

**(2020) 09 DEL CK 0157**

**In the Delhi High Court**

**Case No :** Criminal Appeal No. 832 Of 2017, Criminal Miscellaneous (Bail) No. 7775 Of 2020, Criminal Miscellaneous Application No. 5348 Of 2020

Sunil @ Saleem

APPELLANT

Vs

State NCT Of Delhi

RESPONDENT

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**Date of Decision :** 24-09-2020

**Acts Referred:**

Indian Penal Code, 1860 — Section 376  
Code Of Criminal Procedure, 1973 — Section 164, 313

**Citation :** (2020) 09 DEL CK 0157

**Hon'ble Judges :** Vibhu Bakhru, J

**Bench :** Single Bench

**Advocate :** Manika Tripathy, Ravi Nayak

**Final Decision :** Dismissed

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## Judgement

Vibhu Bakhru, J

1. The appellant has filed the present appeal, inter alia, impugning a judgment dated 25.07.2017 passed by the learned Additional Sessions Judge, North-West, Rohini Courts, Delhi, whereby the appellant was convicted for the offence punishable under Section 376 of the Indian Penal Code, 1860 (IPC). The appellant also impugns the order dated 25.07.2017, whereby the petitioner was sentenced to seven years of rigorous imprisonment with a fine of Rs. 75,000/- and in default of payment of fine, to undergo simple imprisonment for a period of six months.

2. The impugned judgment was rendered in connection with a case arising from FIR No. 156/07 under Section 376 of the IPC registered with PS Sultan Puri. The said FIR was registered at the instance of a young married woman (hereafter Ms 'A'). She alleged that she, along with her infant, came to stay at her sister's home and her brother-in-law (the appellant herein) raped her on 27.01.2007, while her sister was away at work. Ms A went back to her house the same evening with her husband and after deliberating, they reported the matter to the

police on 29.01.2007.

3. Ms A was medically examined at about 11:55 pm on 29.01.2007. The MLC records that she had reported that she had been assaulted by her sister's husband on 27.01.2007. The MLC also records that Ms A had stated that she had not taken a bath and had not changed her undergarments since the incident. The MLC indicates that Ms A had no injury on her body. It also records that on a general examination, there were no signs of any struggle. Her 'High Vaginal Swab' (hereafter 'HVS') was taken and the said swab along with the undergarments were sealed and handed over to W/Ct. Sandhya (who was examined as PW3). PW 3 had testified that she had taken Ms A to SGM Hospital for her medical examination and thereafter, two sealed pullandas and one sample seal of the hospital were given by the doctor and were received by her. She had also signed the MLC as acknowledgement of having received the two pullandas. She identified her signatures on the MLC (Ex.PW3/A).

4. Ms A's statement under Section 164 of the Cr.PC was recorded on 03.02.2007 (Ex.PW13/E). She stated that she resides with her husband and they have a nine month old son. She stated that on 25.01.2007, her sister had come to their house along with her husband (the appellant herein) and had stayed over for a day. On the next date when her sister was leaving for their father's place at Jahangir Puri, she asked her (Ms A) to come along with her. She stated that her husband declined. Thereafter her sister asked her to come along with her as she wanted to show her, her new house at Jain Nagar. She stated that she along with her nine month infant accompanied her sister to her house at Jain Nagar. She stayed overnight at her sister's house. The next day, her sister had a show and she left. Her husband (the appellant herein) remained in the house and he forced himself on her and raped her. She screamed but he threatened to kill her.

5. The accused (appellant) was charged on 14.09.2007 for raping Ms A. The accused pleaded not guilty and the matter was set down for trial. However, the accused absconded and was declared a proclaimed offender on 16.07.2010. He was re-arrested on 24.05.2012. The prosecution examined fourteen witnesses. The appellant did not examine any witness for his defence.

#### Evidence

6. Before proceeding further, it is relevant to briefly examine the evidence led by various witnesses and the statement of the appellant.

7. Inspector Sanjita, PTC, Jharoda Kala deposed as PW1. She identified the accused in open court. She testified that on 29.01.2007, Ms A came to the police station along with her husband at about 10:00 pm and she recorded her statement. She sent Ms A to the hospital along with W/Ct. Sandhya. Ms A came back from the hospital at about 01:00 pm. Thereafter, she along with Ms A, her husband and Ct Joginder went to the spot at around 02:00 am. She denied that the place of the incident is surrounded by other houses. There are vacant plots near the place of the incident. The wife of the accused (sister of Ms A) was

present in the house. She did not record the statement of the occupant of house no. A-462 regarding the incident. She remained there for about three to four hours. She recorded the statement of the wife of the accused on the same day. She never visited the said house again. She met the accused in the morning near his house but not at his house. She denied that the accused met PW1 along with his wife, when she met his wife at her house. The accused was sent for a medical examination with Ct Joginder. PW1 denied the suggestion that the prosecutrix (Ms A) demanded Rs. 85,000 from the accused and his wife. She denied that on such refusal, Ms A had filed a false case against the accused. She denied there being a scuffle between Ms A and the wife of the accused. She denied that the house of the accused has glass windows or a mesh door (jali wala darwaja). She affirmed that she had not clicked any photographs of the spot (the room and the house).

8. Ms A's husband was examined as PW8. He stated that on 25.01.2007, his sister-in-law (sali) came to his house. On 26.01.2007, she took his wife along with their son to her house in Jain Nagar, despite his objections. On 27.01.2007, PW8 went to Jain Nagar to bring back his wife and at that time, he found her frightened. After they had returned, she informed him that her jija, Sunil @ Salim, had raped her. PW8 stated that he told this fact to his sali, however, she abused him. Thereafter, he along with Ms A, went to the police station on 29.01.2007 and Ms A's statement was recorded. PW8 correctly identified the accused in open court. In his cross-examination, he stated that the relations between his family and that of Ms A, were normal.

9. Ms A, the prosecutrix, was examined as PW13. She stated that on 25.01.2007, her sister along with her husband Sunil (the appellant) came to her house at Nihal Vihar and thereafter, she took her along with her son to their house at Jain Nagar. Ms A stated that she remained at their house for about two days. On 27.01.2007, at about 04:00 pm Ms A's sister left for her work. Ms A alleged that her jija (Sunil - the accused) remained at home and he did zabardasti with her. He dragged her to the bed and raped her. In the evening, PW13's husband came and took her home. She informed him about the incident upon reaching her house. On 29.01.2007, they reported the matter to the police. They did not report the incident on the same day as they felt ashamed (sharam ke maare). Ms A correctly identified the accused in court.

10. In her cross-examination, she affirmed that her wedding took place on 21.11.2004 and it was a love marriage. She denied any knowledge regarding her sister's marriage being a love marriage or an arranged marriage. She stated that her husband was doing the work of nose-pin gold at the material time. Her husband would leave for work and would come back home after two to four days. She denied that her husband was involved in gambling. However, she volunteered that he used to indulge in gambling in the past but had left that and had started nose-pin work. She affirmed that due to her husband's gambling habit, they had fallen in debt and their valuable items such as household goods,

motorcycle etc. were mortgaged/pledged by her husband. She denied the suggestion that her husband had, through her asked for an amount of Rs. 80,000 to Rs. 85,000 from her sister. She stated that no altercation had taken place between her and her sister's family on their refusal to furnish the said amount.

11. She stated that she did not notice whether her sister's house had glass panes. She stated that her sister worked as a dancer in a club. There was no fixed time of her going to work. She had not gone to work on 26.01.2007 but on 27.01.2007, she had gone for work at about 04:00 pm. She stated that her husband had not seen her sister's residence at Jain Nagar and her sister had given him that address. She stated that the incident took place after about 1-1.5 hours of her sister going to work. She affirmed that she tried to raise an alarm, however, the appellant had gagged her. She denied having biting, scratching, piercing the accused or pulling the accused's hair. She claimed that she tried to ward him off by pushing him away. Neither the clothes worn by her nor the clothes worn by the accused were torn in the process of the scuffle (khichatani). After the incident, she neither came out of the home nor raised any alarm. She informed her husband regarding the incident. She stated that she changed her clothes by the time her husband came. She did not sustain any bruises or injury. She denied the suggestion that she had told other family members about the incident.

12. The statement of the accused was recorded under Section 313 of the Cr.PC. He stated that Ms A had come to his house out of her own volition. He stated that the allegation of the incident was false. He affirmed that Ms A's husband came in the evening and took her back with him. He stated that the police officials came to his house and took him to the police station without disclosing anything. He stated that when Ms A's husband came, he told her to make another cup of tea for him. He stated that Ms A's husband also interacted with the neighbours. He stated that the case was filed against him because Ms A's husband wanted Rs. 80,000 to Rs. 85,000, but he was not in a position to part with such an amount.

### Submissions

13. Ms Tripathy, the learned counsel appearing for the appellant assailed the impugned judgment on several fronts. First, she submitted that the timeline of events, as put forth by the prosecution, was improbable. Ms A had stated that her sister had left for her work at 04.00 PM and Ms A was allegedly raped after one hour/one and a half hour thereafter. The alleged offence continued for 15 to 20 minutes and, Ms A's husband had come to take her back at about 6.00/6.15 PM. In the meanwhile, Ms A had also changed her clothes. She submitted that Ms A's husband would have arrived barely minutes after the incident but Ms A had testified that he had come to her sister's place later in the evening, thus indicating that he came to the house much after the incident had taken place. She contended that it is impossible for Ms A's husband not to have noticed

anything if Ms. A had been forcibly raped a few minutes prior to his arrival.

14. Next, she submitted that there was a material inconsistency in the statements of Ms A and her husband. Whereas, Ms A had stated that they tried to call her sister but could not reach her; Ms A's husband testified that he had informed her about the offence but she had abused him.

15. She contended that it is highly unbelievable that a person who has been raped by her brother-in-law would file a complaint with the Police without informing any of the family members.

16. She further contended that there is an inconsistency as to when Ms A changed into the clothes of her sister. According to her she had changed her clothes when her husband came to fetch her but during her MLC, which was conducted three days later she stated that she was wearing the same undergarments as on the date of the incident and had not taken a bath.

17. Lastly, she contended that Ms A's sister's residential unit consisted of only two rooms but the site plan indicated that there were three rooms and therefore, the other room was, obviously, occupied by one Aunty, who Ms A had affirmed that she lived in the vicinity. However, Ms A had not mentioned the incident to her despite the Aunty being present in the next room or close by. She also stated that the room where the incident had allegedly taken place had three windows, which looked on to terraces/open space where women would normally sit out in the sun as the incident had occurred in the peak of winter. Thus, it is unbelievable that they would not have heard any commotion if the offence had taken place as alleged.

18. Mr Nayak, learned APP appearing for the State countered the aforesaid submissions and contended that there is no material inconsistency in Ms A's testimony and the evidence led, clearly established that the appellant was guilty of the offences for which he has been convicted. It is also submitted that the testimony of Ms A is coherent and corroborated by the evidence as adduced.

#### Reasons and Conclusion

19. The case of the prosecution rests substantially on the testimony of Ms A. Ms A was examined as PW13. She had testified that her sister along with her husband had come to her house at Nihal Vihar and thereafter, had taken her along, to their house at Jain Nagar. She testified that she remained in their house for about two days. She stated that on 21.01.2007 at about 04:00 pm, she along with her son (aged around 1½ years) were present at the house. Her sister had left for her work. She testified that her brother-in-law (jija) was present in the house and he had forced himself on her (zabardasti). She stated that he had dragged her to the bed and raped her. She stated that in the evening her husband came to take her back. She narrated the incident to him after reaching her home. She stated that on 29.01.2007, she reported the matter to the police. Ms A was cross-examined. In her cross-examination, she stated that at the time

of the incident she was wearing pajama and kamiz (night dress). She stated that she had taken a bath prior to the incident and after taking a bath she had worn the same clothes in which she had come to the house of her sister. She stated that the pajama and kamiz which she wore in the night belonged to her sister. A specific question was put to her as to when did she wear the pajama and kamiz. She stated that she had worn the same after her sister had left for work. There is lack of clarity in regard to the clothes worn by Ms A on that day. On one hand, she had stated that at the time of the incident she was wearing pajama and kamiz which according to her belonged to her sister. In the same breath, she had stated that she had taken a bath prior to the incident and after taking the bath, she had worn the same clothes in which she had come to the house of her sister.

20. However, this Court does not consider the above to be of any material importance. This is because at the time of her medical examination, she had reported that she had not had a bath after the incident and also had not changed her undergarments. It is also admitted that none of the clothes that were worn by her at the material time were torn. Thus, the undergarments worn by her at the time of the incident or immediately thereafter were available.

21. Apart from the above, there are certain minor inconsistencies in the statements of Ms A: statement as recorded on 27.01.2007; statement under Section 164 Cr.PC recorded on 3.02.2007 and; her testimony. In her initial statement, she had stated that her sister along with her husband had come to their house on 25.01.2007 and had stayed there for the night. When they were leaving on 26.01.2007, her sister had asked her to accompany them to see her room (karma dekh lena). She stated that despite her husband telling her not to go, she had accompanied her sister to her house and she had also carried her child with her. In her statement which was recorded on 03.02.2007 under Section 164 Cr.PC, she stated that her sister had told her that she was going to their father's house at Jahangir Puri. In her testimony, she simply stated that her sister had taken her along, to their house at Jain Nagar.

22. It was also pointed out that in her initial statement recorded on 29.01.2007 (on the basis of which the FIR was registered), Ms A did not mention that she had resisted the accused at the time of the incident. However, in her statement recorded under Section 164 Cr.PC, she stated that she screamed and on her doing so, the appellant had threatened to kill her. In her examination-in-chief, she did not mention about any threat held out by the appellant or that she had tried to raise an alarm or had offered any resistance. She simply stated that the appellant had done 'zabardasti' with her. She further explained that by zabardasti she meant that he had dragged her to the bed and raped her. But, in her cross-examination, she stated that she tried to raise an alarm but the accused had placed his hand on her mouth. She also stated that she did not scratch or pull the hair of the accused but she volunteered that she tried to ward him off by pushing him away. She further testified that the entire occurrence took about 15-20 minutes and the accused had kept his hand on her mouth throughout the

said period.

23. In addition to the above inconsistencies, it was also pointed out that Ms A's testimony was not consistent with the testimony of her husband (who was examined as PW8). Whereas Ms A stated that she did not inform her sister about the incident either from the mobile of her husband or by telephone from any other place; PW8 (Ms A's husband) testified that he had told Ms A's sister regarding the incident but she started abusing him and thereafter, he along with his wife had gone to the police station where his wife's statement was recorded.

24. This Court is of the view that none of the aforesaid inconsistencies/aspects are material so as to persuade this Court to discard Ms A's testimony. An allegation by any woman that she has been raped is not without consequences to the woman making such an allegation. Even though she is not at fault and is the victim, she does suffer stigma and ignominy. Thus, unless there are good reasons to believe that a rape victim is making an incorrect accusation, the sole testimony of such a victim has been held to be sufficient to return a verdict of conviction for an offence of rape.

25. It is not the prosecution's case that Ms A had screamed or scratched or offered any physical resistance to the appellant at the time when he forced himself on her. Therefore, the fact that the clothes worn by the accused and the prosecutrix at the material time were not torn does not in any manner raise any doubts as to the prosecution's case. It is also not Ms A's testimony that she had screamed or had raised any alarm. However, she has attempted to give two different explanations for the same. In her statement under Section 164 Cr.PC, she stated that she had screamed but the accused had threatened to kill her. In her cross-examination she stated that he had placed his hand on her mouth and therefore, she could not scream. This discrepancy is not sufficient to raise any doubt regarding whether the appellant had committed the offence as alleged.

26. Even if Ms A is not considered a sterling witness, there is also evidence that corroborates her testimony: the FSL Report. The FSL Report indicates that human semen was found on Ex.1 (vaginal swab of the prosecutrix) and on Ex.2 (undergarment of the prosecutrix). In addition, blood was also detected on Ex.2 (undergarments of the prosecutrix). Human semen was also found on Ex.3 (underwear of the accused). The Report indicates that the human semen found in the vaginal swab of the prosecutrix and her underwear were from a person with the same blood group - A Blood Group - as the person whose semen was found on the underwear of the accused. Since a DNA Profile was not generated from the said exhibits, it cannot be conclusively established that the semen found on the vaginal swab of Ms A and on her undergarments was that of the appellant. However, it has been established that it was of the same blood group as that of the accused. This is on the obvious assumption that the human semen found on the underwear of the accused is his semen. The Court is of the view that the FSL Report is not without evidentiary value and does indicate (even though not conclusively) that semen found on the vaginal swab of the

prosecutrix and on her undergarments were that of the accused. This corroborates with the allegation made by Ms A that the appellant had engaged in a sexual intercourse with her. In the given circumstances, her testimony that the appellant had done so without her consent must be accepted.

27. It is also relevant to note that the appellant did not lead any evidence in his defence. However, his case as is apparent from the suggestions given to various witnesses and his statement recorded under Section 313, is that the petitioner's husband had asked him for Rs. 80,000-85000/- which he had refused to give and this led Ms A to falsely implicate him. According to the appellant, no such incident as alleged had happened.

28. The defence as sought by the appellant is clearly unpersuasive and not sufficient to raise any doubts as to the case set up by the prosecution. There is no evidence of any enmity between Ms A and her sister or their respective husbands. Merely because the appellant refused to lend money clearly offers no reason to implicate him in a false case particularly when such implication does not benefit Ms A or her husband in any manner but on the contrary would adversely affect Ms A's reputation.

29. The delay in filing the FIR has also been sufficiently explained. Ms A had stated that she had disclosed about the incident to her husband on reaching her home that would be later in the evening of 27.01.2007. They had not reported the incident on the very next day as according to Ms A she felt ashamed, but finally on the next day i.e. on 29.01.2007, they had decided to report the incident.

30. The contention that the evidence on record indicated that one Aunty was living in the adjoining room where the offence was committed is clearly without merit. There is no evidence on record to indicate that any person other than the petitioner's sister and her husband were residing in their residential premises. The site map (Ex PW1/D) does indicate that there were three rooms, however, the site map is not precise and the nature of the three rooms is not discernable. Ms A had testified that there was one Aunty living in the 'vicinity'. The same cannot be construed to mean that she was living in the next room. The contention that there would have been women sunning themselves outside the windows of the room where the offence was committed, is also speculative and there is no evidence to establish that at the given point of time there was anybody outside the window of the room where the offence was committed. In any view of the matter, this would not be of material value as admittedly Ms A had not screamed or raised an alarm, but the same does not indicate that she had consented to a sexual intercourse with the appellant.

31. In view of the above, the decision of the Trial Court to convict the appellant cannot be faulted. The appeal is, accordingly, dismissed.

32. All pending applications are also disposed of.