

(2012) 07 DEL CK 0689

In the Delhi High Court

Case No : Criminal A. 475 of 2011 and Criminal M.B. 630 of 2011 (Suspension of sentence)

Vinod Sharma

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 04-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 376

Citation : (2012) 3 JCC 1830

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Thakur Virender Pratap Singh Charak and Mr. Pushpender Charak, Amicus Curiae, for the Appellant; Mukesh Gupta, APP for State, for the Respondent

Final Decision : Dismissed

Judgement

Hon"ble Ms. Justice Mukta Gupta

1. By this appeal the Appellant lays a challenge to the judgment dated 1st November, 2010 convicting him for offence u/s 376 IPC and the order on sentence dated 3rd November, 2010 directing him to undergo Rigorous Imprisonment for a period of ten years and to pay a fine of Rs. 5,000/- and in default of payment of fine to undergo simple imprisonment for a period of six months. Learned counsel for the Appellant contends that the statement of the prosecutrix u/s 164 Cr.P.C. was recorded after three days though she was conscious and oriented. The FIR was registered on the statement of the mother PW1 at whose instance the Appellant has been falsely implicated. The Appellant is not named in the history given in the MLC. The MLC of the prosecutrix shows that the hymen was intact. Further since the prosecutrix was aged around 81/2 years if the Appellant had committed the alleged offence there would have been injuries on the private part of the Appellant which were not found in his MLC. The

offence of rape is ruled out because on examination of the Appellant's penis, smegma was found present. Though the prosecution case is that the prosecutrix was wearing a nicker however, as per the seizure memo underwear has been seized. The FSL report also does not support the case of the prosecution as no semen has been found on the alleged underwear of the prosecutrix or vaginal swabs.

2. The statements of the prosecutrix and the mother recorded in the Court are contradictory to the statement of the prosecutrix recorded u/s 164 Cr.P.C. by the learned Metropolitan Magistrate. The mother of the prosecutrix stated that she saw blood on the floor however the blood with the control earth has not been seized. No site plan has been prepared of the place. The place of occurrence is doubtful. There are material contradictions in the statement of the prosecution witnesses. There is no evidence against the Appellant and he has been convicted on the basis of assumptions. The Appellant was beaten badly at the spot and then falsely implicated. Thus the Appellant be acquitted of the charge framed.

3. Learned APP for the State on the other hand contends that the prosecutrix was duly examined before the Court and she specifically leveled allegations against the Appellant describing the act committed by him. Besides soon after the incident the mother of the prosecutrix saw the prosecutrix with blood coming out from her private parts and thus immediately went to the spot. The Appellant has made an extrajudicial confession before PW2 Sanjay Chandok his employer. As per the MLC of the prosecutrix she has suffered a superficial tear on the private part clearly showing that she was sexually assaulted. The contradictions pointed out in the statement of the witnesses are minor in nature and do not go to the root of the prosecution case. Absence of rupture of hymen or presence of smegma on the private part of the Appellant does not rule out the offence of rape. The prosecutrix was 81/2 years old at the time of offence committed as proved by PW8 the Principal of MCD school where she was studying and thus her consent was immaterial.

4. I have heard learned counsel for the parties.

5. PW2 the prosecutrix stated before the Court that on 19th August, 2005 her mother left her along with her two brothers at the shop of her grand maternal uncle while going for work in houses. The Appellant came at the shop of her nana for taking tea as he was also running a shop at some distance from the shop of her nana. After taking tea in a glass, the Appellant went to his shop. So the prosecutrix went to the shop of the Appellant for taking empty glass. At that time the Appellant was alone in his shop. When the prosecutrix reached the shop, the Appellant called her and made her sit on his lap. The Appellant pulled down the shutter of his shop. The prosecutrix was wearing a ghaghra and nicker at that time. The Appellant removed her nicker and lifted her ghaghara upward and also removed his own nicker. The prosecutrix thereafter explained the act committed by the Appellant on her. The Appellant stated that he would bring campa cola for her. When she was standing outside the shop and weeping, her mother reached

there and took her to her nana's shop. On her mother asking the reason for weeping she narrated the incident to her mother. Her mother and nana took her to the shop of the Appellant where she pointed out at the Appellant as the person who inserted his organ into her body. The Appellant tried to run away when her mother raised alarm and was apprehended by the public persons. The police reached at the spot and the Appellant was arrested. According to the prosecutrix, the nicker she was wearing at the time of incident was taken by the police and she was provided with another nicker. She identified Ex.P1 as the nicker she was wearing at the time of the incident.

6. Learned counsel for the Appellant has tried to draw a distinction that Ex. P1 was an underwear though the prosecutrix stated that she was wearing a nicker. It may be noted that the prosecutrix in her statement has stated both the underclothes as knickers and while identifying the two clothes in the court she has duly identified her undergarment as the nicker she was wearing. Thus there is no contradiction if the underwear is called as a nicker.

7. Though learned counsel for the Appellant has sought to point out that in prosecutrix statement u/s 164 Cr.P.C. the mother of the prosecutrix came to know about the incident when the prosecutrix reached home and she saw her blood stained underwear, however, this part of the statement u/s 164 Cr.P.C. has not been confronted to the prosecutrix when she came in the witness box. The statement of PW1, the mother of the prosecutrix was also recorded, who reiterated the contents of her statement made before the police resulting in registration of the FIR. She stated that when she saw her daughter sitting on the ground, she saw blood was oozing from her underwear. The same was spread on the floor. Her daughter told her that the Appellant committed rape with her and then she took her daughter to the shop where the Appellant was working with her father and one customer. There is no doubt that there is contradiction in the statement of the prosecutrix to the extent that she has not stated that her mother noted her condition only when she reached home. According to her, her mother saw her weeping while she was standing at the shop. However, a minor contradictions to this extent cannot belie the otherwise cogent testimony of the witnesses specially when PW2 the prosecutrix has not been confronted with earlier statement recorded u/s 164 Cr.P.C.

8. Learned counsel for the Appellant has also stated that the customer who accompanied the mother of the prosecutrix has not been examined. The non-examination of the said witness who was incidentally present at the spot cannot be fatal to the prosecution case. Further as per the testimony of PW12 Sanjay Chandok, the employer of the Appellant, the Appellant confessed before him that he had taken the girl inside the shop and raped her by taking her on his lap after pulling down half the shutter. Nothing material has been elicited in the cross-examination of this witness regarding the confession made by the Appellant by PW12.

9. The defence of the Appellant is that PW1 the mother of the prosecutrix and

her father owed Rs. 10,000/- and since he was demanding the same, he has been falsely implicated. This defence has been put to PW1 which she denied. Further the statement of the prosecutrix is corroborated by the presence of blood on the underwear of both the prosecutrix and the Appellant and also the lungi. Further the MLC of the prosecutrix showed one small superficial tear about 1 cm x 0.5 cm just below the vagina. Learned counsel for the Petitioner has strenuously emphasized on his MLC conducted on 19th August, 2005 at 4.35 p.m. that is, Ex. PW9/H. As per the said MLC smegma was present on the penis of the Appellant. The incident alleged by the prosecutrix took place on 19th August, 2005 after PW1 left her at the shop of her father at 10.00 a.m. and before she came back at 1.30 p.m. The Appellant was examined at 4.35 p.m. The presence of smegma does not belie the version of the prosecutrix. It may be noted that as per the version of the prosecutrix the Appellant inserted his male organ into her body. There was no vigorous sexual act. The case of the prosecutrix is only of insertion. The offence of rape is constituted by mere penetration that is even if the penis touches the vulva and no active sexual intercourse takes place. Further the chances of rubbing of smegma around the corona glandis in such a situation is ruled out.

10. The Appellant committed the offence of rape on a minor girl around 8 1/2 years and thus the sentence of Rigorous Imprisonment of ten years awarded to the Appellant is not required to be reduced as there is no special circumstance for the same. The appeal and application are dismissed. The Appellant, who is in custody, will undergo the remaining sentence. Trial Court record be sent back.