
(2013) 05 DEL CK 0367
In the Delhi High Court
Case No : Criminal Appeal 638 of 2011

Vishnu Khandelwal

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 22-05-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313
Penal Code, 1860 (IPC) — Section 328, 376, 506

Citation : (2013) CriLJ 3245 : (2014) 1 Crimes 551 : (2013) 3 JCC 1543

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Anil Soni, for the Appellant; Rajdipa Behura, APP, for the Respondent

Final Decision : Allowed

Judgement

G.P. Mittal, J.—The Appellant impugns a judgment dated 15.03.2011 and an order on sentence of even date passed by the learned Additional Sessions Judge ("ASJ") in Sessions Case No. 84/2008 FIR No. 450/2008 registered at Police Station Rohini whereby the Appellant was held guilty for the offences punishable under Sections 328, 376 and 506 IPC. He was sentenced to undergo RI for two years and to pay a fine of Rs. 3,000/- or in default to undergo SI for two months for the offence punishable u/s 328 IPC; he was sentenced to undergo RI for seven years and to pay a fine of Rs. 5,000/- or in default to undergo SI for three months for the offence punishable u/s 376 IPC; he was further sentenced to undergo RI for one year and to pay a fine of Rs. 1,000/- or in default to undergo SI for one month for the offence punishable u/s 506 IPC. The facts of the case are extracted from the opening para of the impugned judgment hereunder:

Balbir Kaur got married with Harmeet Singh who expired about 11-12 years back. P", Manmeet Kaur and Raman were born out of the said wedlock. Balbir Kaur after the death of her husband Harmeet Singh and due to financial constraint started to work with Vishnu Khandelwal. Vishnu Khandelwal was also having matrimonial dispute with his wife who had already left his house. Balbir

Kaur stated to be got married with the Vishnu Khandelwal and thereafter both of them along with their children started to reside at house no. E-20/147, Sector-3, Rohini. Balbir Kaur expired on 30.5.2007. "P" and her sister Manmeet Kaur after the death of their mother continued to reside in the house of Vishnu Khandelwal while their brother Raman Singh started to reside with his maternal uncle (mama) Ranjit Singh. Vishnu Khandelwal after the death of Balbir Singh intended to keep the P" as his wife and also wanted to establish sexual relation with the P". P" was studying in 11th standard at that time and used to study till late night. P" refused to accede the desire of Vishnu Khandelwal. Vishnu Khandelwal gave sleeping pills to P" by mixing in her food and committed sexual intercourse with the P". P" along with her sister Manjeet Kaur was thrown out by the Vishnu Khandelwal from his house in the month of February, 2008 and thereafter both of them started to reside with their maternal grand mother Swaran Kaur. P" was threatened by the Vishnu Khandelwal. P" got pregnant and delivered a pre-matured female child Devika in Vijay Nursing Home, Sector-5, Rohini on 20.7.2008 who expired on 23.7.2008.

2. On the complaint made by the prosecutrix "P" a case for the offence punishable under Sections 328/376/506 IPC was registered. On completion of the investigation, a charge sheet was filed against the Appellant. On Appellant's pleading not guilty to the charge, the prosecution, in order to establish its case, examined 17 witnesses.

3. PW5 "P" the prosecutrix; PW1 Babita, her friend; and PW3 Smt. Swaran Kaur, prosecutrix's maternal grand-mother are the important witnesses examined by the prosecution.

4. The Appellant in his examination u/s 313 Cr. P.C. denied the allegations of administering any sleeping pills (sedatives) or having sexual intercourse with the prosecutrix without her consent. The Appellant pleaded that he was lured by the prosecutrix to have sex with her and thus claimed to be innocent.

5. On appreciation of evidence, the learned ASJ found that sexual intercourse was committed upon the prosecutrix after administering her some sedatives and she was also extended threats. The Appellant was thus convicted for the offence punishable under Sections 328, 376 and 506 IPC as stated earlier.

6. It is urged by the learned counsel for the Appellant that no details of the date and time when sleeping pills were administered to the prosecutrix have been given. The prosecutrix and her grandmother were well-aware of the alleged rape at least in February, 2008. No complaint was lodged with the police till the delivery of the child in July, 2008 which supports the defence version that the prosecutrix had sexual intercourse with the Appellant of her own free will and with her consent and when she got pregnant, she had an eye on the Appellant's property. The instant FIR was lodged after delivery of the premature child who was about to die. It is contended that it is not a case where the prosecutrix wanted to give birth to the child out of any love for the child, rather immediately

on delivery of the child, it was left at an orphanage "Matra Chhaya." It is urged that it may be immoral for the Appellant to have sex with a girl aged less than 18 years but immorality cannot make an act criminal. It is urged that the learned ASJ erred in holding that the prosecutrix was administered sedative or that the sexual intercourse was without her consent and convicting the Appellant who was entitled to be acquitted.

7. On the other hand, the learned APP supports the impugned judgment and urges that from the prosecutrix's testimony which is corroborated by the statement of Babita (PW1), it is established that sexual intercourse was committed by the Appellant with the prosecutrix after administering her sleeping pills.

8. Thus, it is admitted case of the parties that there was sexual intercourse between the Appellant and the prosecutrix; the prosecutrix got pregnant; she delivered a premature baby of 30-32 weeks on 20.07.2008; and that the DNA profile proved that the Appellant was the biological father of the child delivered by the prosecutrix.

9. In order to appreciate the testimony of the three important witnesses, it would be appropriate to extract the material portions therefrom. PW5, the prosecutrix in her examination-in-chief stated as under:

PW5.....Immediately, after the death of my mother, accused asked me to take place of my mother. At the first instance, I thought that accused was telling about the taking over the business of rickshaw garage but later on I realized that accused wanted to keep me as his wife and wanted to maintain sexual relationship with me. I refused to accede the desire of accused. Then accused did not utter anything to me on my refusal. I used to study till late night hours as I was studying in 11th class at that time. Accused used to give me sleeping pills by mixing the same in my meals. In February, 2008 when one morning I got up then I found the blood on my clothes. Then at the first, I thought that this blood may be due to my menstruation but that was already happened 10 days before. Even then, I thought that I usually got menstruation very late so I thought that I might have got the menstruation twice or double. Thereafter, accused had thrown myself and my sister from his house and we started residing at the house of my Nani (maternal grandmother).....Accused Vishnu turned myself and my sister from his house in February 2008 at about 11.30 pm as he wanted to surrender my LIC policy and policy of my sister in his name and also because I had refused to the accused to make relationship. Accused used to rape me.....I narrated to my Nani that accused Vishnu used to rape me and also wanted to continue the same act with me.....I also told my Nani that I did not disclose the above acts of the accused to anybody as accused used to threaten me that in case I will disclose the said fact to anybody then he will kill me, my sister and brother.

10. The relevant portion of PW3's testimony is reduced as under:

PW3.....My daughter namely Balbir Kaur was expired in the year 2007. In the month of February, 2008, accused Vishnu Khandelwal had thrown out Preeti Kalra along with her brother and sister and they started living with me. Preeti Kalra had told her friend Babita that accused Vishnu Khandelwal had committed rape with her many times after administering her the sleeping pills due to which she became pregnant. Babita told this fact to me. In the year 2008, Preeti Kalra gave birth to a female child in the Vijay Nursing Home, Rohini, Delhi. After the birth of girl child, we left the girl at "Matra Chhaya". Accused Vishnu Khandelwal also threatened Preeti Kalra and her brother and sister if told this fact i.e. of raping her and administering sleeping pills by him....

XXXX by Shri Anil Soni, Advocate for accused

I came to know of the pregnancy of Preeti Kalra only 2/3 days before the delivery of premature child....

11. Babita (PW1) testified as under:

PW1In February, 2008, accused Vishnu Khandelwal had thrown out Preeti Kalra alongwith her brother and sister. Preeti Kalra told me that accused Vishnu Khandelwal had committed rape with her many times after administering her sleeping pills and due to which she became pregnant. Preeti Kalra gave birth to a female child of six and half months at Vijay Nursing Home, Avantika, Rohini, Delhi.

12. It is admitted case of the parties that the prosecutrix delivered a premature child on 20.07.2008. The child was left at "Matra Chhaya" by the prosecutrix and her maternal grandmother. A report Ex. PW5/A was lodged by the prosecutrix with the SHO, P.S. Rohini, Sector 3 alleging inter alia that after two-three months of the death of her (prosecutrix) mother, the Appellant started mixing sleeping pills in her food and continued to commit sexual intercourse (Balatkar) with her without her consent. The prosecutrix further informed the SHO that when she came to know of this fact, the Appellant threatened to kill her, her brother and sister. A statement u/s 164 Cr. P.C. was also made by the prosecutrix before the learned Metropolitan Magistrate on 04.08.2008 where this fact was corroborated.

13. When I turn to the testimony of the prosecutrix which was recorded as PW5, she set up a different story by stating that the Appellant proposed to the prosecutrix to live as his wife which was declined by her. The prosecutrix was cross-examined by the defence on the aspect as to when the Appellant will have the opportunity to administer sleeping pills in her food. The prosecutrix admitted that the lunch used to be prepared by the maid servant, whereas the dinner was prepared either by her or by her sister as the accused used to come late to the house. The prosecutrix stated that she used to serve meals to him because he (the Appellant) had instructed her to serve the food fresh and warm. She admitted that when he used to reach home, all the children including her sister used to go to sleep. Thus, the Appellant was not there in the lunch which was being prepared by the maid servant. Similarly, the Appellant would not cook the

dinner. In fact, by the time the Appellant would reach home, it would be very late and all the children had already gone to sleep. The prosecutrix used to remain awake because the Appellant wanted warm food to be served to him. The only inference that can be drawn from the cross-examination of the prosecutrix is that she would also take her dinner by the time the Appellant reach home. Thus, there was absolutely no opportunity to mix sleeping pills in prosecutrix's food. Thus, I am not inclined to believe that the Appellant would have sexual intercourse with the prosecutrix after administering her sleeping pills or any other sedatives.

14. The prosecutrix has tried to set up a case that she came to know of the sexual intercourse committed upon her only when she got pregnant. In other words, although the Appellant continued to have sexual intercourse with the prosecutrix without her consent after putting her under sedation and she (prosecutrix) could not know of the Appellant's act even after waking up out of sedation. If a person is given a very heavy dose of sedative, he or she would not be able to get up at the normal time of waking up in the morning. If a female is administered any light sedative, she would know of the act of commission of sexual intercourse while the act is being committed or after it has been committed. In any case, in spite of any sedative if a girl is ravished, she would come to know of the act when she wakes up. It is, therefore, a cock and bull story that the prosecutrix was consistently being subjected to sexual intercourse after being administered sleeping pills and she continued to be unaware of the act for a couple of months.

15. Admittedly, the FIR was lodged against the Appellant only on 24.07.2008 after the premature child was delivered on 20.07.2008. It is a matter of record that immediately on birth, the child was left at "Matra Chhaya". Thus, it is evident that the prosecutrix did not give birth to the child for her love for it. The prosecutrix has not given any explanation as to why the FIR was not lodged against the Appellant since the date of her been thrown out of her house in February, 2008 till 24.07.2008. Swaran Kaur (PW3) tried to take the shelter of being unaware of the prosecutrix having been raped or being pregnant. when in cross-examination, she deposed that she came to know of the pregnancy of "P" just two or three days before the delivery of the premature child. This is, however, contrary to the testimony of PW5, (the prosecutrix). She testified that she had informed her maternal grandmother that the Appellant used to rape her and wanted to continue the same with her. When she protested she was turned out of the house. Thus, there was no threat to the prosecutrix. Her grand-mother was well aware of the rape having been committed on the prosecutrix, but in spite of this no report was lodged with the police.

16. Thus, from the totality of circumstances, that is, prosecutrix continuing with the pregnancy and lodging the FIR only after a premature child was delivered, the defence taken by the Appellant that the prosecutrix had sexual intercourse with him (the Appellant) as per her free will and that when she got pregnant, the

Appellant suggested to terminate the pregnancy and that she (the prosecutrix) continued to carry the pregnancy to claim share in the property cannot be easily brushed aside.

17. It may be stated that a young girl of just above 17 years of age may not be having any choice when the master of the house asks her to satisfy his sexual desire and thus there can be no free consent by the prosecutrix in the circumstances in which she was placed. Unfortunately, this was nowhere the case of the prosecution right from the investigation upto this Court. By myself, I cannot introduce a new case for the prosecution. (See State of Madhya Pradesh Vs. Ramesh,) and State of U.P. Vs. Rashid and Another,

18. The act on the part of the Appellant may be highly immoral, but immorality and criminal offence are two different things. The Appellant cannot be convicted for the offence of rape only for doing an act which may be immoral. In this connection, I would refer to para 10 of the report in Ram Chandra Bhagat Vs. State of Jharkhand, where the Supreme Court echoed its sentiments as under:

10. It is true that the appellant has not behaved like a gentleman. He lived with the complainant for nine years and had two children by her, and hence as a decent person he should have married her which he did not do. However, there is a difference between law and morality, as already stated above. There are many things which are regarded by society as immoral but which may not be illegal. If we say something is illegal then we must point to some specific section of the Penal Code or some other statute which has been violated. Merely saying that the person has done something improper will not necessarily make the act illegal.

19. In the circumstances, in my view, the prosecution has miserably failed to establish that the sexual intercourse was committed by the Appellant with the prosecutrix without her consent after administering sedatives. Thus, there is no question of extending any threat to the prosecutrix. The Appeal, therefore, has to succeed and the order on conviction is liable to be reversed. I order accordingly.

20. The Appellant is thus acquitted of the charges. He be set at liberty, if not required in any other case. The Appeal is allowed in above terms.