

(2009) 02 DEL CK 0197

In the Delhi High Court

Case No : Criminal Appeal No. 541 of 1999

Satbir Singh

APPELLANT

Vs

The State (Govt. of NCT of Delhi)

RESPONDENT

Date of Decision : 02-02-2009

Acts Referred:

Citation : (2009) 02 DEL CK 0197

Hon'ble Judges : Sunil Gaur, J

Bench : Single Bench

Advocate : Raj Kumar Bhartiya, for the Appellant; Amit Sharma, Additional Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Sunil Gaur, J.—Appellant stands convicted and sentenced for the offence of rape by the trial court vide impugned judgment/order of 20th September and 25th September, 1999, which is under challenge in this appeal.

2. The factual scenario emerging from the record of this case is that on 10th February, 1990 in the morning time, prosecutrix (PW-1) had gone to the dispensary to take medicine as she was not feeling well and she had carried her eight months old child in her lap with her. However, the dispensary was closed on that day and while she was returning back, appellant/accused was on bicycle and he met her near "ganda nala" around 12 noon and had offered to the prosecutrix to drop her at her house but she refused. However, appellant stated that he is a neighbour and neighbours should help each other and insisted to drop the prosecutrix at her house. Prosecutrix agreed and sat on the rear seat of the bicycle and after travelling a little distance, appellant took his bicycle to the jhuggi of Ramdhari in Nihal Vihar Colony on pretext that he had some work with him and the Appellant/accused had gone inside the jhuggi of Ramdhari and thereafter, he had sent Ramdhari away and had pulled the prosecutrix inside, whereas infant child of the prosecutrix remained outside the jhuggi and as per the version of the prosecutrix, Appellant/accused had gagged her mouth with a

cloth and had committed forcible sexual intercourse with her and the prosecutrix became unconscious. Upon gaining consciousness, prosecutrix alongwith her child reached her house at about 7 PM and she took bath and had put her underwear and petticoat (which she was wearing at the time of incident) in a bucket of water and at about 8 PM, her husband came back to the house and she narrated this incident to her husband, then this matter was reported to the police. After registration of the FIR, investigation commenced. Prosecutrix was got medically examined and on the next day, Appellant/accused was arrested and he was also got medically examined. After completion of investigation, charge sheet for the offence of rape was filed against the Appellant/accused.

3. To the charge of rape, framed by the trial court against the Appellant/accused, he pleaded not guilty and at trial, eleven witnesses had deposed and out of them, the key witnesses are the prosecutrix (PW-1), her husband (PW-3), Ramdhari (PW-10), in whose jhuggi, this incident had taken place. They are all residents of the same locality. The MLC of the prosecutrix and the Appellant/accused are proved on record by Dr. N.Z. Farooqi (PW-2). Sub Inspector Gulab Singh (PW-11) is the Investigating Officer of this case.

4. The defence plea taken by the Appellant/accused before the trial court, reads as under:

This is a false case registered against me as the husband of the prosecutrix namely Rajender who is my neighbour, also belongs to UP had purchased land in my neighbourhood. First they erected a jhuggi in that land, then after sometime they prosecutrix and her husband) took Rs. 10,000/- from me to raise a pucca structure on that land. I gave them Rs. 10,000/- and when after ? months, I demanded my money back, they refused to return the same as they had no money at that time and told me that they will give the money after 1 or 2 months. When I demanded the money again they conspired amongst themselves and got registered this false case against me. Ram Dhari, PW is also my neighbour. He also is a witness of lending of money and he has no Jhuggi in Nihal Vihar. This is a false case just to avoid returning of my Rs. 10,000/- by prosecutrix and her husband.

5. The two witnesses got examined by the Appellant/accused in his defence before the trial court are Smt. Raj (DW-1), who is his wife and Balwan Singh (DW-2), who is the neighbour of Appellant/accused. After the trial, Appellant/accused was found guilty for committing the offence of rape and vide impugned judgment/order of 20th September and 25th September, 1999, trial court has sentenced him to undergo rigorous imprisonment for seven years, which is under challenge in this appeal.

6. Upon having heard both the sides and on scrutiny of the evidence on record, I proceed to deal with the contentions raised regarding the reliability of the version as given by the prosecutrix (PW-1) in this case.

7. Although the stand taken by the Appellant/accused before the trial court was

of false implication, as the husband of the prosecutrix (PW-1) did not want to pay back the loan of Rs. 10,000/- taken by him from the Appellant/accused for the purpose of constructing a house at the place where his jhuggi was there, but since aforesaid stand of the Appellant/accused was rightly discarded by the trial court, therefore, the stand now taken by the learned Counsel for appellant at the hearing of this appeal is of prosecutrix being a consenting party to the sexual intercourse with the Appellant/accused.

8. It is true that the Appellant/accused is entitled to show from the testimony of the prosecutrix (PW-1) that she was a consenting party to the sexual intercourse. The contentions advanced on behalf of the Appellant/accused in this regard are that the prosecutrix (PW-1) did not raise any hue and cry while she was being taken away to a deserted area by the Appellant/accused and prosecutrix (PW-1) did not offer any resistance to the purported forcible sexual intercourse committed by the Appellant/accused with her. It is pointed out that the medical evidence shows that there was no external mark of injury on the person of the prosecutrix, which indicates that she was a consenting party to the sexual intercourse and the medical evidence has been misread by the trial court as it has been wrongly recorded in the evidence of Dr. Farooqi (PW-2) that "there was obvious external injuries mark" on the person of the prosecutrix. Attention of this Court has been drawn to the MLC Ex.PW-2/A of the prosecutrix to show that it is clearly recorded therein that "no obvious external injuries mark". It is pointed out that the MLC Ex.PW-2/A of the prosecutrix is silent about prosecutrix having any fever or low blood pressure to justify her alleged fainting at the spot after this incident. It is pointed out that the cloth allegedly used for gagging the mouth of the prosecutrix at the time of this incident has not been recovered and the site plan of the spot falsifies the version of the prosecutrix of the place of incident being a deserted place.

9. Another contention of the defence is that although the husband of the prosecutrix was out of station but the prosecutrix could have complained about her being raped by the Appellant/accused, to her neighbours but she did not make any complaint to anyone and she had remained at the spot for about more than four hours, which belies the prosecution case and supports the plea of the Appellant of prosecutrix being the consenting party. Thus, it is contended that in view of the aforesaid infirmities in the prosecution case, conviction of the Appellant/accused by the trial court is illegal and therefore, the Appellant/accused deserves to be acquitted. Reliance has been placed upon the decision of the Apex Court reported in 2003 (1) ST 522, to contend that absence of injuries on the person of the prosecutrix indicated her consent and benefit of doubt was given to the accused. Nothing else has been urged on behalf of the Appellant/accused.

10. On behalf of the State, it is submitted that from the testimony of the prosecutrix (PW-1), it cannot be inferred that she was a consenting party and the conviction and sentence imposed upon the Appellant/accused is just and proper.

11. It emerges from the evidence on record that the prosecutrix (PW-1) and the Appellant/accused were neighbours and when Appellant offered to drop the prosecutrix at her house, initially, prosecutrix declined the offer but when the Appellant/accused stated that neighbours are meant to help their neighbours, then prosecutrix relented and took a lift to her house as she was not well on that day. Appellant/accused took her to the jhuggi of Ramdhari (PW-10) which was at a lonely place on the pretext of having some work with him. Site plan of the spot Ex. PW-11/A reveals that on the three sides of the jhuggi of Ramdhari (PW-10) there were open plots and therefore, the prosecutrix was right in saying that it was a lonely place. It appears from the evidence of the prosecutrix that she could not raise any alarm because her mouth was gagged with a cloth and upon Appellant forcibly raping her, she became unconscious. Since she was not well on that day, it is quite natural that after forcible sexual intercourse, she had fainted. May be, her MLC Ex.PW-2/A does not indicate that she was having fever on that day but this could have been brought out in the cross- examination of the defence. In fact, there is no cross-examination of the doctor, who had medically examined the prosecutrix. It is quite obvious that the prosecutrix could not offer any effective resistance to the forcible sexual intercourse by the Appellant/accused with her because she was not well on that day.

12. The probability factor tilts in favour of the prosecutrix and against the Appellant/accused, for the reason that no lady would leave her eight month old child at an alien place outside the jhuggi and would have consensual sexual intercourse with her neighbour. Had it been a case of consensual sexual intercourse, then prosecutrix would have left her infant child at the house of her relative or a neighbour and would not have left her infant child outside the jhuggi of a stranger. Another reason for discarding the story of the defence of consensual sexual intercourse is that the prosecutrix would not go for it, when she is not well. Nothing worthwhile has been brought out in the cross-examination of the prosecutrix by the defence, to enable the court to draw a reasonable inference of the prosecutrix being a consenting party to the sexual intercourse by the Appellant/accused. Had there been effective cross-examination of the prosecutrix, by the defence, regarding her taking bath upon reaching her house, then perhaps, something could have been brought out to draw a meaningful inference regarding the consent. The contradiction in the version of the prosecutrix regarding giving birth of a child eight months prior to this incident (as stated in chief examination by her), and of delivery of a child about two months prior to this incident, is hardly of any consequence, as this Court is of considered opinion that no mother would leave her infant child, whether of eight months or two months, outside the jhuggi of a stranger and would have consensual sexual intercourse with a neighbour.

13. Another factor which rules out consensual sexual intercourse in this case, is that the MLC Ex.PW-2/B of the Appellant/accused remains unchallenged and it discloses that there was an abrasion on his left cheek and on his left ear. Thus, it is clear that the present case is not of absence of any resistance to the forcible

sexual intercourse by the Appellant/accused with the prosecutrix (PW-1). In the decision reported in 2003 (1) ST 522, relied upon by the defence, the clothes of the prosecutrix did not have any stain of semen, whereas in the instant case, although the husband of the prosecutrix was out of station for two days, but still as per FSL report on record, underwear and petticoat of the prosecutrix were found to be having human semen on them. Aforesaid decision is on its own facts and is of no assistance to the case of the Appellant/accused, as the version of the prosecutrix inspires confidence and rules out the plea of consensual sexual intercourse taken by the Appellant/accused.

14. For the reasons aforesaid, the conviction and sentence imposed upon the Appellant is well merited and this appeal lacks substance. Resultantly, the conviction and sentence of the Appellant/accused is upheld and this appeal is, accordingly, dismissed. Trial court is directed to take the Appellant into custody, so that he serves out the remainder of the sentence awarded to him by the trial court.

15. With aforesaid directions, the appeal stands disposed of.