

(2018) 04 DEL CK 0087
In the Delhi High Court
Case No : CRL.A. 1025 of 2016

MAHENDER @ GANJA; RAJU CHHAKA; RAJU BHAIJE; ARJUN; APPELLANT
MOHD RAJA

Vs

STATE RESPONDENT

Date of Decision : 16-04-2018

Acts Referred:

Indian Penal Code, 1860 — Section 376D, 366, 342, 34, 396, 395, 506, 397, 412
Arms Act, 1959 — Section 25
Code of Criminal Procedure, 1973 — Section 161, 164, 313

Citation : (2018) 04 DEL CK 0087

Hon'ble Judges : S. MURALIDHAR, I.S. MEHTA

Bench : Division Bench

Advocate : Chetan Lokur, Amit Chadha, Azhar Qayum, Amit Chadha,

Final Decision : Dismissed

Judgement

Introduction

1.A shocking incident of gang rape of a Danish tourist took place in the vicinity of the New Delhi Railway Station in the evening hours of 14th January

2014. The 51 year old victim of the brutal assault survived the ordeal. She later returned from Denmark to depose at the trial and identify the

perpetrators. Her testimony was fortunately corroborated by the forensic evidence.Â

2.By a judgment dated 6th June 2016, in Sessions Case No.35/2014 arising out of FIR No.17/2014 registered at Police Station (â??PS?) Paharganj, the

learned Additional Sessions Judge, Special Fast Track Court-2 (Central) (hereafter the trial Court), the accused i.e. Mahender @ Ganja (A-1;

appellant in Crl.A.1025/2016), Mohd. Raja (A-2; appellant in Crl.A.1141/2016), Raju Bhajje @ Raju Bhagat (A-3; appellant in Crl.A.1139/2016),

Arjun (A-4; appellant in CrI.A.1140/216), and Raju Chhaka (A-5; appellant in CrI.A.1138/2016), for the offences punishable under Sections 376D,

366/34, 342/34, 395, and 506 Part-II/34 Indian Penal Code (â??IPC?). Additionally, Arjun (A-4) was held guilty of offences under Section 397 IPC

and Arjun (A-4) and Mohd. Raja (A-5), were held guilty of the offences punishable under Section 412 IPC.Â

3. These appeals, which challenge the above conviction, are also directed against the order on sentence dated 10th June 2016 whereby each of the

Appellants were sentenced as under:

a. For the offence punishable under Section 376-D IPC, to undergo Rigorous Imprisonment (RI) for life which shall mean imprisonment for the

remainder of convicts' natural life, in addition to payment of fine of Rs.50,000/- each, and in default to undergo Simple Imprisonment (SI) for 2 years.

b. For the offence punishable under Section 366/34 IPC, to undergo imprisonment for 10 years, in addition to payment of fine of Rs.5,000/- each, and in

default thereof, to undergo SI for 2 years.

c. For the offence punishable under Section 342/34 IPC, to undergo imprisonment for 1 year and pay a fine of Rs. 1,000/- each, and in default thereof,

to undergo SI for 3 months.Â

d. For the offence punishable under Section 395 IPC, to undergo RI for 10 years, and pay a fine of Rs.20,000/- each, and in default thereof, to undergo

SI for 1 year.

e. For the offence punishable under Section 506 Part-II/34 IPC to undergo imprisonment for 7 years, and pay a fine of Rs.5,000/- each, in default

thereof, to undergo SI for 1 year.

Further, for the offence punishable under Section 25 of Arms Act, A-1 was sentenced to undergo RI for one year and pay a fine of Rs.10,000/-, and

in default thereof, to undergo SI for 3 months.

Further, for the offence punishable under Section 412 IPC, A-4 and A-5 were each sentenced to undergo RI for 10 years and pay a fine of

Rs.10,000/- each and in default thereof, to undergo SI for 1 year.

Further, for the offence punishable under Section 397 IPC, A-4 was sentenced to undergo RI for 7 years, and pay a fine of Rs.10,000/-, and in default

thereof, to undergo SI for 1 year.

All the sentences were directed to run concurrently.

The charge

4.The charge against the Appellants is that on 14th January 2014, at around 6 to 7 pm, A-1 to A-5 along with Shyam Lal @ Bhajni (A-6) (who expired during the trial) along with three juveniles in conflict with the law (â??JCLs?) in furtherance of their common intention abducted the victim (PW-12), wrongly confined her, robbed her of her belongings, threatened to kill her by showing her a knife/dagger and committed gang rape on her.Â Â

Background

5.The victim (PW-12), is a Danish national who was visiting India as a tourist. She arrived in India on 31st December 2013 and stayed at a hotel in Paharganj, New Delhi. She visited Udaipur, Pushkar, Jaipur, Agra etc. After she returned to Delhi on 13th January 2014, she stayed at the same hotel in Paharganj.Â

6.On 14th January 2014, PW-12 left her hotel at 9.30 am and visited the National Museum. In the evening, she decided to return to her hotel. Owing to the rush on the roads, she decided to walk back to her hotel from State Entry Road, one of the roads branching off from the outer circle of Connaught Place. This road leads to one of the entrances to the New Delhi Railway Station. She found no rush on that road and eventually came to a dead end. She asked a young man nearby whether she could go that way to which he responded in the affirmative and gave her directions.Â

7.PW-12 recollected later that she noticed a statue of a Hindu goddess near the spot. She went on to state that eight persons who were hiding behind the bushes emerged and caught hold of her. Even as she attempted to scream for help, the assailants put a piece of cloth on her mouth to stifle her screams. She remembered that some sniffing glue had been put on that piece of cloth.

8.PW-12 was carrying a black coloured cloth bag containing her mobile phone, a music player, her glasses with a case, earphones, guide book, money in a small purse and some cosmetics. In another small purse, she was carrying her passport and approximately 750 Euros and Rs.3000/- Indian currency. In another bag she was carrying her passport and money. The assailants took away all her belongings except for her passsport, visa card and black cloth bag. They assaulted her on her face and also other parts of her

body. One of the assailants brandished a very big knife, placed it on her neck, and threatened to kill her if she shouted.Â

9.They then proceeded to rape her one after the other despite her pleas to them to spare her. The assailants are also stated to have repeatedly hit the victim during the course of the rape. PW-12 states that this continued for about five hours after which the assailants gave her a pair of trousers which she wore and returned to the hotel. Some Canadian tourists staying in the same hotel helped PW-12 in calling the police. It transpired that she had to get in touch with the Danish Embassy in Delhi. According to PW-12, it is only after the arrival of the officials of the Danish Embassy that the police took action.Â Â

Investigation

10.Since PW-12 was returning to Denmark the next morning, her statement was recorded at 11:50 pm on 14th January 2014 itself. She gave a handwritten statement in English to the above effect giving her e-mail ID and her address in Denmark. A rukka was drawn up on the basis of the statement and then sent to the PS for registration of FIR No.17/2014 under Section 376D and 396 IPC at 12:10 am on 15th January 2014. PW-12 declined to undergo a medical examination immediately. She was medically examined in Denmark as soon as she returned there. Those reports were subsequently sent to the Investigating Officer (â??IO?) of this case.Â Â

11.Sub-Inspector (SI) Pushpa (PW-24) reached the hotel where PW-12 was staying on 14th January 2014 at some point between 10:30 and 11:00 pm on the directions of senior officers. She found a team of police officers already present there. PW-12 handed over to PW-24 her written complaint.

PW-24 noticed injuries on the face and another parts of body of the PW-12. Her clothes were muddled. Despite the repeated requests of PW-24,

PW-12 declined to undergo medical examination. PW-12 produced before PW-24 a groundnut coloured handkerchief which according to her was

used by one of the accused for glue sniffing. The handkerchief was seized. PW-12 also handed over PW-24 a white coloured top which was in a torn

and dirty condition, a multi-coloured long top which was also in a torn and dirty condition, a black coloured sweater on which â??Made in Bangladesh?

was written, and black coloured inner wear and lower wear. These clothes were put into a parcel and then sealed by PW-24. According to PW-24, on

intimation given to Danish Embassy, two officials from the Embassy also arrived and in their presence, a request was again made for medical examination, but PW-12 refused.

12. PW-24 then proceeded to the spot along with SI Anand Singh (PW-19). There they found a small room and when they banged on the door of the room, one Shivji Singh (PW-2) opened the door and he introduced himself as the gardener of the Railway Officers' Club. He appeared perplexed but joined the investigation. PW-2 is supposed to have narrated to the police the entire incident which he had purportedly seen. According to PW-24, with the assistance of PW-2, she prepared the rough site plan (Ex. PW-24/B).

13. In his statement under Section 161 Cr PC recorded in the early hours of the 15th January 2014, PW-2 claimed to have known the accused for

many years as they were all from the same area as him. He stated that at 4:30 pm on 14th January 2014, he saw A-1 to A-6 along with the three

JCLs sniffing glue. He left to buy vegetables and returned from the market at around 6:00 pm. At around 6:30 pm, he heard the screams of a lady in a

foreign tongue which he did not understand. He came out of his room and stood on a small mound of mud to see what was going on. He saw that nine

persons (the six accused and the three JCLs) had surrounded a female foreigner after stripping her bare of her clothes. They had laid her on the

ground. According to PW-2 he saw A-1 in the act of raping the victim who was desperately trying to escape but was surrounded on all sides by the

remaining accused. PW-2 stated that A-4, who was holding a knife, noticed him witnessing the incident. A-4 purportedly gestured with the knife to

PW-2 to leave immediately.

14. According to PW-2, on the previous night, i.e. 13th January 2014, there had been a programme for Lohri and he had stayed up all night and was

consequently tired. He got frightened when A-4 threatened him with the knife. He was aware of the background of the accused persons who used to

beat up and humiliate victims. He was also concerned about his own job.

PW-2, therefore, decided to go back to his room and fell asleep.

15. The crime team was called to the spot and photographs were taken. Six used condoms were found at the spot and were kept in a separate

container. A pack of unused condoms and one empty cover were also recovered. Four cigarette butts, leaves on which white liquid was found, one

The trial

21. At the conclusion of the investigation, a charge sheet was filed and charges were framed by the trial Court against the accused on 25th November

2014 in the above terms.Â

22. Twenty-eight witnesses were examined for the prosecution. In their respective statements under Section 313 Cr PC, each of the accused denied

the circumstances against him and claimed innocence. Each of them stated that he had been falsely implicated in this case. However, no defence

evidence was led.

Impugned judgment of the trial Court

23. In the impugned judgment, the trial Court came to the following conclusions:

(i) The testimony of PW-2 was truthful and reliable. He knew all the accused since their childhood. He stood firm during cross-examination. No

question was put to him in his cross-examination about his witnessing the incident after climbing on the heap of mud at a construction site just

immediately behind the scene of crime.Â

(ii) PW-2, who was a natural eye witness, identified each of the accused persons during the trial in the Court.Â

(iii) The recoveries of the stolen articles from the accused were also proved by the prosecution.Â

(iv) The DNA report proved by Mr. D.S. Paliwal (PW-25), an expert from the FSL, was a clinching piece of evidence. The DNA profile generated

connected the accused persons with the crime. There was similarity in the report sent by the authorities at Copenhagen after medical examination of

PW-12 and the DNA profiles as generated by the FSL here.

(v) There was no merit in the contention that the prosecution had manipulated the evidence under media pressure.Â Â

24. It was accordingly held that the prosecution had been able to prove the case against the accused persons beyond all reasonable doubt. The trial

Court then proceeded to convict the Appellants and sentence them in the manner already indicated hereinbefore.

25. This Court has heard the submissions of Mr. Azhar Qayum, the learned counsel for A-2 to A-5, and Mr. Chetan Lokur, the learned counsel

appearing for A-1. The Court has also heard the submissions of Mr. Amit Chadha,

the learned APP for the State.Â

Analysis of the evidence of PW-12

26.The Court would first like to discuss the evidence of the victim herself. The circumstances under which she gave the initial statement to the police

describing what had happened to her on the evening of 14th January 2014 basically remained unaltered even during her deposition during trial. The

learned Counsel for the Appellants did point out that her identification of the accused in the Court gave rise to doubts whether all of them were in fact

involved in the commission of the crime. In particular, reference was made to the following portion of her deposition:

â??I might be able to identify the offenders, if shown to me. However, I am not certain if I will be able to identify them or not as it has been 1 Â½

years since the incident.

At this stage, on seeing the accused persons present in the court today, the witness has pointed out towards accused Raju S/o Om Prakash, accused

Arjun S/o Hari Om, accused Raju S/o Bhagat Singh and accused Mahender @ Ganja and states that she is certain that the above named accused

committed rape upon her on the aforesaid date and in the above stated manner. She further states that she is not certain if the other two accused

present in the court today [i.e. accused Mohd. Raja and Shyam Lal @ Bhajni] were also the offenders or not.Â

At this stage, witness again states that she is not 100% sure if the accused wearing black T-shirt and having beard [i.e. accused Raju S/o Bhagat

Singh] was also one of the offenders or not due to lapse of time.â??Â

27.Later in her cross examination by the counsel for the accused, PW-12 stated:

â??I am not certain but accused in black shirt [witness has pointed out towards accused Raju S/o Om Prakash] present in the court today, is the

person who had told me the direction on that day. I cannot say after how much time they showed me the knife after I asked about the direction to my

hotel.â??Â

28.It was submitted by learned counsel for the Appellants that that while PW-12 was uncertain about the involvement of Mohd. Raja (A-2), Shyam

Lal @ Bhajani (A-6) and Raju Bhajje @ Raju Bhagat (A-3), she has named only three of the accused, i.e. Mahender @ Ganja (A-2), Arjun (A-4)

and Raju Chhaka (A-5). Even as regards A-5, it is sought to be pointed out that he probably only gave her directions and nothing more.Â

29.The above submission overlooks the fact that PW-12 stood firm despite extensive cross-examination by counsel for the accused as to the essential

details of her deposition. She was specifically asked about A-5 who was having light hair at the time of the incident and was referred to by her as a

European. She pointed to A-5 in Court and stated â??I am also confused as this accused has brown eyes and the person referred as â??European?

has lighter eyesâ??.

30.It must be remembered that PW-12 came back to India nearly 18 months after the incident and was deposing in Court on 1st July 2015. Some

leeway has to be given for this lapse of time and the further fact that she had suffered a traumatic experience. Her uncertainty has to be understood

in this context. She was in a foreign land encountering perfect strangers. The time of rape was in the evening hours of 14th January 2014 when sunset

occurred early. Therefore, her uncertainty about the exact identification of some of the accused was understandable.Â Â

31.In this context the following observations of the Supreme Court, in the context of the testimony of a victim of sexual assault, in State of Punjab v.

Gurmit Singh AIR 1996 SC 1393 are relevant::Â

â??We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as

physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys

the physical body of his victim; a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while

trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of

a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to

throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking

corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may

look for evidence which may lend assurance to her testimony, short of

corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.â??

32. Again in *Om Prakash v. State of U.P.* AIR 2006 SC 2214 the Supreme Court observed:Â

â??11. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after staking her own prestige and honour.

â?|..Â

13. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars..â?|. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. 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.â??

The forensic evidence

33. In the present case, the presence of the accused at the spot has been corroborated by the DNA evidence that has been proved in this case through

PW-25, the FSL expert. In particular, the Court would like to refer to the DNA Profile analysis which was explained by him as under:

1. DNA Profile from the source of exhibit '18e' (Blood sample of Mahender @Ganja) is matching with DNA Profile from the source of exhibit

'A-2b' (multi-colour top), exhibit 'A-3d' (condom), exhibit 'A-3e' (condom).

2. DNA Profile from the source of exhibit '18e' (Blood sample of Mahender @Ganja) is also matching in mixed DNA Profile (DNA Profile from more

than one person) from the source of exhibit 'A-2a' (white colour top), 'A-2c' (Sweater) & exhibit '29' (Blanket).

3. DNA Profile from the source of exhibit '31a' & '52' (Blood sample of Mohd. Chand) is matching with DNA Profile from the source of exhibit 'A-

3b' (Condom),

4. DNA Profile from source of exhibit '31a' & '52' (Blood sample of Mohd. Chand) is also matching in mixed DNA Profile (DNA Profile from more

than one person) from the source of exhibit 'A-2a' (white colour top), 'A-2c' (Sweater), & exhibit '29' (Blanket),

5. DNA Profile from the source of exhibit '20d', exhibit '32' (Blood sample of Mohd. Raja), exhibit '22f' (Blood sample of Raju Bhajje @ Raju

Bhagat), exhibit '24f' (Blood sample of Raju Chhakka), exhibit '26e' (Blood sample of Arjun), exhibit '28d', exhibit '28e' & exhibit '47' (Blood sample

of Uvedullah), exhibit '63' (Blood sample of Shyam Lal @ Bhajani) & exhibit '65' (Blood sample of Sadakat @Javed @Chikna) is matching in mixed

DNA Profile (DNA Profile from more than one person) from the source of exhibit 'A-2a' (White colour top), 'A-2c' (Sweater) & exhibit '29'

(Blanket). (emphasis in original)

34. It was repeatedly urged by learned counsel for the Appellants that with the crime being a sensational one which had attracted considerable media

attention, it would have been easy for the police to manipulate even the DNA evidence. It was submitted that it was for the prosecution to explain

how the mixed samples containing DNA profiles of both the accused and the victim could possibly be found on the floral top when what was

described was a gang rape. It was further submitted that how the blanket which was purportedly laid on the ground and on which the victim lay while

she was being raped, was recovered has not been explained.

35. As far as the clothes of the victim being handed over by her to the police at

the earliest possible opportunity, the Court has already referred to the evidence of PW-24 which again is clear and convincing and has not been shaken in cross-examination. No questions have been put to PW-25 about any tampering of the samples sent to the FSL for examination. There is no suggestion that any of these samples could have been manipulated or replaced.

36. In the considered view of the Court, the convincing evidence of PW-12 has been fully corroborated by the forensic evidence in the form of the DNA Profile analysis. This by itself conclusively proves not only the presence of the accused at the scene of crime but their involvement in the commission of gang rape on the victim.

Reliability of the eye-witness account

37. The Court is conscious that the trial Court has placed considerable reliance on the evidence of PW-2 who was put forth by the prosecution as an eye-witness to the entire occurrence. However, there is one serious lapse committed by the IO as far as this witness is concerned, which cautions the Court from straightaway accepting his testimony as a natural witness to the occurrence.

38. According to PW-2, he was standing on a heap of mud at a construction site just behind the scene of crime in order to view what was happening.

Although the rough site plan drawn up by PW-24 indicates where this construction site was, it does not indicate the exact spot from where PW-2 is supposed to have witnessed this occurrence. The rough site plan does indicate a room but fails to mention that the said room was the room occupied by PW-2. Even the APP did not show PW-2 the rough site plan during his deposition in Court to confirm whether the room shown therein was his room and where he was standing at the construction site shown in the rough site plan.

39. The Court is unable to understand why the IO would not undertake this basic exercise of showing in the rough site plan, at the very first instance, the location of the eye witness, i.e. the precise spot from where the eye witness viewed the occurrence. This assumes even greater significance

because it is rare that there would be an eye witness to an incident of rape other than the victim. It must also be remembered that the rape is stated to

have happened for a period of five hours from around 5:30 pm or 6:00 pm on

14th January 2014. This being winter and a time of early sunset, the IOs should have satisfied themselves that it would have been possible for PW-2 to actually witness the incident clearly from that distance and at the hour of sunset. This basic exercise of re-constructing the scene of crime has not been undertaken by the IO.Â Â Â

40. Another aspect of this case that the Court considers imperative to highlight is the carelessness of the IOs undertaking the investigation in the present case. The scaled site plan was prepared on 27th January 2014 after the statement of PW-2 under Section 161 Cr PC was recorded.

Mysteriously, the under-construction site and the room shown in the rough site plan have disappeared in the scaled site plan. In sum, there was a mishandling of the evidence of PW-2 by the IO. It is of course entirely another matter that the counsel who appeared for the accused in the present case in the trial Court did not subject either the IO or even PW-2 to the kind of cross-examination that would have been expected of a defence counsel.Â Â

41. The Court, therefore, is not prepared to accept the evidence of PW-2 as being of a natural witness who could have seen the occurrence. For the same reason, the Court is of the view that the trial Court erred in giving accolades to the IOs in the present case.Â Â Â

Conclusion

42. However even if the evidence of PW-2 is kept aside, in view of the unrebutted evidence of the victim herself, which has been corroborated by the DNA Profile analysis, and with the recoveries from the accused having been proved without any serious contradiction by the counsel for the accused, the Court is satisfied that the ultimate conclusion of the trial Court regarding the guilt of the Appellants for the offences with which they were charged is correct.Â

43. No grounds have been made out for interference with the impugned judgment and order on sentence of the trial Court. The appeals are accordingly dismissed. The trial Court record be returned forthwith along with a certified copy of this judgment.Â