
(2009) 01 DEL CK 0234
In the Delhi High Court
Case No : Criminal A. No. 884 of 2006

Rai Sandeep

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 27-01-2009

Acts Referred:

Penal Code, 1860 (IPC) — Section 376(2)(g)

Citation : (2009) 01 DEL CK 0234

Hon'ble Judges : Sunil Gaur, J

Bench : Single Bench

Advocate : G.P. Thareja, for the Appellant; Amit Sharma, learned Additional Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Sunil Gaur, J.—The above titled two appeals are directed against common impugned judgment and order of 19th August 2006, vide which Appellants-Rai Sandeep @ Deepu and Hari Singh have been convicted for the offence of "Gang Rape" by the trial court and they have been sentenced to undergo rigorous imprisonment for ten years each with fine of Rs. 3,000/- each for the offence u/s 376(2)(g) of Indian Penal Code. In default of payment of fine, they have been directed to undergo rigorous imprisonment for one year each. The facts of this case as unfolded by the prosecution are that on 15th August 2001, at night time, i.e., at about 1.30 AM, prosecutrix (PW-4) aged about 34 years, was present at the house of her sister Seema and she had heard the noise of knocking at the door and Nonu, minor daughter of Seema had opened the door and Appellant/accused Deepu alongwith his companion came inside and told the prosecutrix that he wanted to have sexual intercourse with her, but the prosecutrix had refused stating that she was not "that type" of lady and thereafter, both the Appellants/accused started threatening the prosecutrix and in the meantime Jitender, minor son of Seema also came down and above said two minor children of Seema told the Appellant/accused to go away but they had pushed the

aforesaid two minor children of Seema into a room and had bolted the door of that room from outside. Thereafter, Appellant/accused Deepu made the prosecutrix lie down in the verandah itself, outside that room and forcibly had sexual intercourse with her and in the meanwhile, the companion of Appellant/accused Deepu, guarded the main door of the house. After Appellant/accused Deepu had forcible sexual intercourse with the prosecutrix, he guarded and the companion of Appellant/accused Deepu, also had forcible sexual intercourse with her and thereafter, both the Appellant/accused wiped their private parts with a socks of red colour, which was lying in the verandah. Then, both these Appellant/accused left the spot and while doing so, they took away a gold chain and a wrist watch, which was lying near the TV inside the room and while leaving, they had bolted the main door from outside. According to the prosecutrix, due to fear and darkness outside, she did not try to come outside the house and in the morning, prosecutrix told aforesaid Jitender to go from the roof and to open the door of the house from the outside and thereafter, report regarding this incident was made to the police. Investigation commenced. Prosecutrix was got medically examined. Spot proceedings were conducted. Appellant/accused-Rai Sandeep @ Deepu was arrested during the course of investigation of this case and he had got recovered one gold chain and one wrist watch said to be belonging to the complainant/first informant and on his disclosure, co-appellant/accused Hari Singh was also arrested in this case. Both the Appellants/accused were got medically examined. Appellant/accused Hari Singh had refused to participate in the test identification parade. Exhibits of this case were sent for analysis and FSL report was obtained. Upon completion of the investigation, charge sheet was filed against both the Appellants/accused for the offence of gang rape.

2. Both the Appellants/accused preferred to face the trial in this case, by pleading not guilty to the charge of gang rape framed against them. Out of the seventeen witnesses, examined at trial, prosecutrix had deposed as PW-4 and Nonu/Noju and Jitender, the two children of Seema, sister of prosecutrix have deposed as PW-10 and PW-11.

3. The medical evidence consists of Dr. Manisha (PW-1), Dr. Veena (PW-5) who have deposed regarding the MLC of the prosecutrix. Dr. Manmohan (PW-2), Dr. C.B. Dabas (PW-3), Dr. Seema (PW-13) have deposed about the MLC of both the Appellants/accused. SI Rajiv Shah, (PW-14) is the Investigating Officer of this case. The evidence of remaining witnesses is, more or less, of formal nature.

4. The plea taken by both the Appellants/accused before the trial court was of false implication. Appellant/accused Rai Sandeep @ Deepu alleged false implication at the hands of local police, who was said to be inimical to him. Appellant/accused Hari Singh admitted that he had refused to join the test identification parade but he gave no reason for his refusal to do so. Both the Appellants/accused did not furnish any reason for their false implication or as to why the local police was inimical towards Appellant/accused Rai Sandeep @ Deepu. No evidence had been led by these two Appellants/accused in their

defence before the trial court.

5. After the trial both the Appellants/accused stood convicted and sentenced as indicated above, and the same is under challenge in these two appeals.

6. Since these two appeals pertain to one incident and arise out of common impugned judgment, therefore, they have been heard together and are being decided together by this common judgment.

7. The major assault upon the impugned judgment is on the ground that the trial court has mainly relied upon the chief examination of the prosecutrix (PW-4) and has ignored her cross-examination by the defence, although, she had major improvements in her evidence, which renders her testimony as unreliable. It is pointed out by the defence that there is no corroboration to the evidence of the prosecutrix (PW-4) as the two children i.e. PW-10 and P-11 of sister of the prosecutrix have not supported the prosecution case and the medical evidence does not connect the Appellant/accused with the offence in question. It is contended that absence of semen on the socks, with which the culprits had cleaned their private parts after committing the offence in question, demolishes the prosecution case and this vital aspect has been illegally ignored by the trial court. The major contradiction pointed out by the defence is that although it is stated in the FIR that the accused have cleaned their private part with the socks in question but in the chief examination, prosecutrix (PW-4) had stated that she had clean her private part with the said socks. It is also urged that regarding the recovery of the socks also, there is a contradiction as prosecutrix (PW-4) claims that she had handed over the said socks to the police, whereas Investigating Officer PW-14 has asserted that he had recovered the red socks in question, which were lying at the spot. Lastly, it is contended on behalf of both the Appellants/accused that since the fate of this case depended upon the testimony of the prosecutrix (PW-4) and since she has demolished her version given in her chief examination, during her cross-examination by the defence, therefore, the conviction and the sentence imposed upon these two Appellants/accused by the trial court is rendered illegal and it deserves to be set aside and these two Appellants/accused ought to be acquitted in this case. Reliance has been placed upon judgment reported in IV (2008) DLT (CRL.) 85 (SC), to contend that in the aforecited case, the contradictory statements made by the prosecutrix (PW-4) corroded the prosecution version and the benefit of doubt was given to the accused.

8. Nothing else has been urged on behalf of these Appellants/accused.

9. On behalf of the State, learned Additional Public Prosecutor supports the conviction and sentence imposed upon the Appellants/accused by submitting that the trial court has rightly relied upon the chief examination of the prosecutrix (PW-4) as it inspires confidence and her cross-examination by the defence after a long gap of about two years has been rightly discarded by the trial court by relying upon a decision of the Apex Court reported in Khujji alias Surendra Tiwari

Vs. State of Madhya Pradesh, . Learned Additional Public Prosecutor has relied upon the decisions of the Apex Court reported in State of Himachal Pradesh Vs. Asha Ram, , to contend that the improvements made have to be material one and insignificant discrepancies or contradictions are not sufficient to throw out the testimony of the prosecutrix (PW-4) and the absence of injuries on the person of grown up married lady/victim, is not sufficient to hold that no rape has been committed upon her. It has been pointed out that as per the recovery memo Ex. P-4/B of the socks in question, they were handed over by the prosecutrix to the police and as such, there is no contradiction. In the last, it is submitted that the parameters for appreciation of the evidence of the prosecutrix as highlighted by the Apex Court, in its decision reported in State of Punjab Vs. Gurmit Singh and Others, and AIR 2004 SC 129 have been given due consideration by the trial court while convicting and sentencing these two Appellants/accused and there is no infirmity or illegality in the impugned judgment.

10. It is true that the fate of this case entirely depends upon the testimony of prosecutrix (PW-4) but the attendant circumstances of this case have to be taken into consideration and if there are two versions before the court, then it has to be seen, as to which of them is reliable. Even uncorroborated testimony of the prosecutrix can be relied upon, if it inspires confidence.

11. In the above background, the testimony of prosecutrix (PW-4) has been scrutinised by this court to test its veracity. In the chief examination, prosecutrix (PW-4) has graphically narrated this incident as already noticed in the opening paragraph of this judgment. It is a matter of record that chief examination of the prosecutrix (PW-4) was recorded in September, 2002 and she was cross-examined by the defence in December, 2004. Clearly there was a gap of more than two years in recording of the chief examination and the cross-examination of the prosecutrix (PW-4), which had led the prosecutrix to take a somersault and to try to wriggle out of her chief examination regarding the identity of the Appellants/accused by stating that due to darkness, she could not see the faces of the two boys/culprits and that she had identified the Appellants/accused as they were shown to her outside the court before her chief examination was recorded on the previous date in the trial court. In the cross-examination by the defence, prosecutrix (PW-4) had denied that she was raped by these two Appellants/accused. In the cross-examination by the defence, she had tried to retract from the version given by her in the FIR, which she had reiterated in her chief examination before the court.

12. It is unfortunate that the trial court had declined the request of the State for re-examination of the prosecutrix (PW-4) after her cross-examination by the defence was concluded. In any case, trial court ought to have put a court question to the prosecutrix (PW-4), demanding an explanation as to how she has given a diametrically opposite version in cross-examination by the defence, to the version given by her in the FIR, which she had stood by, in her chief

examination recorded by the trial court. Since no such explanation has been sought from the prosecutrix (PW-4) by the trial court, therefore, to arrive at the truth and to do the real justice, the only option left, is to evaluate and find out, as to which of her version deserves acceptance, i.e., her cross-examination by the defence or her chief examination, which finds support from her initial version recorded in the FIR of this case.

13. In the instant case, the court is not faced with the usual challenge of there being contradictions or improvements in the evidence of material witnesses, but the court has to principally decide as to whether chief examination of the prosecutrix (PW-4) or her cross-examination by the defence recorded after a huge gap of more than two years, is to be relied upon. Such a situation has not arisen for the first time now.

14. The Apex Court had an occasion to deal with such a situation, which was peculiar about one and half decades ago, in the case of *Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh*, where the two eye witnesses refused to name the accused in the dock as assailants of the deceased and it was found that the trial court had not made any effort to scrutinize their evidence in regard to the factum of the incident and the dictum of the aforesaid citation reads as follows:-

The evidence of such witnesses cannot be treated as effaced or washed of the record altogether but the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof.

15. It is equally true that the evidence has to be read as a whole but it does not mean that if version given in cross-examination of a witness by defence is divergent to the one given in chief-examination, then the entire testimony is to be discarded. The courts are within their rights to evaluate and judge as to whether version given in chief examination has got a ring of truth in it or the divergent version given in the cross-examination by the defence is probable one.

16. In the case of *Shrawan Sisode Vs. State of Maharashtra and Another*, Apex Court noted with concern that in the first report made by the prosecutrix, there was no allegation of rape but within three or four days of the occurrence, a report/complaint was made to the Superintendent of Police, mentioning the fact that the complainant had been raped by the accused and the Apex Court dispelled the contention of the accused that the subsequent report/complaint alleging rape was an afterthought and it was observed that the totality of facts of the case have to be seen and the plea of the accused was not found to be convincing and thus, the conviction for the offence of rape was sustained.

17. In the case of *State of Himachal Pradesh Vs. Asha Ram*, the pertinent observations made by the Apex Court needs to be noticed and are as under:-

It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for

seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be worthy of reliance. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.

18. Case of Santosh Kumar Vs. State of M.P., , was of gang rape of a married grown up lady and the absence of injuries on her private parts, was held to be not of much significance by the Apex Court and it was held that absence of injuries on the private parts of a victim specially a married lady cannot, ipso facto, lead to an inference that no rape has been committed."

19. The decision of the Apex Court in the case of "Lalliram & Anr. Vs. State of M.P." IV (2008) DLT (CRL.) 85 (SC), relied upon by the defence was a case where the prosecutrix had claimed that she was having pregnancy of four months on the day of the incident but the doctor who had medically examined her, had found that she was actually on menstruation period. In the afore cited case, victim/prosecutrix had claimed that she was dragged for a considerable distance by catching hold of her hair, but no injury was found on her person and rightly so, it was held that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case.

20. In the instant case, much capital is sought to be made out by the defence regarding the recovered socks in question. No doubt, prosecutrix (PW-4) has stated in the FIR that while leaving the spot, the Appellants/accused had wiped their private parts with the red coloured socks which was lying at the spot, whereas in her evidence, prosecutrix (PW-4) has stated that she had cleaned herself with red socks, which were lying nearby. Certainly, this is an improvement but not a deliberate one, as it is evident from the charge sheet of this case that the FSL report was not received when the said charge sheet was filed in this case. It is matter of record that semen was not detected on the said recovered socks, as per FSL reports-Ex. PW-14/O & Ex. PW-14/N on record. In any case, defence in order to have any benefit of any improvement or contradiction, has to confront the witness with it, so that the witness has an opportunity to explain the circumstance, which is sought to be used against the witness, to discredit his/her version. Strangely, prosecutrix (PW-4) has not been confronted with the fact that she had stated in her initial statement/FIR that the Appellants/accused had wiped their private parts with the recovered socks. Had the prosecutrix (PW-4) been confronted with the aforesaid improvement by the defence, then, perhaps she would have given some plausible answer to it. In the

absence of any such confrontation, no benefit accrues to the Appellants/accused on this account.

21. The contradiction regarding seizure of the socks in question, pointed out by the defence stands dispelled from the Seizure memo, Ex. P-4/B, of the socks in question, which reveals that the said socks were handed over by the prosecutrix (PW-4) to the Investigating Officer at the spot and the prosecutrix (PW-4) is a witness to this seizure memo. Thus, there is no contradiction as to whether the socks in question were seized by the Investigating Officer himself at the spot or whether the same were handed over by the prosecutrix (PW-4) to the police.

22. Present case is not the one, where the medical evidence belies the prosecution case. In fact, semen was detected on the petticoat of the prosecutrix (PW-4) and its blood group was "AB". However, it could not be tallied with the "blood sample" of the Appellants/accused because their blood sample had putrefied as per the FSL report on record. Appellant-Rai Sandeep @ Deepu is not named in the MLC of the prosecutrix (PW-4) as the alleged history has not been given by her to the doctor. In any case, it is up to the doctor, as to whether to record the name of the culprit or not. There is no cross-examination of the doctor by the defence on this aspect. However, MLC Ex. PW-5/A of the prosecutrix reveals that there was an abrasion/bruise over the right side of her neck which indicates that she had offered resistance, when she was gang raped. MLCs of the Appellants/accused are of no assistance as they were apprehended in this case after more than a fortnight of this incident.

23. The moot question which remains to be considered is whether the trial court was right in relying upon the chief examination of the prosecutrix (PW-4) and in discarding the cross-examination of the prosecutrix (PW-4). Upon a close scrutiny of the testimony of the prosecutrix (PW-4), I find that for extraneous reasons, she has sought to create a doubt about the identity of the Appellants/accused by introducing, for the first time, story of darkness at the spot. In my considered opinion, trial court has rightly accepted the chief examination of the prosecutrix (PW-4) as the correct version and her cross-examination merits rejection, for the reason that, what is said in the chief examination by her, finds support from her initial version, which is contained in the FIR of this case. Cross-examination of the prosecutrix (PW-4) lacks plausibility, whereas her chief examination is fully reliable and deserves unqualified acceptance, in the facts of this case.

24. In criminal cases, "probability factor" is always put on high pedestal while appreciating evidence. In the present case, the "probability factor" is clearly in favour of the prosecution and against the Appellants/accused as they have taken a bald plea of false implication. No reason is forthcoming as to why prosecutrix (PW-4) would falsely implicate them or as to why the local police would frame them up in this case for a heinous offence of gang rape.

25. Upon consideration of the totality of the circumstances of this case, I hold

that the conviction and the sentence awarded to these two Appellants/accused is fully justified and it calls for no interference by this court in these two appeals. Consequently, these two appeals are without merit and are dismissed as such.