

(2004) 11 DEL CK 0103
In the Delhi High Court
Case No : Criminal Appeal No. 161 of 2002

Rabu	Vs	APPELLANT
State of NCT of Delhi		RESPONDENT

Date of Decision : 18-11-2004

Acts Referred:

Penal Code, 1860 (IPC) — Section 376

Citation : (2004) CriminalCC 844

Hon'ble Judges : Pradeep Nandrajog, J

Bench : Single Bench

Advocate : Sumit Verma, for the Appellant;

Judgement

Pradeep Nandrajog, J.—Appellant Rabu stands convicted of an offence u/s 376 IPC vide judgment and order dated 16.10.2001 in sessions case No.77/2000 in FIR No. 1690/1999, Police Station NDLS.

2. Vide order dated 27.10.2001 7 years R.I. and fine of Rs.5000/-, in default S.I. for a period of 6 months has been inflicted upon him.

3. Appellant continues to be in jail and as per jail record has already undergone a sentence of approximately 6 years.

4. Order dated 27.10.2001 imposing sentence records age of the appellant to be 22 years. Medical examination to determine the age of the prosecutrix shows that Doctor opined her age to be between 14 to 15 years. Giving margin of 2 years error possibility of the age of the prosecutrix being about 17 years cannot be ruled out.

5. Testimony of the prosecutrix, who was examined as PW7 is to the effect that the appellant used to reside in her neighbourhood. She had never seen Ramlila before. On the date of incident i.e. 18.10.1999 at about 6.00 p.m. at the asking of the appellant she left her jhuggi to watch Ramlila. At about 8.00 p.m. after watching Ramlila rather than taking her to her house, appellant took her towards

a jungle and committed rape upon her. After committing rape, appellant left for his jhuggi and she went to her jhuggi. She narrated the incident to her mother who took her to the police station. Four police personnel accompanied them and accused was arrested. In cross-examination prosecutrix admitted that she and the accused were accompanied by 3 other girls Seema, Neena and Soni as also another boy whose name she did not recollect when they went to see Ramlila. She admitted in her cross-examination that she did not raise any alarm when appellant committed rape upon her. She admitted in cross-examination that site of Ramlila was at a far of distance and a rikshaw had to be used for reaching site of Ramlila.

6. Mother of the prosecutrix was examined as PW6. She corroborated testimony of the prosecutrix, in that, she stated that when her daughter came back at about 8.00 p.m. she told her that the appellant had taken her near some bushes near a railway track and committed rape on her. She stated that her husband was not at home and she went with the prosecutrix at night to lodge a complaint.

7. PW10 has deposed that he had recorded the statement of the prosecutrix Ex.PW10/A vide DD No. 14A on basis of which the FIR was registered.

8. Prosecutrix was examined by Dr.Neelu Talwar at Lady Harding Medical College on 19.10.1999. Her MLC which was prepared by Dr.Neelu Talwar was proved as Ex.PW 13/A. As per testimony of Dr.Meenakshi Jain PW13, MLC showed no marks of assault, fresh injury or abrasion. Hymen was not intact. Report was that possibility of sexual assault could not be ruled out.

9. Dr.D.L.Mishra who was examined as PW1 conducted the physical examination of appellant Rabu and as per MLC appellant was capable of sexual intercourse.

10. Salwar which was worn by the prosecutrix was seized. CFSL report showed that it had semen stains.

11. It is settled law that a conviction u/s 376 IPC can be sustained on the uncorroborated testimony of the prosecutrix provided the testimony bears the stamp of confidence. Merely because a prosecutrix does not raise hue and cry or offers no resistance would be no ground to disbelieve the testimony of the victim of a sexual assault. Each person reacts in a particular manner when faced with an adverse and hostile situation.

12. Mr.Sumit Verma, learned counsel appearing for the appellant draws attention of this court to the testimony of PW.9 SI C.L.Meena who deposed that he took the appellant thrice to Lady Harding Hospital on 4.11.1999, 11.11.1999 and 15.11.1999 to obtain semen of the accused. Doctors made effort to collect semen but the appellant could not ejaculate.

13. Mr.Sumit Verma contends that the testimony of PW9 is destructive of the prosecution version.

14. A perusal of Ex. WP.1/A MLC of the appellant conducted by Dr.D.L.Mishra

records the opinion that appellant was capable of sexual intercourse as based on the physical health of the appellant. MLC directs production of the appellant after 7 days to give semen fluid. It records that on date of examination appellant was unable to produce semen fluid. It may be noted that the examination of the appellant was conducted on 19.10.1999 at 1.20 p.m.

15. That appellant did not ejaculate when doctor attempted to take seminal fluid is no conclusive evidence that appellant was not capable of performing sexual intercourse.

16. Prosecutrix in her evidence deposed that appellant was married but had deserted his wife and was living with his son. Prosecutrix was not cross-examined on this point. While arguing on quantum of sentence, counsel for the appellant before the trial court urged for a lenient sentence on the ground that appellant was aged 22 years, was married and had 2 children. If appellant had 2 children, obviously he was capable of performing sexual intercourse.

17. Learned counsel for the appellant urges that sentence may be reduced to already undergone as appellant has been in jail for approximately 6 years (inclusive of remissions).

18. Counsel urges that evidence of the prosecution shows that she, 3 other girls, appellant and another boy had gone to watch Ramlila. It is, therefore, not a case where appellant lured the prosecutrix. On the way back, the incident occurred. Prosecutrix could be 17 years of age. Appellant was 22. A remote possibility of sex by consent cannot be ruled out and particularly when prosecutrix has suffered no physical injury.

19. On issue of consent, I have no reasons to disbelieve the prosecutrix. However, keeping in view the young age of the appellant and that he has 2 minor children to support coupled with the fact that the devil in him surfaced when he committed the offence, there being no past history of criminal antecedents, while dismissing the appeal, sentence is modified to period already undergone.

20. Copy of the present judgment be sent to Superintendent, Central Jail (Tihar) for compliance and being handed over to the appellant.