

(2016) 01 DEL CK 0371
In the Delhi High Court
Case No : Crl. L.P. 676/2015

State (Govt. of NCT of Delhi)

APPELLANT

Vs

Bipin Kumar Paswan

RESPONDENT

Date of Decision : 19-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 363, Section 366, Section 376
Protection of Children from Sexual Offences Act, 2012 — Section 4

Citation : (2016) 227 DLT 30 : (2016) 5 RCRCriminal 392

Hon'ble Judges : G.S. Sistani and Sangita Dhingra Sehgal, JJ.

Bench : Division Bench

Advocate : Aashaa Tiwari, APP, Vivek Malik, SI and Prabhu Dayal, Inspector, for the Appellant;

Final Decision : Dismissed

Judgement

G.S. Sistani, J.—CRL. M. A. 14293/2015

1. This is an application seeking condonation of 20 days delay in filing the present leave to appeal.

2. Heard.

3. Delay in filing the present leave to appeal is condoned. Application stands disposed of.

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4. Present leave to appeal arises out of an order dated 28.05.2015 passed by the learned trial court by which the respondent stands acquitted of the charges under Sections 376/363 of the Indian Penal Code and Section 4 of the POCSO Act.

5. A complaint was made by the father of the prosecutrix on 07.03.2014 that his 13 1/2 years old daughter was missing since 2:00 p.m. Based on the complaint,

FIR under Section 363 of the Indian Penal Code was registered and investigation was carried out. In support of the age of the child, the complainant handed over a school transfer certificate of the prosecutrix according to which the date of birth of the prosecutrix was 03.04.2000. The prosecutrix was recovered from Nalanda, Bihar on 15.03.2014. The respondent also appeared in the Police Station and produced a marriage certificate and an affidavit and stated that he and the prosecutrix had got married on 11.03.2014 in Bihar. At this stage, sections 366 and 376 of the Indian Penal Code were also added. Medical examination of the prosecutrix was carried out at Safdarjung Hospital. Statement under Section 164 of the Code of Criminal Procedure was also recorded.

6. After considering the evidence of the witnesses of the prosecution, more particularly, the evidence of PW-2, the prosecutrix, the trial court has acquitted the respondent.

7. Counsel for the State submits that the judgment of the trial court is contrary to law and facts on the record. The trial court has erred in acquitting the respondent. Counsel also submits that the trial court while passing the judgment has failed to appreciate the correct position of law. Counsel further submits that the trial court has erred in coming to the conclusion that it is difficult to believe that a girl would be taken against her wishes under a threat from Delhi to Bihar and she would not make any effort to raise any alarm or seek assistance of the public persons present around her. Counsel for the State further submits that the trial court erred in taking into account that the prosecutrix informed her father PW1 Riyajuddin on 2nd March, 2014 that she was going with the accused, these circumstances show that it is the prosecutrix who had accompanied the accused and was not enticed by the accused. Counsel further submits that the trial court did not appreciate the fact that the prosecutrix was given some intoxicating liquid on the day of her reaching the house of the accused because of which she became unconscious and regained her consciousness after three to four hours. The trial court relied on her statement under section 164 Cr.P.C wherein she has stated that she had gone to Bihar out of her sweet will and that she had returned from Bihar to Delhi on her own. However, it is pertinent to mention here that the prosecutrix has stated in her testimony before the court that statement under section 164 Cr.P.C was given at the behest of the accused. Counsel further submits that the Supreme Court has in several judgments held that the prosecutrix complaining of having been a victim of an offence of rape is not an accomplice after the crime and there is no rule of law that her testimony cannot be acted upon without corroboration in material particulars for the reason that she stands on a much higher pedestal than an injured witness.

8. We have heard learned counsel for the State and considered her submission.

9. In the case of *Moti Lal vs. State of Madhya Pradesh* 2008 SCC (Vol.11) 20, it had been noted that the testimony of the prosecutrix should be generally believed and can be the sole basis of conviction except for in the exceptional circumstances. We may also note that in the case of *Dinesh Jaiswal Vs. State of*

M.P. , 2010(3) (SCC) 232 while taking note of the earlier decision in the case of Moti Lal (supra), the Supreme Court held:-

9. Injury 6 is a grievous one. As per the prosecutrix she had caused these injuries to the appellant during the time of rape and thereafter, that the accused had caused her three minor injuries as well whereas the case of the appellant is that he had gone to her house to recover his cow and in a quarrel that followed both had received injuries. In any case as the investigating officer had not verified the statement of the appellant, some corroboration for the prosecutrix's story was required. As already mentioned, her son Babulal and Shivbalak, a relative, who had reached the place of incident, were both declared hostile and did not support the prosecutrix. We find that even her husband Sampat who had accompanied her to the police station to lodge the report did not come into the witness box and the doctor was also unable to confirm the factum of rape.

10. Mr.C.D. Singh has however placed reliance on Moti Lal case to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one.

11. As already mentioned above, in our opinion, the story given by the prosecutrix does not inspire confidence. We thus allow this appeal, set aside the impugned judgment and direct that the appellant be acquitted."

10. There is no quarrel to the proposition that the testimony of the prosecutrix is generally to be believed but the courts in the absence of any other corroboration must be conscious and must be satisfied that the testimony of the prosecutrix inspires confidence, it is trust worthy, credible and in case testimony of the prosecutrix does not lend any credence, the accused must be acquitted.

11. The prosecutrix has deposed that she had gone to live with her parents in their house in Kishangarh five to six months prior to the incident. She used to talk to the accused as well as to the other girls who were living near their house. She did not, however, become a friend of the accused. On the day of incident, the accused came to their house at around 2/2.30 p.m. and told her to accompany him to the park. He took her to the park and thereafter to the railway station. She enquired where was he taking her but he did not disclose anything and took her in a train to his village at Bihar and kept her in his house. She stayed there for about ten days. On the next date of reaching his house, he made her drink some liquid because of which she became unconscious but she later regained her consciousness. She told him that she wanted to return back to her house but he did not take her back. He also did not permit her to talk to her parents. On 9th day, when the accused was out of the house, she called her

father from the mobile phone of the accused and informed him about her whereabouts. Her father along with two police officials reached there on the 11th March and brought her back to Delhi on 13.3.2014.

12. Complete reading of the testimony of the prosecutrix would show that respondent was known to her and he used to reside near her house and they used to communicate with each other. The prosecutrix has further testified that on the date of incident i.e., 2nd March, 2014, the respondent had come to her house and asked her to accompany her to the park. He has taken her to the park. Thereafter to the railway station and from there they both boarded a train and went to Bihar. Reading of the testimony would further show that prosecutrix had voluntarily accompanied the respondent from her house to the park and from the park to the railway station and from the railway station, they boarded a train to Bihar. No where in the testimony, prosecutrix has deposed that she was forced by the respondent to leave her house for the park. From the park, the prosecutrix travelled with the respondent to the railway station and even at that stage, the prosecutrix did not raise any alarm or protest. The journey from Delhi to Bihar also did not see any protest, cry or shouting nor such a deposition has been made.

13. While according to the prosecution, she was able to return back of her own but in the complaint Ex.PW 1/A dated 7.3.2014, it has been mentioned by the father of the prosecutrix that on 2nd March, 2014, itself he had received a phone call from the respondent informing him that he was taking away the prosecutrix. PW-1 has further testified that on the same day, he received another call from his daughter informing him that she was with the respondent.

14. Reading of the testimony of the prosecutrix and father of the prosecutrix would show that even the father of the prosecutrix was familiar with the respondent. The testimony of the father of the prosecutrix with the complaint Ex.PW 1/A would show that prosecutrix was able to talk to her father on the day she left Delhi for Bihar and thus there was no restrain upon her from making a phone call or creating a hue and cry. Another aspect which would show that prosecutrix and her father were well acquainted with the respondent and which corroborates that phone call was received by the father from the prosecutrix as well as respondent is that uptill 7th March, 2014, no formal complaint was lodged by the father of the prosecutrix that her daughter had been kidnapped. There is no explanation nor it is believable that either from the house to the park or from the park to the railway station from the railway station and in the train, the prosecutrix did not get any opportunity to raise any alarm.

15. In a similar situation where a prosecutrix had accompanied the accused in a rickshaw to a market area and then she alleged rape in a hotel, the Supreme Court in the case of *Mussaiddin Ahmed vs. State of Assam*, (2009) 14 SCC 541, had observed that there was no explanation given by the prosecutrix as to why she did not inform anybody in the hotel or on the road about the incident. As in the present case, there is no explanation by the prosecutrix that she did not

inform anyone when she had sufficient opportunities. Thus the evidence of the prosecutrix comes under a cloud and it would be difficult to believe that she did not raise any alarm despite various opportunities. All the above factors would go to show that prosecutrix had accompanied the respondent out of her free will. Her evidence is unreliable for the reason that she deposed in court that she was given some intoxicated liquid on reaching the house of the respondent, however, in her statement under section 164 Cr.P.C. Ex.PW 2/B no such incident with regard to having administered any liquid because of which she became unconscious was stated. In fact in the statement under section 164 Cr.P.C, the prosecutrix has stated that she had gone to Bihar out of her own sweet will and she had returned from Bihar to Delhi on her own and nothing wrong had happened with her while she was with the respondent. In her testimony in court, prosecutrix has testified that respondent had taken her to the court and forcibly married her while she admitted the affidavit Ex.PW 2/DC and that she has signed the affidavit and also the marriage certificate Ex.PW1/D1. Reading of the affidavit would show that the prosecutrix had mentioned her age as 21 years. In our view, all the aforesaid would again show that their marriage was voluntary.

16. Having regard to the statement of the prosecutrix under section 164 of Cr.P.C Ex.PW2/B as well as her testimony wherein she has categorically stated that during the period, she stayed with the respondent, they did not establish any physical relationship, in our view, the trial court has rightly acquitted the respondent.

17. There is no infirmity in the judgment of learned trial court. The leave petition, therefore, has to fail. The same is accordingly dismissed.