

(2019) 07 DEL CK 0478

In the Delhi High Court

Case No : Criminal Appeal No. 851 Of 2018

Meera Giri

APPELLANT

Vs

Wahid & Ors

RESPONDENT

Date of Decision : 29-07-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 200, 313, 378

Indian Penal Code, 1860 — Section 34, 375, 376, 376(2)(g), 452, 506

Citation : (2019) 4 JCC 3931

Hon'ble Judges : Siddharth Mridul, J;Brijesh Sethi, J

Bench : Division Bench

Advocate : Braj Kishan Ray, Sulaiman Mohd. Khan, Taiba Khan, Ashish Choudhary, S.A. Rajput, Riaz Mohd., Ravi Nayak

Final Decision : Dismissed

Judgement

Siddharth Mridul, J

1. The present appeal under Section 378 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), assails the judgment and order dated 19.12.2016, passed by the Sessions Court, Tis Hazari, Delhi, in Session Case No.75/2013, CC No.412/04/09 titled as 'Meera Giri vs, Wahid and Ors.' and in Session Case No.111/14 titled as 'Meera Giri vs. Rashid', under Section 452/376(2)(g)/506/34 IPC; whereby all the respondents were acquitted of all charges.

2. Briefly encapsulated, the case of the prosecution is as follow:

(a) On 14.12.2008, the prosecutrix/complainant (hereinafter referred to as 'PW-1') filed a complaint case against the respondents, namely, Jaffar, Iklakh, Sarwar Noor, Rashid, Wahid @ Wazid, Vishal @ Vishaluddin, Naim and Gujjar.

(b) On the directions of the Court of Competent Jurisdiction, an FIR bearing No.158/2009 under Section 376(2)(g)/452/506/34 IPC (hereinafter referred to as 'subject FIR') was registered against the aforementioned 8 accused persons, along with some ladies.

(c) PW-1 alleged that the respondents used to threaten her to withdraw the said FIR and eventually on the intervening night on 25th /26th May, 2009, when she was asleep along with her minor daughter, namely, Baby (hereinafter referred to as 'PW-8') at their residential house, the respondents forcibly entered therein after breaking down the door.

(d) It was alleged that the respondents terrorized PW-1 into withdrawing the said FIR and when she refused to compromise the matter with them, accused Iklakh and Wajid @ Wahid caught hold of her both hands, the accused Rashid closed her mouth with his hands and Vishal caught her from her hair.

(e) Accused Gujjar was then, alleged to have removed her salwar and raped her, whilst the other accused stood outside preventing next door neighbours from coming to her aid.

(f) It was the prosecution's case that PW-8 had been hidden by PW-1 in the small space next to the refrigerator, which was in the adjoining room and witnessed the entire incident therefrom.

(g) PW-1 is alleged to have made the following calls to the PCR on 100 number being DD No. 47A dated 25.05.2009 and DD Nos.5A and 6A dated 26.05.2009, PS Uttam Nagar.

(h) PW-1 further alleged that, whilst leaving, the accused told her that the SHO of the concerned Police Station is known to them and consequently, her complaints with regard to the incident would fall on deaf ears.

(i) PW-7, SI Ved Prakash recorded the statement of PW-1. It was the allegation of the PW-1 that, despite the visit by PW-7, she was not medically examined, owing to the circumstance that he was not accompanied by a lady police official and was assured that, she would be escorted for the same once, one was available.

(j) PW-1 further went on to allege that when the police did not return, she called PW-7 around 4-4:30 am and was asked to come to Police Station Uttam Nagar. She further alleged that even thereafter, the police refused to get her examined medically and asked her get it done on her own. PW-1 thereafter went to Deen Dayal Upadhyay Hospital, New Delhi and had herself medically examined vide MLC [Ex.PW-4/A].

(k) PW-1 lastly, alleged that despite repeated entreaties, the police declined to register a case on her complaint and she was constrained to institute an appropriate proceeding before the Court of the learned Metropolitan Magistrate under Section 200 Cr.P.C.

(l) On the directions of the Court of Competent Jurisdiction, the subject case was eventually registered as aforestated.

3. The learned Trial Court framed charges against the respondents vide order dated 05.10.2011. In order to establish its case, the prosecution examined 10

witnesses in all.

4. Upon completion of the prosecution's evidence, the statement of the accused persons was recorded under Section 313 Cr.P.C. It was submitted on their behalf that they have been falsely implicated in the present case and that they would lead evidence in their defence.

5. DW-1 to DW-4 were examined in evidence on behalf of the respondents.

6. Having heard learned counsel appearing on behalf of the parties and after due consideration of the evidence on record, the learned Trial Court vide the judgment and order impugned in the present proceedings returned findings, which is reproduced hereinbelow, in extenso:

" 30. As regards the offence u/s 452 IPC, for proving the offence of committing house trespass, the testimonies of PW-1, prosecutrix & PW-8 (d/o Prosecutrix, herein after called as 'Baby') are relevant. They have stated that there were two gates in the house of Prosecutrix in order to reach the house of the Prosecutrix and out of those two doors, one door was sliding door having iron grill fitted there and other was iron door. In the cross examination, Prosecutrix had specifically stated that accused persons had used gas cutter, to cut the said doors. Accused Gujjar as per testimony of PW-1 and PW-8 was having gas cutter. PW-1 had stated in her cross examination, conducted on 11/04/13, in post lunch session, that it took about 10-15 minutes for accused persons for breaking open the door and to come inside. But it is also admitted case of the complainant that in these 15 minutes, which allegedly, accused persons have taken to break open the door of the prosecutrix's house and to enter in her house, she did not make any call to the police nor she made any call to her brothers, who were residing in Delhi, at that time. This conduct of the Prosecutrix specially becomes relevant in the light of the fact that on the same date ie 25/05/09 at about 4p.m allegedly quarrel had taken place between accused persons and the Prosecutrix, for which, police was called and she had sent her son to the residence of her brother as she wanted to ensure his safety. Despite knowingly well that many cases were pending between the complainant and accused persons, also knowing fullywell that in the afternoon, quarrel had taken place between herself and the accused persons, due to which, she had sent her son to the house of her brother, she had not acted promptly by calling the police at the time, when accused persons were allegedly trying to break open the door of the prosecutrix's house. It is not the natural conduct of a person in distress, therefore, it cannot be said that any such incident had actually taken place. No broken door or damaged door by the gas cutter has been shown or proved on record by the complainant/prosecutrix to show that accused persons had entered her house forcibly. No such evidence has been led by the prosecutrix to prove that any door of her house was cut or damaged by accused persons and thereafter they have entered in the house of the prosecutrix. Hence I am of the opinion that prosecutrix has not been able to prove her case against accused persons with regard to the offence u/s 452 IPC.

31. As regards the allegation under section 376 (2) (g) IPC, it is settled proposition of law that for proving the case of rape against the accused persons- the requirements are that- firstly presence of the accused and prosecutrix at the same place and at the same time is to be proved; secondly the occurrence of sexual relationship between the parties has to be proved and thirdly it has to be proved by the prosecution that prosecutrix has not given her consent for such act or that the consent of the prosecutrix was not voluntary.

32. A case to fall under section 376, will have to meet the requirements of definition of 'rape' given in section 375 IPC.

33. Though, it is settled proposition of law that on the sole testimony of the prosecutrix, accused can be convicted but caution given by Hon'ble Supreme Court and Hon'ble High Courts are that testimony of prosecutrix should be so cogent and trustworthy, which only point towards the guilt of the accused persons and does not leave any room for doubt or suspicion. In case, any doubt or suspicion arise in the testimony of the prosecutrix, benefit has to be given to accused persons.

34. In the light of these facts, I will discuss the evidence of prosecutrix led on the point of charge u/s 376 (2) (g) IPC.

35. In this case the prosecutrix had stated that all these accused persons, who have been named in the present case, have entered into the house of the prosecutrix and the incident had taken place at about 12.30 a.m, when accused persons had forcibly entered into the house of the complainant. At the instance of other accused persons, accused Gujjar (P.O) had committed rape upon the prosecutrix. It has also come in the evidence led by the prosecutrix that PW-8 (daughter of prosecutrix) had been eye witness of the incident and she had tried to support the case of the complainant. But on one hand, there is testimony of the prosecutrix along with PW-8 who tries to support the case of the complainant against accused persons but on the other hand, there is testimony of PW-7 SI Ved Prakash, who had gone to the house of the complainant after receiving the DD entries ie DD no. 5A and DD no 6A(dt 25/05/09) and DD no 47A (dt 25/05/09), which contradicts the testimonies of PW1 and PW8 'Baby'.

36. The defense of the accused persons all through the case, has been that no such quarrel had taken place between the parties on the intervening night of 25/26.05.09 and no such incident of rape had taken place. Rather the case of the accused persons have been that since there was property dispute between the parties, the complainant wanted to grab the property from accused persons and wanted to throw them out, due to which, she had resorted in lodging false complaints against accused persons and one such complaint ie FIR no 868/03 for kidnapping the son of prosecutrix namely Chandan had earlier been lodged by the prosecutrix. It has been admitted by the prosecutrix in her cross examination that said FIR was cancelled by the police, as it was not found to be correct.

37. During the lengthy cross examination of the prosecutrix, prosecutrix had

admitted that at the time of incident, she was having 4-5 mobiles phones with her. During cross examination conducted on 29/05/13 by Sh C B Garg, Ld counsel for accused Jaffar and Iklakh, prosecutrix had admitted that she made call to the police at about 11.45 p.m but admittedly that call was made by her in respect to the quarrel. Although, it was tried to be stated by the prosecutrix, during cross examination, that she made a call to the police, when accused tries to break open the iron door of her house. However, admittedly, this complaint made by the prosecutrix at 11.45 p.m is only in respect to the quarrel and no such incident of attempting to break open the lock or the door has been reported by the prosecutrix. Prosecutrix has also admitted that at that time, PCR van had come. She had also admitted that crowd had gathered there to inquire about what had happened. Thus, it again shows that even the call made by the prosecutrix at 11.45 p.m to the police, on which PCR had reached the spot, does not show that accused persons have ever tried to enter forcibly into the house of the prosecutrix or that there was any apprehension of commission of offence by the hands of the accused persons, at that time. The only matter, reported to the police, was regarding "quarrel", & since police did not find substantial material in the complaint, police had not taken any action. As per the statement of PW-7 SI Ved Parkash call was received by him vide DD no 5A and DD no. 6A at about 2.30 a.m, on which he reached the house of the complainant at 2.35 a.m. Even at 2.30 a.m prosecutrix had not stated to PW-7, SI Ved Parkash that any offence of 'rape' had been committed against her by the accused persons.

38. Testimony of PW-7 is very important in this regard. PW-7 SI Ved Parkash had categorically stated, in his examination in chief, that he had gone to the spot of incident three times on receipt of above said DDs. PW-7 when appeared as PW-4 in Sessions Case No. 111/14, in his cross examination by Ld counsel Sh S.A. Rajput, had specifically stated that when he reached the house of the prosecutrix on receipt of DD no 5A and DD no 6A, he met the prosecutrix and her son Chandan, Inspector Bhram Prakash Additional SHO and other beat staff were also present there. Also in the examination in chief PW-7 (while appearing in the Sessions Case No. 75/13, where he was examined as complainant witness), had specifically stated that after receiving the DD no.5A and 6A he had reached the spot of incident at about 2.40 a.m, there he met the prosecutrix and her son Chandan. At that time, complainant has informed him that it was a 'property dispute'. Witness SI Ved Parkash has specifically stated in his examination in chief that prosecutrix did not disclose about being raped by any person at that time. Despite categorical statement of PW-7 SI Ved Parkash, in examination in chief, neither the witness was cross examined by the prosecutrix on these aspects nor any suggestion was given to the witness that he is deliberately trying to depose incorrectly or he has been won over by the accused persons. Since the testimony of PW-7 SI Ved Parkash, who is police official, who has reached the spot after receiving the DD entries regarding the quarrel and had inquired from the complainant about the incident, is uncontroverted and unchallenged by the prosecutrix herself, it inspires confidence and proves that even till 2.40 a.m, on

26/05/2009, no incident of rape had taken place. Except there being some quarrel between the parties, no serious offence was committed by accused persons against the prosecutrix. Testimony of PW-7 also proves that the son of prosecutrix was present in the house, although, the prosecutrix had tried to deny his presence at the spot of incident and has given the excuse that her son namely Chandan had already been sent by her to her brother's house. Despite taking this stand, PW-7 had not been cross examined or suggested by the prosecutrix about speaking falsely before the court. Thus, I am of the opinion that testimony of PW-7 is credible testimony, which proves the dent in the story of the complainant. Repeated calls were made by the complainant for reporting the matter and in all the matters, complainant has reported that it was quarrel, which had taken place between herself and the accused persons. She had not narrated the serious offence being committed by accused persons. Nor she had placed or proved on record any offence regarding breaking open of the door by accused persons. Presence of son of prosecutrix namely Chandan at the place of incident has been proved by PW-7 SI Ved Parkash. Sh Chandan was material witness and since he has not been examined by prosecutrix, the only inference which could now be drawn is that his testimony must have been detrimental to the case of the complainant, hence he has not been examined by the complainant.

39. One more important aspect, required to be discussed is that in the cross examination, when the prosecutrix was asked about calling her brothers at the time when accused were trying to break open the door of her house before the alleged incident of rape or after the alleged incident, she had specifically stated that, "her brothers are not her chowkidars", therefore, she had not called them either prior to or after the incident. But as per the testimony of PW-9, who is son of landlord, prosecutrix-complainant had called him after the incident and told him about the occurrence of alleged rape. However, PW-1, prosecutrix is silent towards this aspect. PW-1, in her testimony, has nowhere stated that she had informed about the alleged incident to PW-9. Thus, testimony of PW-9 becomes suspicious. Even otherwise, it becomes highly improbable that a person after being victim of serious offence will not inform her own brothers but will inform the son of the landlord, who is not ever residing in Delhi. Whereas her brothers are residing in Delhi, at the distance, which could be covered in 30 minutes on motorcycle. Therefore, I am of the opinion that there are material discrepancies between the testimony of PW-1 & PW-9 regarding being informed about the alleged incident. Even brother of prosecutrix namely Subhash and Anil have not been examined in this case. Admittedly Sh Anil is real brother of the prosecutrix. She had stated that she had gone to the hospital on 26/05/09 with her brother Sh Anil. Despite that, he has not been examined by the complainant. Even this fact of taking her brother to the hospital by prosecutrix, has been countered by PW-8 Ms 'Baby'. She had stated that she does not know as to with whom, her mother had gone to the hospital. Hence, I am of the opinion that testimony of Sh Anil, with whom the prosecutrix had allegedly left her son and with whom

prosecutrix had gone to the hospital allegedly would have been material witness in order to complete the chain of sequence. In the absence of testimony of Sh Anil, brother of the complainant, various lacunas have cropped up in the case of the complainant, which has not been explained by the complainant. Therefore, I am of the opinion that prosecutrix has not been able to prove her case beyond reasonable doubt that accused persons have committed house trespass or that they have committed rape upon the prosecutrix or that they have ever threatened her of dire consequences not to tell the incident to any one.

40. As regards the charge u/s 174A IPC as against accused Rashid is concerned, accused Rashid was in judicial custody, as per the application moved by Sh S A Rajput on 26/08/2013. It was mentioned in the application that accused Rashid was in Judicial custody in case FIR no 37/2011 PS Ranhola, hence production warrants were issued against the accused Rashid. No evidence has been led by the complainant to prove that accused Rashid had deliberately absented himself prior to his arrest in FIR No. 37/2011. As regards the charge u/s 174A IPC as against accused persons ie Wahid and Sarvar Noor, no evidence has been led by the prosecutrix. Hence, I am of the opinion that prosecutrix/complainant has not been able to prove the case as regards the offence u/s 174A IPC as against accused Rashid, Wahid and Sarvar Noor.

7. A perusal of the above extracted findings, insofar as they relate to the alleged commission of the offence under Section 452 IPC, clearly and unequivocally lead to but one inescapable conclusion, that the prosecution failed miserably to establish, by leading cogent evidence that, the door of PW-1's house was either cut or damaged by the respondents, in order to commit house trespass.

8. Insofar as, allegation under Section 376 (2)(g) IPC is concerned, it is relevant to observe that at no stage in her calls-as evidenced by DD No.47A, 54A, 5A and 6A, which are spread out over a period of 5 hours- did she report anything therein, apart from the occurrence of a quarrel with the respondents.

9. Even when, PW-7 SI Ved Prakash admittedly visited the spot of the incident and met with PW-1 and her son Chandan, the latter only informed him of the occurrence of a quarrel owing to a property dispute and nothing further.

10. In addition, the conduct of PW-1, in the matter of reporting the incident does not inspire confidence. In short, the testimony of PW-1 does not establish the charge of 'gang rape' against the respondents in any manner much less beyond the shadow of doubt.

11. Further the medical testimony, as evidenced by Ex PW4/A, does not support the case of the prosecution either, in as much as , it does not establish the commission of rape upon the PW-1 by anybody, let alone the accused persons.

12. The Hon'ble Supreme Court of India in 'Ghurey Lal vs. State of Uttar Pradesh' reported as (2008) 10 SCC 450, authoritatively laid down the well settled principles, in relation to the reversing, over-ruling or disturbing the learned Trial

Court's verdict of acquittal in criminal cases as follows:

"70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread by material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused."

13. Predicated on the evidence available on record and having had the benefit of hearing the learned counsel appearing on behalf of the parties, who have taken us through the relevant testimony, we are of the view that there are no compelling or very substantial reasons to discard the finding arrived at by the learned Trial Court and we have no hesitation in saying that the findings returned in the impugned judgment are clear, cogent and do not suffer in any manner from the vice of being perverse, so as to enable this Court to arrive at a conclusion different from the one arrived at in the impugned judgment and order.

14. In view of the foregoing discussion, we find no infirmity with the impugned judgment and order dated 19.12.2016, so as to warrant interference by this Court in the present appeal.

15. The appellant has been unable to establish the guilt of the respondents beyond the reasonable doubt, and due appraisal of the evidence on record, does

not persuade us to arrive at a different view.

16. The appeal is accordingly dismissed with no order as to costs.