had not been filed even after the completion of the prosecution evidence and application filed by the public prosecutor to bring the CFSL report on record has been allowed; permission to summon Dr. Sanjeev had been granted but for one reason or the other the expert was not summoned. On 08.3.2001 it had noted that the report had been filed but same is not admitted by the counsel for the accused and it was reiterated that it was necessary to examine Dr. Sanjeev who had been directed to appear on the following date i.e. 03.01.2001. Thereafter without examining Dr. Sanjeev the CFSL report was taken on record and the evidence was closed; submission being that where there was a specific request by the defence counsel to examine the CFSL expert but not calling the CFSL expert and taking the report of the CFSL on record without giving a chance to the accused to cross-examine the said witness on this count

suffers from an infirmity. Such a report was not admissible u/s 293 of the Cr.P.C. It is also not a case of the prosecution that this report was prepared by any of the category of persons mentioned in Section 293(4) of the Cr.P.C. The defence of the appellant is plausible; Gopi and the victim were sharing a consensual relationship and they were intimate with each other for the last several dates which is evident from the fact that even in the MLC of Gopi it was recorded that on the first day i.e. 03.9.1993 he had stated that he knows the prosecutrix since their village time and they are regularly sharing intimate relationship since 15-20 years; she had come to his jhuggi voluntarily on her own and stayed up to 5:00 a.m. Submission of the defence being that the accused had been falsely implicated because of a dispute between the brother of the victim and Ram Niwas on the purchase of the jhuggi. On all counts benefit of doubt accrue in favour of the appellants and they are entitled to a consequent acquittal.

11. Arguments have been refuted by the learned APP for the State. It is stated that on no count does the impugned judgment call for any interference. Version of the prosecutrix examined as PW-3 has been corroborated by the CFSL report; it is the gist of her deposition which has to be noted. Minor contradictions even if they are there have necessarily to be ignored. It is pointed out that it is a settled law that sole testimony of the prosecutrix even if uncorroborated is sufficient to nail the accused. The impugned judgment does not call for any interference.

12. Record has been perused and arguments have been appreciated.

13. The incident had occurred at about 12:00 midnight in the intervening night of 2-3.9.1993. Admittedly, the prosecutrix was sleeping in her jhuggi; at the time she was sleeping with her three children. In her first statement to the police Ex. PW-3/A (on the basis of which rukka was taken) she had stated that her husband had gone to the village; Gopi accompanied by Ram Niwas and Krishan had come to her jhuggi and forced her by dragging her from her hand to the jhuggi of Krishan. She was threatened there at the point of a knife. Each of the accused had committed rape upon her twice. She was asked to make tea in the morning at 5:00 a.m.; she managed to escape and went to Pradhan Mehar Singh. This was her first statement. In her second statement which was recorded u/s 164 Cr.P.C.; three days later i.e. on 06.9.1993 (Ex. PW-14/A) her version has twisted. She has stated that while she was sleeping in her jhuggi along with her three children Gopi came their armed with a knife and threatened her at the point of knife and she was told that if she shouted he will kill her as also her children; when she woke up she saw that in the jhuggi Ram Niwas and Krishan were also present; all of them committed rape upon her. She managed to escape in the morning at 5.00 a.m. and narrated this version to her neighbor. On oath in court which was her testimony recorded in April 1997 i.e. 4 years after the date of incident she has sought to toe the line of her version recorded u/s 164 Cr.P.C. which was contrary to Ex. PW-3/A. In this version she has stated that Gopi had come her jhuggi and threatened her with a knife; she was forced to accompany him to jhuggi of Krishan where Krishan and Ram Niwas committed rape upon

her; she managed to escape from the jhuggi in the morning and ran to the house of Roshan.

14. These aforementioned versions disclose material contradictions in her testimony; whereas in her first statement Ex. PW-3/A she stated that all three persons together had come to her jhuggi and she was forced to go to the jhuggi of Krishan, where in the jhuggi of Krishan she was threatened with a knife. In Ex. PW-14/A she stated that Gopi had come alone and she had been threatened her at the point of knife. In this version the knife was already with Gopi when he had come to her jhuggi more over in this version Gopi was alone and was not accompanied by the two co-accused, Krishan and Ram Niwas. In Ex. PW-3/A she had stated that she managed to escape and went to the house of Mehar Singh. In Ex. PW-14/D she stated that she had gone to the house of her neighbor whereas in her version on oath in court she had given a still different version; she stated that after managing to escape she went to the house of Roshan. In Ex. PW-3/A, PW-3 has stated that she knew Gopi as he hails from her village; Ram Niwas was also known to her. In Ex. PW-14/A PW-3 has stated that Gopi is related to her; he is her uncle; she does not know him very well. On oath in Court her version was that only Gopi was known to her and the other two co-accused Krishan and Ram Niwas were not known. She was not even aware of their names. In another part of her cross-examination she changed her version and admitted that Rami Niwas was known to her because her brother had purchased a jhuggi from him.

15. The site plan Ex. PW-13/B is a relevant document. The jhuggi of Pw-3 has been depicted at point B. The route from her jhuggi to the jhuggi of Krishan has been marked; the jhuggi of Krishan is at point A. the site plan depicts jhuggis all along on either side of this route; incident had occurred (as per PW-3) in the night of 2-3.9.1993; distance from her jhuggi to jhuggi of Krishan is not short. She had to cross almost seven jhugges to reach the jhuggi of Krishan; had it been a case of pressure and coercion nothing prevented her from shouting to escape from the clutches of the accused. This was not done.

16. Ex. PW-9/C which is the MLC of Gopi was recorded on 03.9.1993. In the history given by the patient, he had stated that he knows the prosecutrix from her village; they were having a sexual relationship for the last 15-20 years. On the fateful day she had come to the jhuggi of Krishan (where he was staying) on her own voluntarily and stayed there up to 5:00 a.m..

17. Cross-examination of PW-1 has also been conducted on this line of defence. It was suggested to the victim that there was several jhuggis adjacent and surrounding the jhuggi of Krishan; she admitted that if a noise is made in her jhuggi the people living in the adjacent jhuggi could hear it. She admitted that she did not raise any alarm either on the way or in the jhuggi of Krishan. She denied the suggestion that the accused had been falsely implicated because of a dispute on the purchase of jhuggi by her brother from Ram Niwas.

18. This evidence oral and documentary clearly establishes that there are material discrepancies in the version of the prosecutrix. There is no doubt to the proposition that the testimony of a prosecutrix if cogent and coherent may be sufficient to nail the accused; however where there are embellishments and exaggerations and which go the root of the matter as in this case where PW-3 has given different and varying versions as to whether Gopi had come to her jhuggi alone or whether he had been accompanied by Ram Niwas and Krishan; whether he was armed with a knife and had threatened her in her own jhuggi or whether this threat was extended to her in the jhuggi of Krishan; why she did not make noise when she went from her own jhuggi to the jhuggi of Krishan; this route was clustered by jhuggis on either side and admittedly if a noise was made it would have been heard by the persons in the surrounding jhuggis; her admission that she had not shouted or screamed either in her jhuggi or on the route from her jhuggi to the jhuggi of Krishan; all throw doubt on the veracity of this version sought to be set up by PW-3. Her varying version as to whom she contacted in the first instance after she managed to escape from the jhuggi of Krishan; whether it was Mehar Singh; whether it was a neighbor or whether it was Roshan are also discrepant. This again throws doubt on her credibility. Her further deposition on oath in court she stated that she did not know Ram Niwas and Krishan but later on admitted that Ram Niwas was known to her as her brother had purchased a jhuggi from Ram Niwas and there has been a dispute between her brother and Ram Niwas on this issue and the defence adopted by the learned defence counsel right from the inception i.e. at the time of the cross-examination of PW-3 and this line of defence being consistently followed even in the statement of the appellants recorded u/s 313 Cr.P.C. all go to show that a dent has been created in the version of the prosecution. PW-3 was not a reliable witness.

19. Report of the CFSL which has been admitted u/s 293 of the Cr.P.C. is also an illegality. The order dated 08.3.2001 clearly reflects that the accused had not admitted this report and that is why the Dr. Sanjeev was being summoned time and again by the trial judge in order that the defence counsel could cross-examine this witness on the CFSL report. However the very next order sheet reflects that on 21.3.2001 the CFSL report was admitted in evidence without giving any reason for not giving a chance to the defence counsel to cross-examine the CFSL expert.

20. A single Judge of this Court in Emma Charlotte Eve Vs. Narcotic Control Bureau, has held that where the report of the chemical examiner is a disputed document and there is nothing on record to show that the appellant had waived her right to have the said report proved u/s 293 Cr.P.C., it could not be used in the absence of a formal proof. A Division Bench of this Court reported in Vidya Sagar Anand Vs. State had noted that the report u/s 293 of the Cr.P.C. may be admitted without formal proof but the accused is entitled to question and challenge it in the evidence.

21. As is evident in the instant case all efforts were being made to call Dr. Sanjeev and several dates had been granted for the said purpose but thereafter on the executive date without assigning any reason the court chose to accept the report u/s 293 of the Cr.P.C. preventing the accused from exercising his right to cross-examine the expert from the CFSL. This report, in this background, could not be relied upon.

22. Prosecution has failed to establish its case beyond reasonable doubt. Accused persons are entitled to a benefit of doubt. Giving benefit of doubt to the appellants they are acquitted. Their bail bonds are cancelled. Sureties discharged. Appeal allowed. File be consigned to record room.