
(2013) 02 DEL CK 0142

In the Delhi High Court

Case No : Criminal A. 150 of 2007 and Criminal A. 172 of 2007 and Criminal M.B. No. 1451 of 2008

Surender Mandal

APPELLANT

Vs

The State (NCT Delhi)
 Dhani Ram Vs The State

RESPONDENT

Date of Decision : 12-02-2013

Acts Referred:

Citation : (2013) 1 JCC 778

Hon'ble Judges : S.P. Garg, J

Bench : Single Bench

Advocate : Sumit Verma in Criminal A. 150/2007 and Criminal A. 172/2007 and Criminal M.B. No. 1451/2008, Mr. Bhupesh Narula with Mr. A.V.Gupta, in Criminal A. 42/2007, for the Appellant; M.N. Dudeja, APP for the State, for the Respondent

Final Decision : Allowed

Judgement

S.P. Garg, J.—The appellants Surender Mandal (A-1), Dhani Ram (A-2), and Mahender Mandal (A-3) impugn their conviction in Sessions Case No. 376/2006 arising out of FIR No. 180/2003 registered at Police Station Keshav Puram by which they were convicted for committing offences punishable u/s 376 (2) (g) IPC and sentenced to undergo RI for ten years with fine Rs. 1,000/- each. Allegations against the accused were that on 28.05.2003 at about 11:00 P.M. they all in furtherance of common intention committed gang rape with "X" (assumed name) aged three years in the house of Shabnam, at Gali Sainiwali Ram Pura, Delhi. Daily Dairy (DD No. 27-A) was recorded at 12:45 A.M. on the night intervening 28/29.05.2003 at Police Station Keshav Puram on getting information that a girl aged two and a half years was raped and the culprit has been apprehended. The investigation was assigned to SI Ram Chander who with Constable Dharmavir reached the spot. In her statement, Shabnam disclosed that on 28.05.2003 when she went to her house after selling vegetables at about 11:00 P.M., she saw that A-2 was committing rape upon her daughter "X". A-1 was present inside the room waiting for his turn and was

pressing her daughter's mouth. A-3 was standing outside the room to guard the spot. On seeing her, they started fleeing the spot. "X" was bleeding from her private parts. She gave beatings to the accused. On hearing her noise, many people gathered and caught hold of them. During the course of investigating, "X" was medically examined. A-1 to A-3 were arrested. Statements of the witnesses conversant with the facts were recorded. Exhibits were sent to the Central Forensic Scientific Laboratory, Kolkata (CFSL). After completion of investigation, a charge-sheet was submitted against A-1 to A-3. They were duly charged and brought to trial. The prosecution examined eight witnesses. Statements of the accused were recorded u/s 313 Cr. P.C. and they pleaded false implication. On appreciating the evidence and considering the rival contentions of the parties, by the impugned judgment, the Trial Court held all the accused responsible for committing rape upon the prosecutrix "X". Aggrieved by the said orders the appellants have preferred the present appeals.

2. Counsel for the accused urged that the Trial Court did not appreciate the evidence in its true and proper perspective and fell into grave error in relying upon the sole testimony of PW-1 (Shabnam) without ensuring her credibility. The prosecution case was based upon circumstantial evidence and there were major discrepancies and lapses in investigation which were conveniently ignored. The prosecution failed to establish the exact spot of occurrence and perpetrators of the crime. Adverse inference is to be drawn against the prosecution for not examining the complainant's children who were present in the room where the prosecutrix was ravished. The CFSL report does not connect the accused with the crime.

3. Learned Additional Public Prosecutor supported the judgment and urged that it does not call for interference. It is based upon the cogent and reliable testimony of PW-1 (Shabnam) who had no enmity with the accused to falsely implicate them. Minor discrepancies or improvements which do not go to the root of the case are not fatal. The accused cannot take advantage of the defective investigation or lapses of the investigating officer. The occurrence had taken place at 11:00 P.M. and the incident was reported to the police without any delay. When the accused persons were medically examined, they were having smell of alcohol. Two of them had injuries on their lips. They were last seen with the prosecutrix.

4. I have considered the submissions of the parties and have examined the record. At the outset, it may be mentioned that counsel for the appellant has fairly admitted that incident had taken place with the child and she was physically assaulted. He, however, urged that the prosecution was unable to establish that she was sexually assaulted inside the house of the complainant and that the accused persons were the culprits. The prosecutrix "X" was a child of three years. When PW-1 went to her house, she found her bleeding from private parts. MLC was prepared at Babu Jagjivan Ram Memorial Hospital on 29.05.2003 at 01:10 A.M. PW-7 (Dr. A. Kesari) proved MLC (Ex. PW-7/A)

prepared by Dr. Purdhut Kumar, Dr Rita Jindal and Dr. Taseem. Their signatures were identified as the said doctors were not available. In the MLC (PW-7/A), on local examination it was noticed that "X" was bleeding from the vagina and hymen was not intact. She was referred to LNJP hospital for repair of complete perineal tear. Undoubtedly, it was a case of assault upon the child. Undisputedly, the prosecution case is based upon circumstantial evidence. It is an admitted position that prosecutrix "X"'s statement was not recorded u/s 161 Cr. P.C. or 164 Cr. P.C. The prosecution case against the accused after completion of the investigation was that PW-1 (Shabnam) witnessed A-2 committing rape upon "X". She also saw A-1 inside the room waiting for his turn and pressing "X"'s mouth. The case was registered on the statement of PW-1 (Shabnam) and she in her statement (Ex. PW-1/A) categorically named the accused persons and attributed specific role to them. However, she did not support the version recorded in her statement (Ex. PW-1/A). In her statement before the court as PW-1, she admitted that she had not seen any of the accused committing "wrong act" with her daughter. Learned Additional Public Prosecutor, after seeking court's permission, cross-examined her. She denied that she had seen A-2 committing rape on her daughter or A-1 was pressing her daughter's mouth. She denied that she had stated so in her statement (Ex. PW-1/A) to the police. Apparently, Shabnam was not an eye-witness to the incident and being X's mother, she had no good reasons to resile from her previous statement (Ex. PW-1/A).

5. PW-1 (Shabnam) introduced a new version in her statement before the court which was at variance with her statement (Ex. PW-1/A). She deposed that when she went to her house after closing vegetable shop at 10:45 P.M., she saw that the lights in the house had been put off. Her two sons were lying asleep. Her daughter "X" was unconscious and her tongue was protruding out. When she entered the house, she found A-3 standing outside her house. A-1 and A-2 were coming out of the house that time. She raised alarm and people from the locality gathered. She further deposed that "X" pointed towards A-2 who had committed the "act" with her and A-1 who had pressed her throat. She took her daughter to a hospital at Jahangir Puri. In the cross-examination, she was confronted with her statement (Ex. PW-1/A) where she had not stated that her daughter had pointed towards A-1 and A-2 and told her the role played by them in the incident. She admitted that she did not know the name of the accused prior to the incident. A-1 and A-2 used to reside in her neighbourhood and A-3 used to visit them.

6. The prosecution has not given any reasons for the conflict between the version stated in Ex. PW-1/A at the first instance and the one given in the court by PW-1 (Shabnam), the star witness. PW-1 (Shabnam) did not see any of the accused committing rape upon "X" or outraging her modesty. None of them was found in the room in an obscene position with "X". None of them was naked or had put off his undergarments. "X" was unconscious when PW-1 went to the house. At the time of her examination on 29.05.2003 at about 01:10 A.M. in the hospital,

she was semi conscious/disoriented. It was unbelievable that she could point out towards A-1 and A-2 and apprise her specific role of A-1 and A-2, when she went to the room. PW-5 (SI Ram Chander) went to the spot and took "X" with her mother Shabnam to BJRM hospital. He did not depose if PW-1 (Shabnam) had told him the role played by each accused while sexually assaulting "X". Admittedly, PW-5 did not record her statement u/s 161 Cr. P.C. Wavering testimony of sole witness is inconsistent with her initial version in Ex. PW-1/A and has not been corroborated at all. According to PW-1 (Shabnam) when she raised alarm, many public persons gathered there. However, the Investigating Officer did not record statement of any such person. PW-5 (SI Ram Chander) in the cross-examination admitted that when he reached the spot no body met him as everyone was lying asleep. Number of tenants were residing in the neighbourhood of the complainant but no inquiry was made from them. Contradictory and inconsistent version has been given as to how and when the accused persons were arrested and how and when their involvement in the incident surfaced. Shabnam in her statement (Ex. PW-1/A) told that the assailants were apprehended at the spot and beaten. The public persons who gathered at the spot caught hold them and information was given to the police. However, PW-5, who went to the spot, on receipt of DD No. 27A at about 11:00 P.M. categorically admitted that none of the accused was present at the spot. He rather stated that SHO brought all the three accused in the hospital. Statement of SHO was not recorded to ascertain when and from where the accused were arrested. In the cross-examination, PW-5 (SI Ram Chander) stated that the SHO was not aware about the involvement of the accused and he could not say how he had apprehended the accused.

7. Admittedly, the complainant had three children besides the prosecutrix "X" and they were elder to her. The prosecutrix alleged that her two sons were sleeping in the room when she went there. The prosecution, however, did not examine them u/s 161 Cr. P.C. PW-8 (SI Veena Sharma) who took over the investigation admitted in the cross-examination that she had not recorded the statement of other children of the complainant. Suggestion was put to her that the age of the children was 12/13 years but she was unable to admit or deny. It is unbelievable that the children elder to the prosecutrix continued to sleep despite she being subjected to violence by the assailants. PW-3 (Sanjay Kumar), landlord, who allegedly went to the spot, did not support the prosecution and stated that he did not know anything about Shabnam and the accused. He denied the contents of the statement marked (PW-3/A) recorded by the police.

8. The investigation is highly defective and faulty. Exhibits were sent to CFSL, Kolkata. However, the Investigating Officer did not collect Serological report during trial. This Court vide order dated 11.01.2011 directed Additional Public Prosecutor to obtain instructions from Investigating Officer as to whether the said report was collected from CFSL and if not, the reasons thereof. Vide order dated 17.01.2011 it was recorded that the said report was not obtained from CFSL. Directions were given to file on record the report with an affidavit of the

Investigating Officer explaining the circumstances in which the report was not collected. On 15.02.2011 an affidavit was filed along with the report dated 30.12.2004 from CFSL, Kolkata. Even that report is not helpful to the prosecution as only on Ex. 9 (i.e. Underwear) human blood of "AB" group was detected. In Ex. 4 (blood sample) and Ex. 7 (blood sample) human blood of "B" group was detected. Ex. 1/A (Chaddar cutting) had human blood of "A". No DNA test was conducted in this case.

9. Mere presence of the accused near the spot is not enough to establish their guilt. Admittedly, A-1 and A-2 were tenants in the adjoining room of the complainant and A-3 used to visit them. They did not stop her from entering the room. The complainant did not depose that she confronted them at the spot. She admitted in the cross-examination that she had no talk with A-3 and did not ask as to why he was standing outside her house. The accused did not abscond after the occurrence. No injuries were found on their private organs in the MLC. The doctors who prepared the MLC (Ex. PW-7/A) were not examined as they were not traceable. PW-7 (Dr. A. Kesari) identified their hand-writing and signatures. In the examination-in-chief he was unable to give definite opinion if sexual intercourse took place with the victim. PW-1 (Shabnam) did not depose if any "chaddar" was seized. No injuries on the neck of the prosecutrix was detected in the MLC to corroborate the complainant's version that A-1 had pressed her neck. DD No. 27A was registered at 12:45 P.M. on getting information from the PCR. Statement of PCR official was not recorded. Complainant did not lodge any information with the police. The delay in lodging the FIR at 03:00 A.M. has remained unexplained.

10. Considering all the facts and circumstances, I am of the considered view that the prosecution was unable to establish the guilt of the accused persons beyond reasonable doubt. The prosecution was required to satisfy three tests when its case rested upon circumstantial evidence:-

(a) The circumstances, from which an inference of guilty is sought to be drawn, must be cogently and firmly established.

(b) Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

(c) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypotheses than that of the guilt of the accused. The circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

11. In the light of the above discussion it is apparent that the prosecution has failed to establish incriminating circumstances to connect the accused with the commission of offence beyond reasonable doubt. When two incredible version

confront the court, the court has to give benefit of doubt to the accused and it is not safe to sustain the conviction. Mere suspension is not enough to take place of proof.

12. The impugned judgment and conviction cannot be sustained and is set aside. The appeals filed by the appellants are allowed. The appellants be released immediately if not required to be detained in any other case. It is relevant to note that as per nominal roll on record, the appellants have already undergone the sentence awarded to them. Pending application stands disposed of. Trial court record be sent back forthwith.