
Shamshad Vs State

Criminal A No. 77/2015

Court: Delhi High Court

Date of Decision: Dec. 4, 2015

Acts Referred:

Arms Act, 1959 - Section 27#Criminal Procedure Code, 1973 (CrPC) - Section 428#Penal Code, 1860 (IPC) - Section 367, 377, 506

Hon'ble Judges: Ashutosh Kumar, J.

Bench: Single Bench

Advocate: Harsh Prabhakar, Anirudh and Dhruv Chaudhary, Advocates, for the Appellant; Rajni Gupta, APP and Brij Mohan, SI, for the Respondent

Final Decision: Allowed

Judgement

Ashutosh Kumar, J.

Shamshad stands convicted under Sections 367/377/506 IPC and Section 27 of the Arms Act by judgment dated

15.10.2014 passed by the learned Additional Sessions Judge, North East, Karkardooma Courts in S.C No. 38(1)/2012 arising out of FIR No.

220/2012 (P.S. Welcome).

2. By order dated 16.10.2014, appellant Shamshad has been sentenced to undergo RI for three years, fine of Rs. 5000/- and in default of

payment, SI for two months for the offence under Section 367 IPC; RI for four years, fine of Rs. 15,000/- and in the event of default of payment

of fine SI for six months for the offence under Section 377 IPC; RI for two years, fine of Rs. 5000/- and in default of payment SI for two months

for the offence under Section 506 IPC and RI for three years, fine of Rs. 5000/- and in the event of default of payment of fine SI for two months

for the offence under Section 27 of the Arms Act. The sentences have been ordered to run concurrently with the benefit of Section 428 of the

Code of Criminal Procedure. The fine of Rs. 25,000/-, on realisation from the appellant, has been directed to be paid to the complainant as

compensation.

3. The appellant is said to have ravished Mohd.Zareef (PW-6). His statement (Ex.PW-6/A) discloses that on 13.07.2012 while he was returning

to his house from Jheel Park, one person came on a motorcycle at about 7 p.m and asked him to accompany him. On such request, PW-6 sat on

the motorcycle. The motorcyclist disclosed his name as Salim. When some of the boys who were walking in the Jheel park called him by the name

Shamshad, Mohd.Zareef (PW-6) became suspicious and asked him to stop the motorcycle. Mohd.Zareef is then alleged to have been taken to a

secluded place where, on point of knife, the appellant had carnal intercourse with him.

4. During trial though PW-6 has supported the prosecution version but has substantially improved upon his original version. He has testified before

the Court that on the day of the occurrence i.e. 13.07.2012 he was going to offer prayers when the appellant offered him to come to the mosque

on his motorcycle. PW-6 refused the offer initially, but on insistence, sat on the motorcycle of the appellant. For about 15 minutes, he rode along

with the appellant but since he was getting late for his prayers, he wanted to get down from the motorcycle. At that point, it has been deposed by

PW-6, that the appellant threatened him and told him that there are many people who would kill him. PW-6 has further deposed that the appellant

dragged him by holding his collar. An effort by PW-6 to free himself from the clutches of the appellant led to injuries on his legs. PW-6 was

thereafter caught by the appellant and on point of knife, was ravished. The underwear of PW-6 became wet with semen. He was also threatened

about his being subjected to the same act of sodomy by other friends of the appellant. He was divested of his money also. PW- 6 was thereafter

assaulted by means of fists and legs, whereafter the appellant fled away. PW-6 threw his underwear in the park as it had become wet and came to

the factory which is located at H-490, Janta Colony, under the territorial jurisdiction of Welcome police station at around 8.30 p.m. He met the

factory owner Pappu (PW-5) and apprised him of the incident. Thereafter he made a call at 100 number. It was on his call that the police came at

the factory and recorded his statement (Ex.PW-6/A). PW-6 was thereafter taken to the police station from where to the GTB Hospital for medical

examination. The MLC which was prepared (Ex.PW-3/B) bears his thumb impression. His medical card also was prepared (Ex.PW-3/A) which

also bears his thumb impression. The site plan was prepared in the morning of the occurrence at his instance.

5. During cross examination, he has categorically stated that when the appellant stopped his motorcycle near the bushes, some public persons were

roaming in the area but they were at some distance. He has also, in his cross examination, changed his version and has stated that his employer,

Pappu (PW-5) had called the police. PW-6 has denied the suggestion that no such incident had taken place and he had falsely implicated the

appellant.

6. Thus from the deposition of PW-6, the victim, it would appear that he has made improvements in his version. In his first information report, he

does not state the colour of the motorcycle which was being driven by the appellant. However, in his deposition before the Court he speaks about

the motorcycle being of red colour. The story of PW- 6 going to offer prayers in a mosque on the day of occurrence is also something new which

was not there in the FIR. The version of PW-6 before the Court that he was threatened that other persons also would ravish him and that he tried

to run away from the clutches of the appellant and injured his legs are also new facts which were introduced only at the trial.

7. It appears to be rather strange that PW-6 would accede to the request of an unknown person to accompany him on a motorcycle, more so

when he was going to offer prayers in a mosque which is situated nearby. There is no statement of the informant/PW-6 which would suggest that

the appellant also was going to the mosque to offer his prayers. Thus the story put forth by the prosecution does not appear to be trustworthy.

Apart from this, there are certain material contradictions which go to the root of the matter.

8. The deposition of PW-6, in juxtaposition to the deposition of PW-5, his employer, appears to be full of inconsistencies and contradictions.

9. Pappu (PW-5) has stated that he runs a jeans factory at Seelampur, Delhi. The victim hailed from his home town. He has further deposed that in

the night of 13.07.2012, PW-6 came to him weeping. His clothes were torn and there was a scratch mark of knife on his neck. On his asking PW-

6, he was informed that the appellant met him at Jheel Park and committed carnal intercourse with him. Thereafter he called the police. When the

police arrived, statement of PW-6 was recorded. During cross examination, PW-5 has changed his version and has stated that PW-6 himself

informed the police about the occurrence. He has further admitted that he did not tell the police that there was scratch mark of knife on the neck of

Zareef (PW-6). The statement of PW-5 was not recorded by the police.

10. In this context, it would be relevant to refer to DD No. 28A dated 13.07.2012 which was recorded at P.S. Welcome (Ex.PW-11/A). The

DD entry clearly refers to a male caller informing that he was raped.

11. Dr.Jitender Meena (PW-2), Senior Resident, Department of Surgery, GTB Hospital, Delhi has deposed that on 14.07.2012 i.e a day after the

incident, the victim was examined by him. The patient was brought by Constable Trilok Singh (PW-7) with the alleged history of sodomy. On local

examination, small tear of 0.5 cm was found at Perianal region posteriorly (only). No other visible injury was found. As per rectal examination,

good anal tone was found. There was no presence of blood. In his presence rectal swab, pubic hair, oral swab and undergarments were sent for

forensic examination. However, he has clearly stated that no definite opinion of sodomy could be given before the FSL report was perused. The

examination note of PW-2 is Ex.PW-2/A which has been proved by him.

12. Dr.O.P. Jaiswal (PW-3) who had worked at GTB Hospital as a Junior Resident from November, 2011 to August, 2012 has deposed that on

14.07.2012, PW-6 was brought to the casualty by Constable Trilok Singh (PW-7) for medical examination for sodomy. The patient was found to

be conscious and oriented and his vitals were found to be normal. On local examination, no external injury was seen. PW-6 was referred to

Surgery Department for expert opinion and advice (the emergency slip has been exhibited as Ex.PW-3/A). The MLC of PW-6 was also prepared

by him (Ex.PW-3/B).

13. Dr.Mohd.Parwez (PW-4) who also worked as Junior Resident in GTB Hospital from December, 2011 to December, 2012 has testified

before the Court that the appellant was found to be conscious and oriented and his vitals were found normal. On local examination secondary

sexual characters were found to be well developed. After examining PW-6, PW-4 had given an opinion that there was nothing to suggest that the

appellant was incapable of performing sexual intercourse. Semen sample could not be collected because of environmental condition. The MLC of

the appellant (Ex.PW-4/B) was prepared by him.

14. The FSL report (Ex.PW-11/F) discloses that exhibit 1d2 (Rectal Examination Smear) and exhibit 1e1 (oral swab) were analysed. No semen

could be detected on them. Human semen was only detected on exhibit 2, a dirty underwear.

15. Dr.Chandermohan Sharma (PW-12), Senior Resident, Surgery Department, GTB Hospital, Delhi has stated that he had examined the expert

opinion (Ex.PW-2/A) and had also examined the FSL report (Ex.PW-11/E and 11/F). He had the occasion to see the MLC of the victim Ex.PW-

3/B. He has clearly stated that on the basis of medical report and FSL reports his opinion regarding the tear found at perianal region was that it

could be due to an act of sodomy. On the examination of FSL report also PW-12 has opined that it could be a case of sodomy. Thus no definitive

finding could be given by PW-12.

16. Thus from the deposition of PWs.2, 3, 4 & 12 as well as the exhibits (MLC of PW-6, FSL report and the opinion of PW-12) it is not certain

whether the victim was sodomised. The medical opinion belies the statement of the victim as no substantial injury was found on his person and

vitals.

17. In his 313 statement, the appellant has completely denied of having any acquaintance with PW-6. When he was confronted with the question

that he was made accused in cases of similar nature in the past, he has categorically stated that those cases were false and he has been acquitted in

those cases. He has also stated that his personal record was available with the police and he was falsely implicated in those cases without there

being any material against him. On the day when he was arrested, the appellant has stated that there was a secret informer with the police who

knew him. The appellant was going to a milk diary situated at a distance of 10 minutes from his house when he was picked up by the police and

taken to the police station. He has completely resiled from his disclosure statement (Ex.PW-6/C). He has, while expressing his ignorance, stated

that he is a married person having three children and he does not have any alternative sexual preference.

18. Thus taking into consideration the facts (i) that the deposition of PW-6 is full of material contradictions and inconsistencies and are substantially

different from his first statement; (ii) no probable reason for the appellant to have accepted the offer of the appellant to pillion ride his motorcycle;

(iii) presence of many persons in the jheel park when the occurrence is said to have taken place; (iv) non production/examination of the underwear

of the victim which he has claimed to have thrown in the bushes and (v) inconclusive medical opinion regarding PW-6 having been sodomised, this

Court is of the opinion that the prosecution has not been able to prove the case beyond the shadow of reasonable doubt.

19. With reference to the nominal roll, learned APP has submitted that the appellant has remained in jail for about three years and five months but

his conduct in jail has been unsatisfactory. He was punished in the year 2014 for his involvement in a sexual activity with other inmates whereas on

two other occasions he was punished for the recovery of prohibited articles from his possession. This conduct of the petitioner in jail would not

improve the case of the prosecution which has to stand on its own legs.

20. Thus in the wake of such inconsistent statements of PW-6 and inconclusive opinion of the doctors regarding the act of sodomy, the major

charges against the appellant have not been proved beyond all reasonable doubts.

21. The conviction of the appellant, therefore, cannot be sustained in the eyes of law.

22. For the reasons aforesaid, the judgment and order of conviction and sentence dated 15.10.2014 and 16.10.2014 respectively are set aside.

The appellant is directed to be released from jail forthwith if not wanted in any other case.

23. Trial Court record be returned.

24. Two copies of the judgment be sent to the Superintendent of the concerned jail for information, compliance and record.

CrI. M.B. No. 111/2015

25. In view of the appeal having been allowed, this application becomes infructuous.

26. This application is disposed of accordingly.