

(2017) 06 DEL CK 0011

In the Delhi High Court

Case No : 500 of 2014

RAHUL

APPELLANT

Vs

STATE

RESPONDENT

Date of Decision : 01-06-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 164](#) - Power to examine the accused - Recording of confessions and statements
[Indian Penal Code, 1860](#), [Section 176](#)

Citation : (2017) 06 DEL CK 0011

Hon'ble Judges : Mukta Gupta

Bench : SINGLE BENCH

Advocate : Azhar Qayum, Bharat Chugh, Ravi Nayak, Vipin Kumar PS?Kotwali

Judgement

1. Rahul challenges the impugned judgment dated 29th November, 2013 convicting him for offences punishable under Sections 376/323 IPC and the order on sentence dated 9th December, 2013 directing him to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 2,000/- for offence punishable under Section 376 IPC and rigorous imprisonment for a period of one year for offence punishable under Section 323 IPC.

2. Assailing the conviction, Learned Counsel for the appellant Mr. Azhar Qayum contends that there are material contradictions in the testimony of prosecutrix as deposed by her in Court and her statement recorded under Section 164 Cr.P.C. In her statement under Section 164 Cr.P.C. she does not state that she had earned around Rs. 300/- by selling rags. Further even from the evidence of prosecutrix it is evident that she had been roaming around the area with the appellant for quite some time and the act was thus consensual in nature as was also the defence taken by the appellant in his statement under Section 313 Cr.P.C. He further states that from the conjoint reading of the deposition of the prosecutrix and the statement under Section 164 Cr.P.C. it is evident that she was not lost on the way, she knew the appellant from before and was thus comfortable in his

company.

3. Learned amicus curiae Mr. Bharat Chugh, Advocate adding to the contentions raised by learned counsel for the appellant states that the consent of the prosecutrix is evident from the place where the appellant and the prosecutrix were allegedly found. In case there was no consent between the two they would not have been found at a place underneath the bridge which could not be reached easily. Further immediately after the alleged incident, the prosecutrix was medically examined wherein she was found to be conscious and oriented. Thus it cannot be said that her consent was taken under the influence of drugs. Learned counsels thus pray that the appellant be acquitted of the charge for offence punishable under Section 376 IPC.

4. Learned APP for the State on the other hand submits that the alleged incident took place on 20th March, 2013 after the amendment in the Indian Penal Code was brought in on 6th March, 2013. Thus the consent of the prosecutrix was required to be unequivocal. The story set up by the appellant that the relationship between the two was consensual is falsified by the nature of injuries present on the prosecutrix and that she shouted and cried which shrieks were heard by the officials of the PCR van and when they reached the place of incident they found the prosecutrix and the appellant in an objectionable condition. Further contrary pleas have been taken by the appellant i.e. in his statement under Section 313 Cr.P.C. he stated that the relationship was with the consent of the prosecutrix who took money which was given to the two boys who went away whereas appearing as DW-1, appellant deposed that prosecutrix started quarrelling with him as she was demanding more money. The fact remains that from the statement of the prosecutrix and the FSL report it has been proved conclusively that physical relationship between the appellant and prosecutrix was duly established; thus falsifying the plea of the appellant which he took appearing as DW-1 that no physical relationship took place and the prosecutrix started demanding more money. 5. Process of law was set into motion on 20th March 2013, when HC Yogender Singh posted as Incharge, PCR van S-34 along with gunman Ct. Vikram Singh and driver Ct. Dharmender while patrolling at around 11.15 AM reached at electric crematorium behind Lal Quila where they heard the sound of crying of a girl. They stopped the PCR van, looked under the flyover loop wall and saw one boy was lying on a girl in an objectionable condition and was also beating her. HC Yogender Singh along with other police officials went below the flyover to stop the boy. However, on seeing them, the boy started running towards the bushes but was apprehended. His name was revealed as Rahul. Blood was oozing from the head of the girl. Information was given to police control room which was recorded vide DD No. 21(Ex. PW-11/A) at PS Kotwali. DD entry was assigned to SI Manohar Lal, who along with W/HC Krishna and Ct. Arvind reached the spot and met the prosecutrix, Rahul and PCR officials. After sometime, W/ASI Devki also reached the spot and made enquiries from the prosecutrix and PCR officials.

W/ASI Devki along with W/HC Krishna and Ct. Arvind took the prosecutrix to Aruna Asif Ali Hospital for her medical examination. Thereafter, statement of the prosecutrix was recorded vide Ex. PW-1/A wherein she stated that she resided at Jahangirpuri with her family and was a rag picker. Due to the influence of bad company, she got addicted to drugs. On 19th March 2013, around 10:00 A.M., she left her house, without informing anyone, to pick up "kabara". Whatever "kabara" she had picked up from Model Town was sold by her in Model Town itself for Rs. 320. At around 7:00 P.M., she went to Jama Masjid from where she bought a tube of Silochan, sniffed it and was thus under the influence of the drug. Thereafter, she slept on the pavement at Jama Masjid. On 20th March, 2013, when she woke up in the morning, she again sniffed the tube. While roaming around, she reached near Hanuman Mandir, Kashmere Gate, under the flyover where she lost Rs. 20 due to which she started crying. Thereafter, a boy came there and asked her as to why she was crying. She told him that she had lost her money and forgotten the way. The boy assured her that he would tell her the way and took her around. They reached Red Fort around 11:00 A.M., from there he took her to the bushes near Red fort flyover where he forcefully removed her Salwar and did "galat kaam" with her. When she resisted, he assaulted her, as a result of which her head hit the wall and got injured. When she raised alarm, police heard the same and the police van reached there. Seeing the police, the boy got up and started running but was apprehended by the police. On the basis of the aforesaid statement, FIR No. 49/2013(Ex. PW-2/A) was registered under Sections 376/323 IPC at PS Kotwali.

6. Thereafter, W/ASI Devki left the hospital for spot. After inspecting the spot, Crime Team Incharge prepared the report (Ex. PW-12/A). Crime Team photographer took the photographs (Ex. PW-10/A-1 to Ex. PW-10/A-7) of the spot. W/ASI Devki collected blood stained earth, earth control, blood stained shirt of Rahul and seized the same vide seizure memo Ex. PW-14/A. She also prepared the site plan (Ex. PW-16/B) at the instance of SI Manohar. Thereafter she took Rahul to Aruna Asaf Ali Hospital for his medical examination. Articles of the prosecutrix were seized vide seizure memo Ex. PW-16/C. Further investigation of the case was assigned to SI Veena Kumari. Articles of Rahul were seized vide seizure memo Ex. PW-16/D. Rahul was arrested vide arrest memo Ex. PW-17/A. On 23rd March, 2013, statement (Ex. PW-1/B) of the prosecutrix was recorded under Section 164 Cr.P.C. During the course of investigation, the school leaving certificate regarding age of the prosecutrix was collected from her school. Charge for offences punishable under Sections 376/323 IPC was framed against Rahul vide order dated 16th July, 2013.

7. The prosecutrix, who was examined as PW-1, deposed in sync with her earlier statements made before the police and Learned Magistrate. During her cross-examination, she denied the suggestion that Rahul established sexual relations with her consent or that he paid money for the same. She also denied the suggestion that she was demanding more money than settled, to which Rahul refused and quarrel started between them. She further denied the suggestion

that due to scuffle between them, both of them received injuries.

8. Father of the prosecutrix who was examined as PW-15 deposed that on 19th August, 2013, the prosecutrix had left the home in the morning without informing them. When she did not return, he tried to search her but she could not be traced. On 20th March, 2013, around 2:00-3:00 P.M., police informed him on phone about recovery of the prosecutrix.

9. PW-6 Ms. Anju Rani, TGT Social Science Government Girls Senior Secondary School, who was deputed to depose on behalf of the Principal of the aforesaid school stated that as per school records, date of birth of the prosecutrix is 28th November, 1993. The copy of the relevant entry from the attendance register, copy of school leaving certificate of last attended school and copy of school leaving certificate of aforesaid school issued by the Principal were exhibited as Ex.PW-6/B to 6W-6/D respectively.

10. PW-8 Dr. Nazrat Perveen, Medical Officer, Aruna Asif Ali Hospital, Delhi stated that on 20th March, 2013, he had examined the prosecutrix vide MLC Ex. PW-8/A. As per the MLC, there was mild swelling at the temporal pivotal region of the scalp on the right side with superficial abrasion on the same side 1 X 1 cm. She also found two linear abrasions on back of chest extending from right to left side approx 14 cm each X 0.5 cm. After her medical examination, she was referred to SR Gynae for further detailed examination and expert opinion.

11. PW-3 Dr. Basava Raj, SR Gynae, Aruna Asif Ali Hospital, stated that on 20th March, 2013, she conducted the gynae examination of the prosecutrix vide MLC Ex. PW3/A. She found mild swelling at right tempo-parietal region of the scalp with abrasions, two linear abrasions on the back of the chest, the hymen was old torn and redness was found over fourchette.

12. As per the FSL report Ex. PX-1, human semen was detected on exhibits "1k-1" (cotton wool swab on wooden stick- vaginal secretion), "1n" (small amount of dirty liquid kept in a syringe and then kept in an envelope marked as "step 11 washing from vagina"), "1o-1" (dirty cotton wool swab on wooden stick-rectal examination), "1o-2a" (microslide having faint whitish smear kept in plastic cover), "2a" (one dirty ladies shirt), "2b" (one dirty ladies salwar), "2c" (one dirty shawl) and "6" (foul smelling yellowish gauze cloth piece described as "semen").

13. Dr. Akash Jhanji who was to depose in respect of MLC of Rahul was given up as Rahul did not dispute his medical examination. As per the MLC of Rahul, one superficial abrasion small in size was found on the chin. Rahul in his statement recorded under Section 313 Cr.P.C. stated that there were two boys with the prosecutrix. He paid Rs. 350/- and they left after leaving the prosecutrix with him. The prosecutrix had established physical relations with him with her consent after taking money which he paid to the two boys who were alongwith her as told by her. A quarrel ensued between them as she started demanding more money. She fell down on the road herself and might have sustained injuries due to said

fall.

14. Rahul examined himself as DW-1 in his defence wherein he stated that on 20th March, 2013 around 12 noon, he was coming from Gandhi Nagar on foot. When he crossed the iron bridge and reached behind Red Fort at the flyover loop near Electric Crematorium, he saw the prosecutrix standing with two boys. They stopped him and asked him if he wanted to establish physical relations with the prosecutrix. He agreed and it was settled that he would pay Rs. 300/- to her for the same. The prosecutrix asked him to accompany her. He started walking with her. The boys followed them and she asked him to give the money to those two boys. He gave them Rs. 300/- and they went away, leaving the prosecutrix with him. No physical relations were established between them as the prosecutrix started demanding more money. He did not have more money. The prosecutrix started quarrelling with him over money. Two public persons reached there and made a call at 100 number. Police arrived at the spot and he was handed over to the police.

15. From the evidence of the prosecutrix, MLC of the prosecutrix and the FSL report, the prosecution has proved beyond reasonable doubt that physical relations were established between the prosecutrix and Rahul, falsifying his testimony recorded as DW-1. The issue now before this Court is whether the relationship was consensual.

16. As regards the plea taken in the statement under Section 313 Cr.P.C. that after giving money the relationship was established, it would be apposite to note the testimony of the two Police witnesses i.e. Head Constable Yogender Singh, incharge of the PCR van and Constable Vikram Singh, who was accompanying him in the PCR van. After hearing the cries of the prosecutrix they both were alerted, however they could not see the prosecutrix and they went underneath the flyover loop and after getting down from the PCR van they moved 15-20 steps where they found appellant and the prosecutrix. The entire process would have at least taken 5 minutes from the time they heard the cries and reached the spot. On reaching the spot, the two officers found the appellant and the prosecutrix still in objectionable condition, repelling the plea of the appellant that the sexual intercourse took place with the consent of the prosecutrix.

17. Explanation 2 was added to Section 375 IPC by the Criminal Law (Amendment) Act, 2013 as under: "Explanation 2. - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."

18. Not only did the prosecutrix cry out, there was a scuffle between her and the appellant and in the process the prosecutrix sustained an injury on her head

besides other marks of abrasions and bruises on her body, thus falsifying the plea of the appellant that the act was consensual in nature. Moreover the consent if any was not unequivocal.

19. Considering the evidence led by the prosecution, I find no merit in the present appeal. The judgment of conviction and order on sentence are upheld. Appeal is dismissed. Appellant who is in custody would undergo remaining sentence.

20. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation to the appellant.

21. TCR be returned.