

(2014) 05 DEL CK 0182
In the Delhi High Court
Case No : Crl. A. 645/2002

Pushpindera

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 08-05-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 376(2)(g), 428
Penal Code, 1860 (IPC) — Section 304B, 376(2)(g), 506

Citation : (2014) 05 DEL CK 0182

Hon'ble Judges : Indermeet Kaur, J

Bench : Single Bench

Advocate : Jitender Sethi and Mr. Hemendra Jailiya, Advocate for the Appellant;
Varun Goswami, APP along with Megh Raj, SI, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Indermeet Kaur, J.—There are two appellants before this Court. They are aggrieved by the impugned judgment and order of sentence dated 16.5.2002 and 18.5.2002 wherein the appellants had been convicted under Sections 376(2)(g) and 506 Part II of the IPC and each of them had been sentenced to undergo RI for 10 years and to pay a fine of Rs. 5,000/- in default of payment of fine to undergo SI for 1 year for the offence punishable u/s 376(2)(g) of the IPC; for the offence u/s 506 Part-II of the IPC each of them had been sentenced to undergo RI for 3 years. Both the sentences were to run concurrently. Benefit of Section 428 of the Cr.P.C. had also been awarded to the appellants.

2. The version of the prosecution is that on 20.5.2001 at about 9.30 p.m. while "K" (PW-3) was travelling in a bus No. DL-1PA-6430 she was gang raped by three persons; they had committed rape upon her one after another; two appellants are before this Court. PW-3 had lodged her complaint (Ex. PW-3/A) in the local police station; she had noted the bus number on her palm.

3. Beat Constable Praveen Kumar (PW-8) who was on patrol duty near Badarpur Chowk market had first met the prosecutrix who was weeping. His version was

corroborative of this statement of the prosecutrix; he had deposed that the number of the bus was noted by the prosecutrix on her palm. PW-8 had taken the victim to the police station where they met SI Naresh (PW-11). Victim accompanied by PW-11, PW-8 and Constable Jogender (PW-7) went to the spot where accused persons were found in the bus; they were identified by the prosecutrix. Their disclosure statements Ex. PW-7/C and Ex. PW-7/D were recorded.

4. Pursuant to the statement of the victim (PW-3/A) rukka Ex. PW-11/A was dispatched at 2.00 a.m.; present FIR was accordingly registered. The arrest memo of the accused Ex. PW-3/D and Ex. PW-3/E disclosed that the accused were arrested at 8.00 a.m. on the following morning i.e. of 21.05.2001. Further case of the prosecution is that a helper of the bus Gaurav Kumar (PW-5) had witnessed this incident; this had also emanated in the complaint of the victim (Ex. PW-3/A).

5. The victim was medically examined and her MLC Ex. PW-4/A was proved in the testimony of Dr. Vimla examined as PW-4. The vaginal swab of the victim as also the penile swabs of the appellants had been collected and sent to the FSL along with salwar of the victim. The report of the FSL was proved as Ex. PW-11/B. Semen stains were detected on the vaginal swabs as also on the penile swabs.

6. In the statement of the accused persons recorded u/s 313 of the Cr.P.C. they both pleaded innocence; submission being that they have been falsely implicated.

7. No evidence was led in defence.

8. On the basis of the aforementioned evidence collected by the prosecution the accused persons were convicted and sentenced as aforementioned.

9. On behalf of the appellant arguments have been addressed by Mr. Jitender Sethi, Advocate. Written submissions have also been filed. It is pointed out that the prosecutrix (PW-3) had turned hostile and had not supported the version of the prosecution. Attention has been drawn to her cross-examination wherein she has admitted that she is illiterate and her complaint Ex. PW-3/A was not read over to her when she signed it. Submission being reiterated that the judgment of the trial judge convicting the appellants suffers from an illegality and is liable to be set aside. Submission being that the testimony of the so-called eye-witness (PW-5) is wholly disjointed and such a shaky testimony could not have been looked into by the trial judge to support the conviction of the appellants. Attention has been drawn to the testimony of PW-5 wherein he has stated that he had accompanied the prosecutrix to the police station. Submission being that this is contrary to the version of PW-8 who had stated that when he met the victim she was alone and was not accompanied by any person. Further submission on the testimony of PW-5 being that PW-5 has stated that the accused persons had been arrested from Ali Guard House which again is not in conformity with the version of the prosecution as PW-11 (the investigating officer) has categorically stated that the accused persons were arrested from the

bus. Attention has been drawn to the arrest memo to support this submission; submission being that in this the timing had been given as 8.00 a.m. and it mentions the place of arrest as Ali Mod, Mathura Road. Reliance has been placed upon Hem Raj Vs. State of Haryana, to support a submission that in such a case where the testimony of the victim herself is infirm; no other corroborative evidence can be looked into. Attention has also been drawn to the MLC of the victim (Ex. PW-4/A) where no injury mark had been noted; submission being that if there was a forcible gang rape by three persons some kind of injury would have been noted on the person of the victim; she would have obviously resisted such an act. Additional submission being that the semen allegedly found on the salwar of the victim cannot be connected to the accused as there is no blood grouping to establish that this semen was in fact the semen of either of the appellants. Reliance has been placed upon Rai Sandeep @ Deepu Vs. State of NCT of Delhi, to support a submission that in such a background where the entire evidence is shaky and not only is the version of the prosecutrix not to be relied upon but also the scientific and medical evidence is infirm benefit of doubt must accrue in favour of the appellant. Reliance has also been placed upon 1993 JCC 490 State (Delhi Admn.) Vs. Khem Chand to support the same argument.

10. Arguments have been refuted. It is submitted by learned public prosecutor that on no count does the impugned judgment call for any interference; even if a witness is hostile a conviction can still be based on the corroborative evidence. Further submission being that so much of the evidence of the hostile witness which is in conformity with the prosecution version can be relied upon and to support this proposition reliance has been placed upon Anjanappa Vs. State of Karnataka, submission being that even if the investigation is faulty and there have been certain omissions on the part of the investigating officer such loop-holes which are not glaring cannot accrue for the benefit of appellant. For this proposition reliance has been placed upon Karnel Singh Vs. State of M.P., .

11. Arguments have been heard and record perused.

12. The version of the prosecution is that a gang rape has been committed upon PW-3 on the intervening night of 20-21.5.2001. This was at around 9.30 p.m. The prosecutrix examined as PW-3 has not supported the prosecution in court. She, however, admitted that she had signed her complaint Ex. PW-3/A. This complaint reiterates that while she was travelling in a bus No. DL-1PA-6430 a gang rape was committed upon her by three persons. This was while she was travelling in the bus which she had boarded from Badarpur Border. She had raised a hue and cry; the volume of the music in the bus was raised and her cries could not be heard. In Ex. PW-3/A it had been disclosed that the victim was forced to remove her clothes and the act of rape was committed upon her forcibly; one boy who was in the bus tried to save her but he could not do so. Thereafter she was asked to alight from the bus; she had noted the bus number in her palm as DL-1PA-6430.

13. It was on this complaint that the investigative machinery was set into

motion. The rukka was sent at 2.00 a.m. on the same night. On oath in Court the victim had, however, resiled from this complaint (Ex. PW-3/A); she admitted that she had boarded the bus from Badarpur bus stop and while she was travelling in the said bus an attempt was made to rape her; she managed to escape and made a complaint in the local police station. She admitted that Ex. PW-3/A was her statement which was recorded and signed by her. She admitted her signatures on Ex. PW-3/C at point A which was the memo of seizure of the bus.

14. The main thrust of the argument of the learned counsel for the appellant is that since PW-3 the star witness of the prosecution has not supported the case of the prosecution and has been declared hostile, the trial court convicting the appellants had committed an illegality and the trial judge relying upon the so-called eye-witness (PW-5) to base his conviction has given a go-by to the basic tenets of criminal jurisprudence.

15. The law on a hostile witness has travelled and evolved over the years. A witness who receives from his earlier complaint and does not support the version set up by the prosecution on oath in Court is a witness who has to be tested with great caution and circumspection. In this case PW-3 had admitted the incident in so far as that on the fateful day while she was travelling in the bus an untoward act by certain persons was committed upon her. This has been admitted even on oath. She had admitted that she had gone to the local police station where she had made her complaint Ex. PW-3/A which is her own statement. There is no dispute that in one part of her cross-examination she had stated that her statement was not read over to her but keeping in mind her entire narration which had been given by her on oath it becomes apparently clear that PW-3 was aggrieved by certain acts which had led her to go to the police station and make a complaint. She had first met PW-8 on the way and had noted the bus number No. DL-1PA-6430 on the palm of her hand. In fact it was this number which had led the police party to the fateful bus. PW-3 has also on oath admitted that she had signed Ex. PW-3/C which is the seizure memo of the bus. Submission of the public prosecutor being that the witness has been won over by the accused persons and for reasons best known to her, she had not deposed in favour of the prosecution.

16. It is in this background that the testimony of PW-3 has to be viewed. Court shall revert to her version in the later part of the judgment.

17. PW-5 was the eye-witness who being a helper in the bus had witnessed the incident. He has on oath deposed that on the fateful day while he was travelling in the bus in his capacity as a helper, the accused persons stopped the bus near Ali Mod and they committed rape upon PW-3. He identified both the appellants in Court stating that the third accused was not amongst them. He had further deposed that he had objected to this act of the accused and asked them not to commit rape with the girl but they did not listen to him. He further deposed that after committing the rape the accused persons went away from the bus. PW-5

accompanied PW-3 to the police station where his statement was also recorded. Police went in search of the accused persons; the accused persons were arrested from Ali Guard's House. He reiterated that he was working in the bus.

18. At this stage it would be relevant to point out that in the course of the hearing both the appellants who were present in the Court were also queried about the status of PW-5. Both the appellants stated that PW-5 was working as a helper along with the appellant Pushpender who was also working as a helper; accused Adesh Dubey was travelling in the bus. The third accused (Rajender) who could not be not arrested was the driver of the bus.

19. PW-5 has given the place of arrest as Ali Guard's House. He has also stated that he had accompanied the prosecutrix to the police station where his statement was recorded. As per the testimony of PW-8 who was the first person who had met PW-3 while he was on patrolling duty (at about mid night) PW-3 had disclosed to him that she had been raped by 2-3 persons. Number of the bus was noted on her palm. He along with PW-3 went to the police station where they met PW-11. Statement of PW-3 was recorded by PW-11. Thereafter PW-11 accompanied by PW-8, PW-7 and the prosecutrix went to the spot i.e. Ali Mod, Mathura Road; where the bus was parked. On search of the bus three persons i.e. the two appellants Pushpender and Adesh Dubey and PW-5 were found inside the bus. PW-3 pointed out towards the appellants as the persons who had committed rape upon her. In cross-examination PW-8 admitted that when he met the prosecutrix she was alone. It is this line which has been harped upon time and again by the learned counsel for the appellants to support a submission that the testimony of PW-5 is to be discarded for the reason that he had stated that he had accompanied PW-3 to the police station but PW-8 had given a different version on this count.

20. PW-11 was the investigating officer who had recorded the statement of the victim Ex. PW-3/A. He has corroborated the version of PW-8 and had stated that on entering the bus and on pointing out by PW-3 both the appellants were identified as the persons who had committed rape upon her. Third person PW-5 was also present there. PW-11 had recorded the disclosure statements of the accused persons.

21. Testimony of PW-7 who has accompanied PW-8 and PW-11 is also corroborative.

22. The arrest memos of the appellants Ex PW-3/D and Ex. PW-3/E show the time of arrest as 8.00 a.m. on 21.5.2001 from Ali Mod, Mathura Road. Site plan is a relevant document. This depicts the bus which has been parked at point A on Ali Mod, Mathura Road and Ali Guard's House which is also on the same road is not more than 100-200 meters away. Ali Mod, Mathura Road as narrated in the arrest memo has made a reference to the area as the bus was admittedly parked on a patri on Ali Mod, Mathura Road. This is also the categorical version of PW-11 who in his cross-examination admitted that the bus was parked on a busy road

on the National Highway which road is the Ali Mod, Mathura Road, National Highway. PW-8 has also in his cross-examination explained that the bus was parked on Mathura Road which goes to Ashram and the bus was parked at Ali Mod. It is thus clear that this area is referred to as Ali Mod area. The arrest memos are clear on this aspect.

23. PW-5 was admittedly not a witness to the arrest. Thus the testimony of PW-5 that the accused persons were arrested from Ali Guard's House where they were found sleeping and which fact he learnt from the police is only a hearsay version and as such this part of the version of PW-5 is not admissible; to discard his otherwise credible eye-witness account of the gang rape which had been committed by the appellants upon the victim in this background is an argument wholly without merit. Testimony of PW-5 being credible and cogent is fully reliable.

24. The medical evidence Ex. PW-4/A reflects that no injuries had been suffered by the victim. Vehement submission of the learned counsel for the appellants being that if this was a case of forcible rape the victim would have suffered some kind of injuries. This proposition is not correct. The Apex Court has time and again reiterated that merely because no injuries were found on the victim it could not be an establishing factor to conclude that the victim had in fact not been raped. The history given in Ex. PW-4/A clearly shows that three persons had committed rape upon her while she was travelling in the bus and she was unknown to them. Submission of the learned counsel for the appellants on this aspect being that the names of the accused persons had become known to her at the time when the MLC was conducted is thus an argument without force as apart from the fact that the MLC does not bear a time the version of the prosecution all along has been that the appellants were strangers to the victim and even presuming that the names had become known to the investigating officer would be no reason to hold that they would have been known to the victim as well and she should have thus disclosed their names while she was narrating this history to the doctor.

25. Ex. PW-4/A further shows that the vaginal swab of the victim had been taken, her salwar had also been sent to the FSL. Penile swabs of the appellants had also been seized, sealed and sent to the FSL. This has been noted in the MLCs of the accused Ex. PW-2/A and PW-2/B. The penile swabs of the appellants, the vaginal swab of the victim and her salwar, all had semen stains. This is seen from the reports of the FSL Ex. PW-11/B and Ex. PW-11/C.

26. It is in this background and in view of the aforementioned evidence which has been collected by the prosecution that this court has to examine whether the testimony of PW-3 can be looked into to uphold the conviction of the appellants.

27. This court has no doubt in its mind that PW-3 had been won over for ulterior reasons. In this context the judgment of Anjanappa (supra) the Supreme Court while dealing with the testimony of hostile parents in a case u/s 304B of the IPC

had noted as under:

The parents of the deceased have turned hostile. They came out with a story which even the appellant did not have in mind. He merely denied the prosecution story. The parents stated that the deceased was heating water on stove. She caught fire accidentally and sustained burn injuries. If this was true, the appellant would have stated so in his statement recorded u/s 313 of the Code of Criminal Procedure ("the code"). We have perused the evidence of the parents.

We have no doubt that they were either won over by the appellant or pressurized into supporting the appellant.

.....It is sad that even parents did not stand by their daughter. We do not understand how a woman, particularly a mother, turned her back on the daughter. Possibly these witnesses were brought over by the appellant. Such conduct displays greed and lack of compassion. If they were threatened by the appellant and were forced to depose in his favour it is a sad reflection on our system which leaves witnesses unprotected.

28. In the present case as well the victim has clearly been won over. This is apparent from the fact that she has admitted that she had given her statement Ex. PW-3/A and had also signed seizure memo of the bus Ex. PW-3/C; in fact she had set the investigative machinery into motion when she pointed out the bus number which she had noted on her palm and disclosed this number to PW-8.

29. In the context of admissibility of testimony of hostile witness, the observations of the Supreme in *Mrinal Das and Others Vs. The State of Tripura*, are also relevant and read herein as under:-

In the case on hand Ganesh Kol (PW-2), Satyendra Tanti (PW-9), Ramakanta Paul (PW-10) and Prabhir Biswas (PW-12) were declared as hostile witnesses. It is settled law that corroborated part of evidence of hostile witness regarding commission of offence is admissible. The fact that the witness was declared hostile at the instance of the Public Prosecutor and he was allowed to cross-examine the witness furnishes no justification for rejecting en bloc the evidence of the witness. However, the Court has to be very careful, as prima facie, a witness who makes different statements at different times, has no regard for the truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to it. The Court should be slow to act on the testimony of such a witness, normally, it should look for corroboration with other witnesses. Merely because a witness deviates from his statement made in the FIR, his evidence cannot be held to be totally unreliable. To make it clear that evidence of hostile witness can be relied upon at least up to the extent, he supported the case of prosecution. The evidence of a person does not become effaced from the record merely because he has turned hostile and his deposition must be examined more cautiously to find out as to what extent he has supported the case of the prosecution.

30. Testimony of PW-3 to the extent that it supports the version of the prosecution was thus rightly relied upon by the Trial Judge.

31. Section 376(2)(g) (un-amended) reads herein as under:

376. Punishment for rape-(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a terms which shall not be less than seven years but which may be for life or for a terms which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a terms which extend to two years or with fine or with both;

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a terms of less than seven years.

(2) Whoever-

.....

(g) commits gang rape, Shall be punished with rigorous imprisonment for a terms which shall not be less than ten years but which may be for life and shall also be liable to fine;

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a terms of less than ten years.

Explanation 1. Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

32. The explanation attached to this Section makes it clear that both the accused persons are guilty of the aforementioned crime. They deserve no leniency on any count.

33. The nominal roll of the appellants reflects that as on the date when they were granted bail--appellant Pushpindera had suffered incarceration for about 4 years 4 months and the appellant Adesh Dubey had suffered incarceration for about 5 years 5 months. The minimum sentence prescribed for the gang rape is 10 years.

34. While dealing with question of sentence the observations made by the Supreme Court in Bheru Singh Vs. State of Rajasthan, are relevant; they read as under:

While dealing with the question of sentence in Dhananjay Chatterjee @ Dhana v. State of West Bengal (Criminal Appeal No. 584 of 1992, decided on 11.1.1994), this Court observed that the rising crime rate had made the criminal sentencing by the courts a subject of concern and though it is not possible to lay down any

cut and dry formula relating to imposition of sentence and went on to say:

The object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one.

Aggravating factors cannot be ignored and similarly mitigating circumstances have also be taken into consideration.

In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

35. The barbaric, gruesome and heinous crime committed by the appellants calls for no lesser punishment than the minimum that has been engrafted by the Legislature.

36. Appeals are dismissed.

37. Bail bonds of the appellants are cancelled; sureties discharged. Appellants be taken into custody to serve their remaining sentence.