

(2018) 05 DEL CK 0093
In the Delhi High Court
Case No : CRL.A. 267 OF 2013

TEJINDER SINGH @ LUCKY SINGH

APPELLANT

Vs

STATE OF DELHI ON ?5100912

RESPONDENT

Date of Decision : 10-05-2018

Acts Referred:

Indian Penal Code, 1860 — Section 376, 375
Protection of Children from Sexual Offences Act, 2012 — Section 2(d)

Citation : (2018) 05 DEL CK 0093

Hon'ble Judges : S.P.GARG, C.HARI SHANKAR

Bench : Division Bench

Advocate : Rahul Sahdev, Kewal Singh Ahuja, VIKRAM SINGH , VICKY SINGH
THRU, PAIROKAR BALJEET SINGH, PAIROKAR BALJEET SINGH

Final Decision : Allowed

Judgement

1. Aggrieved by a judgment dated 04.01.2013 of learned Addl. Sessions Judge in Sessions Case No.34/2012 arising out of FIR No.32/2012 Police

Station Shahbad Dairy by which the appellants â?" Tejinder Singh @ Lucky Singh (A-1) and Vikram Singh @ Vicky Singh (A-2) were convicted for

committing offences punishable under Sections 376(2)(g)/506 IPC, they have preferred the aforesaid appeals. By an order dated 05.01.2013, A-1 was

sentenced to undergo RI for ten years with fine ` 1 lac under Section 376(2)(g) IPC; RI for two years under Section 506 IPC; A-2 was sentenced to

undergo Rigorous Imprisonment for life with fine ` 1 lac under Section 376(2)(g) IPC; RI for two years under Section 506 IPC. Both the sentences

were to operate concurrently.

2. Briefly stated, the prosecution case as projected in the charge-sheet was that about 4 or 5 months before 28.01.2012 and on several other

occasions at C-105/106, Sector-5, Bawana Industrial Area, Delhi, and the appellants committed gang-rape upon the prosecutrix (assumed

name) aged around 13 years and criminally intimidated her. On 28.01.2012, FIR was lodged at Police Station Shahbad Dairy on the statement

(Ex.PW-10/A) of the prosecutrix. She informed the police that her father used to run a tea stall in front of C-105; she used to sit on the said shop

after return from school in the absence of her father when he used to take her mother to the hospital for medical treatment. She further informed

that both the appellants were owners of C-106 and she used to visit them to serve tea in the office as and when called. She further disclosed that

about 4 to 5 months back, when she had gone to their office, the appellants caught hold of her; removed her clothes and committed rape upon her

one by one. She was criminally intimidated and threatened not to disclose the incident to anybody or else she would face dire consequences.

Whenever her father was away to the hospital, the appellants used to commit rape upon her.

3. The prosecutrix named Deepak Kumar Shah (facing trial before Juvenile Justice Board) a foreman at C-104 who also committed rape upon her

when she had gone to the roof of her house to dry clothes. She claimed that the appellants and Deepak Kumar Shah regularly sexually assaulted her

for 4 to 5 months putting her in fear. About 10 to 12 days prior to the lodging of the complaint, she became ill and her father took her to a doctor

who noticed that she was pregnant. When her father insisted to disclose the names of the perpetrators of the crime, she divulged all the facts to him

in detail. She was thereafter taken to the Police Station to record her statement.

4. During investigation, the prosecutrix was medically examined; she recorded her 164 Cr.P.C. statement. The appellants and Deepak Kumar Shah

were arrested. Deepak Kumar Shah being juvenile was sent to face trial before Juvenile Justice Board. Statements of the witnesses conversant with

the facts were recorded. Exhibits collected during investigation were sent for examination to Forensic Science Laboratory. Upon completion of

investigation, a charge-sheet was filed against the appellants in the Court.

5. To bring home the appellants' guilt, the prosecution examined twenty-three witnesses in all and relied upon several documents. In their 313

Cr.P.C. statements, the appellants denied their involvement in the crime and

pleaded false implication. DW-1 (Darshan Singh) appeared in their defence. The trial resulted in the appellants' conviction as mentioned previously. Being aggrieved and dissatisfied, the instant appeals have been preferred.

6. We have heard the learned counsel for the parties and have examined the file minutely.

7. At the outset, it may be mentioned that on 28.01.2012 when the victim was taken for medical examination before PW-12 (Dr.S.N.Siddharth), he noticed that the victim was pregnant. She was referred to Senior Resident (Gynae) for further examination and management. PW-11 (Dr.Neha Kumari) examined the victim at 05.30 p.m. that day and gave her observations on the MLC (Ex.PW-11/A) at the encircled portion from point

to . The victim was at an advanced stage of pregnancy. All visible symptoms and character of a pregnant woman were

present. Undisputedly, the victim gave birth to a male child on 23.03.2012 at Maharishi Valmiki Hospital. DNA test was conducted to ascertain as to

who was the biological father of the child. PW-13 (A.K.Shrivastava) proved DNA report (Ex.PW-13/A). It was reported that source of Ex.9 (blood

sample of A-2) was biological father of source of Ex.1 (blood on gauze piece of new born child). Apparently A-2 against whom there were specific

allegations by the prosecutrix to have established physical relations with her was ascertained to be the father of the new born child of the victim. It is

informed that at present the child is in some private orphanage in Haryana.

8. Appellants' conviction is based upon the sole testimony of the prosecutrix. This Court is conscious that solitary statement of the victim is

sufficient to record conviction and no further corroboration is required. The victim's testimony, however, must inspire confidence.

9. In *Abbas Ahmed Choudhury v. State of Assam* (2010) 12 SCC 115, observing that a case of sexual assault has to be proved beyond reasonable

doubt as any other case and that there is no presumption that a prosecutrix would always tell the entire story truthfully, the Hon'ble Supreme Court

held : "Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire

story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1.

10. In another case *Raju v. State of Madhya Pradesh* (2008) 15 SCC 133, the Supreme Court stated that the testimony of a victim of rape has to be

tested as if she is an injured witness but cannot be presumed to be a gospel truth. It cannot be lost sight of that rape causes the greatest distress

and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well.

The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must,

further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily

such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a

witness is always correct or without any embellishment or exaggeration.

11. In *Rai Sandeep @ Deepu vs. State of NCT of Delhi*, (2012) 8 SCC 21, the Supreme Court commented about the quality of the sole testimony of

the prosecutrix which could be made basis to convict the accused. It held: In our considered opinion, the 'sterling witness' should be of a very

high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to

accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would

be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement

right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be

natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The

witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give

room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation

with each and everyone of other supporting material such as the recoveries

made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.â??

12. In *Tameezuddin @ Tammu v. State (NCT of Delhi)*, (2009) 15 SCC 566, the Supreme Court held: 'It is true that in a case of rape the evidence of the Prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.

13. In the instant case, there is inordinate delay in lodging the FIR. Physical relations were established with the prosecutrix on several occasions at several places. However, before lodging the FIR on 28.01.2012, the victim did not disclose her ordeal to her parents or any other family members any time. She did not raise any alarm or hue and cry any time at the time of sexual assault or soon thereafter. Even after the commission of the crime, she did not divulge anything to her parents at home and maintained complete silence. Record reveals that when she was taken for the first time to the doctor on her complaint of ill-health, she was having eight months pregnancy. It is highly unbelievable that the victim or her parents were not aware that she was having a pregnancy of eight months duration. PW-11 (Dr.Neha Kumari) in her examination informed that during her medical examination â??Xâ?? was found to have eight months pregnancy. In the cross-

examination, she disclosed that at the time of her visit, all visible symptoms and character of a pregnant woman were there on Xâ??s body. The abdomen was distending about 32 weeks and it was clearly visible. The fetal heart sound was present and found regular. â??Xâ?? did not complain to her any other illness. It is unthinkable that victimâ??s parents were unaware about the visible symptoms showing â??Xâ?? to be pregnant. It is not clear as to why victimâ??s parents ignored all these visible features and did not confront the prosecutrix. Victimâ??s conduct is also unreasonable and unacceptable. As per PW11â??s testimony, the prosecutrix was having a good I.Q. level. There was no plausible reason to suppress the pregnancy for so long. The delay in reporting the incident to the police has remained unexplained.

14. In the FIR, the victim named the appellants to have committed rape upon her when she was called by them to their office to serve tea. She, however, did not give detailed particulars as to the date and time when for the first time she was sexually assaulted. Allegedly, the appellants established physical relations with her on several occasions thereafter. However, at no stage, she apprised her parents about her defilement. She did not exhibit any abnormal conduct. In the FIR, she also accused Deepak Kumar Shah, a juvenile, to have established physical relations with her on the roof when she had gone to spread clothes. Again, Deepak Kumar Shah is alleged to have established physical relations with her several times. It does not appeal to mind that due to fear or threat, the victim was unable to bring it to the notice of her parents about the heinous crime.

15. In her Court statement as PW-10, â??Xâ?? deposed that on a day when her parents were away and she was sitting at the tea stall, the appellants, owners of the factory, where her father used to work as Chowkidar asked her to bring tea to their office. She prepared tea and took it to their office. When she was returning after serving tea, A-1 caught hold of her and A-2 closed / shut the door; A-2 removed her clothes. A-1 forcibly committed rape upon her and thereafter, it was committed by A-2. She raised alarm and cried but the appellants did not leave her. Her voice could not be heard outside due to noise of the machines operating in the factory. After the crime, the appellants asked her to wear clothes. Since she was unwilling to go after the incident, the appellants forcibly put her clothes â??onâ??

and asked her to leave. They threatened to kill her if she disclosed the incident to anybody. She further disclosed that the appellants committed rape upon her whenever her parents were away to the hospital. She also deposed about commission of rape by Deepak Kumar Shah (facing trial before Juvenile Justice Board). Victim's testimony qua Deepak Kumar Shah need not be elaborated here, he being on trial before Juvenile Justice Board. The victim continued to state that one day when she fell ill, she was taken to a doctor by her parents who informed them about her pregnancy about 7 to 8 months. She then informed as to what the appellants and Deepak had done with her. Her statement (Ex.PW-10/A) came to be recorded at the Police Station. She also recorded her 164 Cr.P.C. statement (Ex.PW-10/E). In the cross-examination, she admitted that the incident was not reported to her parents, teachers or friends. At the time of incident, the appellants had two workers working in the factory. The appellants lived at Rohini and used to come together to the factory by their vehicle. The family members of the appellants were visitors to the factory to perform religious ceremonies during festivals. She denied that no such incident had taken place at any point of time or the appellants have been falsely implicated. She elaborated that on the day of incident her younger brother was with her at the tea stall but had gone out to play. She was fair to admit that after the incident when she came back to the tea stall, she did not tell her brother or anybody else as to what had happened. She was unable to tell as to how many times she was ravished by the appellants. She volunteered to add that it was repeated several times. In response to a Court question if anybody else had committed rape or sexually exploited her, she disclosed that five individuals were involved and two of them were Rajesh and Girish; they were Chowkidars of the factory and had established physical relations with her. Rajesh and Girish lived on the top floor of the same factory. She volunteered that they used to call her to the top floor to make physical relations with her on many occasions. She denied the suggestion that she was to get married with Deepak. She was unable to disclose as to to whom the newly born child belonged explaining that it was not possible as all the accused including Rajesh and Girish used to make relations with her regularly. She denied if it was an attempt to extort money from the appellants or that her statement was at the behest of her parents.Â

16. From the sequence of evidence discussed above, it can be inferred with certainty that the prosecutrix is not at all consistent. She has given conflicting and divergent versions at different stages of investigation / trial. Initially, she did not bring it to the notice of her parents or family members her ordeal at any stage; no such incident was reported to the police. The prosecutrix continued to have physical relations with the appellants subsequently without demur or protest. She continued to visit the office of the appellants in the factory as and when called without any hitch. Nothing prevented the prosecutrix to avoid visiting the appellants at the place where she was ravished. Not only that, the prosecutrix established physical relations with one Deepak too in similar circumstances. For the first time in her Court statement she implicated two other individuals Rajesh and Girish to have exploited her for sexual favour. During investigation, the investigating agency could not trace the whereabouts of those individuals and they were not charge-sheeted for the said crime. At no stage, the prosecutrix or her family members got her medically examined. No visible injuries whatsoever were found on her private organs to infer forcible rape; she did not suffer any injury on her body to infer if any time any resistance was offered by her.

17. What was the age of the prosecutrix on the day of occurrence is a mystery. The prosecutrix was a school going child and had studied up to 6th standard. However, the investigating agency did not collect any school record to ascertain her date of birth recorded therein. The impugned judgment records that since there was no authentic document on record regarding the age of the prosecutrix, on the directions of the Court, ossification / age determination test was got conducted. As per ossification report (Ex.PW-15/A) proved by PW-15 (Dr.Shipra Rampal), PW-16 (Dr.Abhilasha), PW-17 (Dr.Niyati Srivastava) and PW-18 (Dr.Javed Salam), her approximate age was ascertained to be between 17 to 18 years as on 13.07.2012. It is pertinent to note that the victim had disclosed her age around 13 years in her complaint (Ex.PW-10/A); and in 164 Cr.P.C. statement [Ex.PX3 (collectively)] recorded on 29.01.2012 without giving specific date of birth. Similar is the age recorded in MLC (Ex.PW-11/A). In the Court statement â??Xâ?? did not disclose her exact date of birth. She informed to be studying in 5th class in Ganesh Public School but did not state as to

what exact date of birth was recorded in the school record. Again, she gave her age as 13 years at the time of her examination on 14.08.2012. PW-

20 (Sunil Kumar) - her father merely testified that her daughter 'X' was aged around 13 years. Nothing was divulged as to what was the

exact date of birth of the prosecutrix. No supporting document like birth certificate or school record was produced or proved by him. Similar is the

testimony of PW-21 (Ravindra Kumar Robin) - victim's uncle. Apparently, the victim and her family members attempted to conceal the exact

age of the prosecutrix which was crucial to ascertain the guilt of the perpetrators of the crime. Huge gap between the age relied upon by the

prosecution and the one found in the ossification report has remained unexplained.

18. Settled position is that ossification test is not a sure test and it admits margin of two years on either side; it only gives opinion about the

approximate age of a person and it cannot be an exact age. The opinion of the doctor based upon such a test cannot be regarded as a conclusive

evidence. Apparently, the prosecutrix was above 16 years of age on the day when physical relations were established with her.

19. From the circumstances described above, it can safely be inferred that the prosecutrix was a consenting party throughout. Physical relationship

(if any) was with her free consent. It is not the case of the prosecution that the victim was unable to understand the consequence of her act of

having physical relations with others due to her low I.Q.; no credible evidence has emerged to substantiate this. The prosecutrix was regularly

performing her duties at the shop in the absence of her father; she was regular to attend her school classes.Â

20. PW-11 (Dr.Neha Kumari) in the MLC (Ex.PW-11/A) noted that the I.Q. level of the patient was good. The victim's version that she was

criminally intimidated and put in fear which forced her to maintain complete silence does not appeal to mind. The appellants were not armed with any

weapon to create real apprehension in the mind of the prosecutrix not to reveal her plight to her parents. Surprising, she carried pregnancy for long

duration without any complication.

21. During the course of hearing it was informed that the prosecutrix has lodged FIR No.643/2015 on 28.05.2015 against her father and brother

implicating them for commission of rape upon her on several dates. Seemingly, the said case is still pending before the Trial Court for disposal. In the said complaint, the prosecutrix claimed herself to be of 17 ½ years old.

22. In the impugned judgment, the Trial Court noted that the prosecutrix was aged around 17 to 18 years. It, however, came to the conclusion that

since A-1 was owner of the factory where X's father was working as Chowkidar and A-2 was his employee for the last many years, the

appellants were in dominant position and the consent of the prosecutrix under these circumstances cannot be considered free. It further noted that

prosecutrix was a "child" under POCSO Act which came into effect on 14.11.2012 to protect children from offences of sexual assault, sexual

harassment and pornography. Under the said Act, in Section 2(d) "child" was defined as any person below the age of 18 years. It further

noted that POCSO Act being a special Act seeks to address the issues regarding sexual exploitation and sexual abuse of a child i.e. a person below

18 years. Since a "child" is not capable of giving the consent, it had no consequence. Relying upon "Collier vs. Austin Health & Ors.",

(2011) VSC 344, the learned Trial Court held that though the penal provisions of this later beneficial legislation cannot be applied retrospectively yet

the intent of the special legislation and its Charter has to be interpreted liberally and in compatibility with the human rights and the rights of the

citizens so sought to be protected by the beneficial legislation. It was held that the protective human rights legislation was beneficial and remedial and

hence the other existing general legislation can be read in the light of the purpose of the special legislation. It agreed that though POCSO Act will not

operate in cases where the facts and events occurred prior to the commencement of the Act but at the same time even in the absence of such a

legislation the statutory provisions already in existence were required to be interpreted in a manner compatible to the Human Rights / Child Rights.

As on date, the POCSO Act has come into force and hence it becomes the obligation of the Court to interpret the provisions of the general law

(Section 375 IPC) in the light of the Charter of the Protective Child Rights Legislation. Accordingly, taking a cue from the legislative intent as

provided in the Charter of the Special Act (POCSO) which is to protect all persons below 18 years as contemplated in POCSO Act, it was held that

the prosecutrix was a child below 18 years and her consent, if any, was immaterial (as the child was not capable of giving any such consent). This approach, though bonafide to impart justice to the victim who was allegedly sexually exploited by several people over a period of time, cannot be countenanced. The provisions of POCSO Act cannot be incorporated in the present proceedings as the offence in question was committed before it came into force in November, 2012. It was enacted, of course, to protect the children of the country from the heinous offences of sexual assault, sexual harassment and pornography. No law, however, can be interpreted so as to frustrate the very basic rule of law. It is a settled principle of interpretation of criminal jurisprudence that the provisions have to be strictly construed and cannot be given a retrospective effect unless legislative intent and expression are clear beyond ambiguity. Since the alleged crime was committed before January, 2012 and the POCSO Act came into force in the year 2012, the findings of the learned Trial Court to take the age of the prosecutrix as 18 years under POCSO Act cannot be sustained. The provisions of such a serious nature impinging upon the valuable rights of the accused, cannot take retrospective effect.

23. Since the victim was more than 16 years of age at the time of commission of the offence and physical relations (if any) were with her consent, the appellants cannot be held guilty for commission of offence punishable under Section 376 IPC and the findings of the Trial Court on that score cannot be sustained and are set aside.

24. In her statement, the prosecutrix repeatedly revealed that over a period of time, she was sexually exploited by several people including the appellants. She also named one Deepak facing trial before Juvenile Justice Board. In the cross-examination, pursuant to the court question, she also revealed names of two other individuals Rajesh and Girish who had established physical relations with her. There are no reasons to disbelieve the innocent statement given by the prosecutrix. DNA finger printing report affirms that the child born to the prosecutrix belonged to A-2; it lends credibility to her statement. It demolishes the defence led by the appellants in the form of DW-1 (Darshan Singh). Attempt was made by A-2 to urge that he was a worker in the factory and had left it about 1 ½ year before. No credible evidence has emerged on record if the victim ever

demanded any consideration / money from the appellants before offering herself for sexual relationship. No evidence is on record if any attempt was ever made by the victim to extort money any time. She rather silently suffered the ordeal and carried the pregnancy unknowingly till the child was delivered. This Court finds no reasons to disbelieve her version that the appellants established physical relations with her on several occasions and apparently exploited her innocence.

25. During the course of arguments, it was enquired as to where the â?? infantâ?? was. It was informed that the infant was with some private orphanage in Haryana. Record reveals that victimâ??s uncle had filed Crl.A.No.376/2014 under Section 372 Cr.P.C. which was disposed of by this Court by an order dated 04.08.2014.Â

26. During hearing, the counsel for the appellants, on instructions, expressed willingness of the appellants to pay certain reasonable amount for the welfare of the infant without prejudice.

27. Record reveals that the victim was granted compensation of `5 lacs. The victim appeared along with her husband in Crl.A.No.365/2013 on 13.04.2017 before this Court and informed that she was married since 2015. She confirmed that she had received the compensation of `5 lacs from DSLSA.

28. Since the victim who was below 18 years on the date of incident was exploited and physical relations were established by the appellants who were major and knew the consequences of their acts whereby the poor girl became pregnant and delivered the child of A-2, she is entitled for compensation for the maintenance of the â??childâ??.

29. Accordingly, A-1 and A-2 shall pay `5 lacs and `8 lacs, respectively in the form of FDRs in the name of the infant and shall deposit it within four weeks before the Trial Court. The amount so deposited in the name of the infant shall not be withdrawn till the child becomes major, without the permission of the Trial Court. The Trial Court, however, will be at liberty to release the amount before the said period if so required to be utilized for the welfare of the child. This payment is de-hors the other rights of the child or mother to claim from the appellants.

30. Resultantly, the appeals filed by the appellants are allowed in the above terms. The conviction and sentence recorded by the learned Trial Court

are set aside.

31. In case of non-compliance, the Trial Court shall initiate necessary proceedings for recovery of the compensation amount.

32. The appellant(s), if in custody, shall be released forthwith if not required to be detained in any other criminal case.

33. The Trial Court record be sent back forthwith with the copy of the order.

34. Intimation be sent to the Superintendent Jail.