

(2012) 04 DEL CK 0447

Delhi High Court

Case No: Criminal Appeal No. 285 of 2009

Jameel

APPELLANT

Vs

State

RESPONDENT

Date of Decision: April 16, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 222, 313
- Evidence Act, 1872 - Section 118
- Penal Code, 1860 (IPC) - Section 354, 376, 506, 511

Hon'ble Judges: Suresh Kait, J

Bench: Single Bench

Advocate: R.P. Luthra and Ms. Tanushree Banerjee, for the Appellant; Rajdipa Behura, APP for State, for the Respondent

Judgement

Suresh Kait, J.

The instant petition is being preferred against the judgment dated 04.02.2009, whereby the appellant has been held guilty and convicted for the offences punishable u/s 376 Indian Penal Code, 1860. Also challenged the order on sentence dated 09.02.2009 whereby, appellant was sentenced to undergo RI for a period of 10 years and to pay a fine of Rs. 5,000/- and in default of the payment of fine further undergo RI for a period of 06 months. The facts of the case in brief are that on 13.11.2006 at about 8 pm, prosecutrix went to purchase goods from Market. When she reached near house of one Pappu, appellant met her there. He told that his father was calling her inside. Accordingly, Prosecutrix went along with appellant inside the house. At that juncture, appellant caught hold her and dragged her to a ditch inside his house. Appellant threatened her of instant death, in case prosecutrix would raise alarm. It is further alleged that appellant made her to fall on ground and committed rape against her will. Prosecutrix did not scream due to fear as the appellant threatened her of instant death of her brothers in case, she would divulge facts before anyone. On the following day, she narrated the facts before her mother,

who informed her husband. By that time, the incident became public and it came within the knowledge of Pradhan of Mohalla. Scared of public sentiments, they lodged a report before police. Accordingly, FIR no. 700/2006 were registered at Police Station - Seelampur for the offences punishable u/s 376/506 IPC.

2. Statement of Prosecutrix Archana (name changed) was recorded, which became the backdrop of this case. Investigation was taken up by SI Usha. Prosecutrix was medically examined. During the course of investigation, appellant was arrested. He was also sent to Hospital for medical examination. Investigation culminated into a charge-sheet against the appellant. Charge for offences punishable u/s 376/506 Indian Penal Code, 1860 was framed against the appellant, to which he pleaded not guilty and claimed trial.

3. To substantiate the charge, prosecution has examined as many as 11 witnesses.

4. Statement of appellant / accused was also recorded u/s 313 Cr.P.C. to which he denied all the allegations levelled against him. He claimed himself to be innocent. He projects that he has been falsely framed in the case at the instance of Pradhan of the locality due to an old dispute.

However, he did not lead any evidence in his defence.

5. PW3, ASI Veena proved FIR Ex.PW3/A. She deposed that SI Lokender Singh joined investigation with SI Usha. He unfolded those very investigative steps which took place in his presence. Head Constable Murari Lal was working as Moharrer Malakhana with him. A few parcels were deposited by SI Usha on different dates and he made entry to this effect in Register no. 19. The said SI Lokender Singh (PW5) proved the photocopies of those entries as Ex.PW7/A and Ex.7/B.

6. Constable Rattan Singh took the appellant for his medical examination to GTB Hospital. Constable Om Prakash, took exhibits of the case from MHC(M) and deposited the same with FSL Rohini. SI Usha conducted the investigation of the case. She detailed those very investigative steps which were taken by her. She concluded the investigation and got the appellant challaned.

7. PW6 Dr. P. Ram proved MLC of appellant Ex.PW6/A, which was prepared by Dr. Safiq. PW10 Dr. Sapna Raina proved MLC of Archana as Ex.PW10/A, which was prepared by Dr. Ansul Grover. She further unfolds that Archana was not mentally sound and her last menstruation period was not known.

8. PW1 Archana, Prosecutrix in the instant case deposed that she used to stay at her house alone. Her parents are labourer. She has two younger brothers. Appellant was known to her since he was residing in a nearby house. He came to her house and told her that she should come to his house, so that he could give her a lipstick and take her to Bombay. He took her to a ditch inside his house, where it was totally dark. He opened her salwar. He pressed her breast and committed rape upon her. She could not raise any cry for help because the appellant had closed her mouth

with his hand. He told her to come again to him in the night. She returned to her house and did not disclose those facts to her parents due to fear of her father. Later in the night, she told her father about the incident. Next morning her father took her to police station and her statement was recorded.

9. Ld. Counsel appeared on behalf of the appellant submits that at one juncture, she admitted that she was advised by her uncle to depose facts against the appellant, while at the other juncture, she projected that no incident had happened with her. In these circumstances, when discrepant facts were unfolded by prosecutrix, her testimony needs corroboration. No corroborative evidence is there on record to substantiate her deposition.

10. Ld. Counsel further submits that trial judge has convicted the appellant solely on the testimony of the prosecutrix, who was of unsound mind. The court did not bother to take the expert opinion of the prosecutrix on this aspect. She was a married lady. Her vaginal swab was taken, however, that do not connect the appellant with the alleged rape. In chief, she deposed that he never used to tease her. The appellant did not threaten her. She did not tell the Doctor about the incident. In cross-examination, this witness deposed to the court questions put to her as under:-

Q. The incident did not take with you?

A. Yes.

Q. The accused had not done anything with you?

A. He had done. Questions by the Counsel for the accused:

Q. What he had done?

A. He had opened my salwar and pressed my breast.

Q. Did the police record your statement?

A. No.

Q. Police did not come to your house.

A. No.

Q. Did the police ever come to you and make inquiry about this case?

A. No.

11. She denied to the suggestion that she was married. Thereafter, she admitted that she was married but the boy left her. She further deposed that Hazi is Pradhan Chacha. He had some quarrel with appellant. Nothing was written on Ex.PW1/A in the police station. She admitted that appellant had been impleaded at the instance of Hazi Pradhan.

12. Id. Trial Judge has observed that from the examination and cross-examination of the witness conducted above, that it appears the witness did not understand the questions properly. Questions had to be repeated to her again and again. The witness had the tendency to give answer immediately without following the question put to her.

13. PW2 Hazi Abdul Qadir did not support the prosecution story and he deposed that he did not know anything regarding this case. He was Pradhan of the Colony. He knew Rama Nand, the father of the prosecutrix. He lived in his colony. He had never come to him with any complaint. He had never gone to police station with him. Accordingly, he was declared hostile. Crossed by Id. APP, however, could not get any material from him.

14. PW4, Rama Nand father of the prosecutrix has deposed on the line as made in the complaint.

15. PW5 SI Lokender Singh has proved the sealed parcels vide memo Ex.PW5/A.

16. Id. Counsel for the appellant submitted that case of the prosecution does not connect the appellant with the rape. If for the sake of argument believed in the deposition made by the prosecution witnesses, including the deposition of PW1 Prosecutrix, maximum the case against the appellant falls u/s 354 Indian Penal Code, 1860 only and not the case for the offences punishable u/s 376 Indian Penal Code, 1860.

17. Id. Counsel further submitted that in FSL dated 12.04.2007 Ex. No. PW11/F, no semen of the appellant was detected on Salwar (1b), Baniyan (4a) and Underwear (4b) and that report gave no reaction of any kind.

18. Id. Counsel for the petitioner further submits that the alleged incident took place on 13.11.2006. FIR lodged on pretext of Chacha Pradhan on 17.11.2006. Sample sent to FSL on 20.12.2006. Therefore, precisely, there is a delay in lodging the FIR. It proves the suspicion on the story of prosecution. Therefore, appellant was not liable to be convicted, accordingly, instant petition may be allowed.

19. Id. APP on the other hand submitted that the Id. Trial Judge has recorded in its impugned judgment that on the competency of a person to testify as a witness depends upon his capacity to understand and rationally answer the questions put to him. If from the extent of intellectual capacity and understanding a person is able to give a rational account of what he has seen or heard, or done on a particular occasion, his competency as a witness is established. A lunatic, when he is in a lucid interval, is not incompetent to testify if he can understand and rationally answers the questions put to him. Explanation appended to section 118 of the Evidence Act applies to the case of a monomaniac or person afflicted with partial insanity, who may be a very good witness as to the other points than that on which he is insane. An insane or an idiot is not a competent witness if he is incapacitated to such an

extent that he is unable to understand the subject to which he is called as a witness.

20. It is further recorded that whether prosecutrix was competent to testify facts, she deposed that appellant called her to his house, on the pretext that he would get lipstick for her and take her to Bombay. When she went to his house, he took her to a ditch in his house, where it was totally dark. He opened her salwar, pressed her breast and committed rape. She could not cry for help because appellant closed her mouth with his hands. He told her to come again in the night. She came back to her home and did not disclose facts before her parents or her brother due to fear of her father.

21. Id. Trial Judge referred Medical Jurisprudence of Modi that onset of insanity is usually gradual, but it may be sudden in some cases. When onset is gradual, early physical symptoms of insanity are loss of appetite, constipation, dyspepsia and other digestive disturbances. Insomnia is almost a common symptom and in some cases there is rise of temperature, which are followed by mental disturbances. Relatives and friends of the patient notice a change in his conduct and behaviour. He is not the same man as he used to be. He is quite eccentric in his dress, manners, habits and in his dealings with other people. Speech becomes involved and his face bears a blank or vacant expression. He is gloomy, morose, listless, apathetic and does not care for social conventionalities.

22. Id. Trial Judge has also recorded that in her testimony, she deposed that she was advised by her uncle to depose facts before Court. At one juncture, she projected that incident had not occurred with her, but in other juncture, she unfolded dramatic experience with her own words. In one breath she claims herself to be apprehensive of her father, while in other she deposed that she narrated facts before him during night hours.

23. On this issue, Id. Trial Judge, while considering testimony of witness, was of the opinion that Court has to see as to whether the case is true in main. Broader probability of the case is to be taken into account, without swaying away when minor contradictions or insignificant discrepancies in statement of a witness, which are not vital in nature to throw out allegations of rape.

24. While referring the Judgment of the Apex Court in [State of Andhra Pradesh Vs. Gangula Satya Murthy](#), Id. Trial Judge also recorded that whether prosecutrix was goaded by her uncle and her father to depose facts against the accused? Had that been the situation, she ought have given second thought to the matter and would have spoken facts favourable to the accused.

25. Further Id. Trial Judge has recorded that these days, witnesses general turn hostile as and when they find it inconvenient to speak truth. Despite that fact that her future would shatter, she opted to narrate facts before the Court. A tutored witness cannot stand with rigors of cross-examination any longer. She was subjected to cross-examination at length.

26. Ld. Trial Judge opined that testimony of prosecutrix corroborated through facts detailed in her MLC Ex.PW10/A. It has further been mentioned in her MLC that her salwar was seized by Dr. Ansul Grover. Salwar was sent to FSL for chemical analysis and report Ex.PW11/E was relied by the prosecution. The defence has not looked down upon that report. When report Ex.PW11/E was perused, it came to light that human semen was detected on salwar of the lady, besides vest and underwear of the appellant. These facts gives corroboration to story projected by prosecutrix. Dr. P. Ram proved MLC, prepared by Dr. Shafiq, who had examined the appellant in GTB Hospital on 30.11.06.

27. Ld. Trial Judge opined that the prosecutrix deposed that she was not criminally intimidated by the appellant, when she was subjected to rape by him. No other evidence is brought over record to establish ingredients of offence of criminal intimidation. Since prosecutrix had not supported theory of criminal intimidation, a vacuum of evidence came over the record on that count. For want of evidence, appellant cannot be held accountable for offence of criminal intimidation. Therefore, he was convicted only for the offences punishable u/s 376 Indian Penal Code, 1860.

28. After hearing both the Id. Counsel appearing for the parties, it is emerged that the first statement of the prosecutrix before the Police was that that appellant caught hold of her and dragged her to a ditch inside his house. He threatened her of instant death in case she would raise alarm. She did not divulge facts before anyone. On the following day, she narrated the facts before her mother, who further informed her father.

29. Whereas in her deposition before the Court, she stated that appellant called her to come his house so that he would give her lipstick and take her to Bombay. After the rape being committed upon her, she returned to her house and did not disclose those facts to her parents due to fear of her father. Later in the night, she told her father about the incident.

30. During her cross-examination, she replied to Court questions put by the Trial Court that the incident did not take place with her. Thereafter she stated that appellant did something.

31. In response to the questions put by Id. Counsel appearing on behalf of the appellant/accused, she replied that appellant had opened her salwar and pressed her breast. And to the question, did the police record her statement or police ever came to her house to make enquiry, she replied in negative.

32. She denied to the suggestion that she was married. Thereafter, she admitted that she was married, but the boy left her. She even admitted that Hazi, Pradhan Chacha had some quarrel with the appellant and he had been implicated at the instance of said Hazi Pradhan. In FSL Report dated 12.04.2007, no semen of appellant was detected on Salwar (1b) of the Prosecutrix. Even on Baniyan (4a) and Underwear (4b) no blood was detected. However, as per the said report, human

semen was detected on Lady's Shirt (1a) and Salwar (1b), however, neither the blood group of the appellant connects with the semen nor it is established that the semen found on the aforesaid exhibits were of appellant.

33. Prosecutrix on the one hand stated that the appellant opened her Salwar and pressed her breast and further did nothing. On the other hand, she deposed that he committed rape upon her.

34. Moreso, in MLC Ex.PW10/A, it is recorded that the accused had some fight with her mother, following which Mr.Jamil/appellant raped her. It is further recorded that patient/prosecutrix had changed her cloths and taken bath.

35. In such a situation, when prosecutrix was of 25 years on the day of incident, which is evident from the statement of prosecutrix recorded on 07.07.2007 and her age recorded is 26 years. She is a married lady. For holding the guilty for the offences punishable u/s 376 Indian Penal Code, 1860, which is very serious offence, the prosecution has to prove its case beyond reasonable doubt. Whereas in the present case, firstly, prosecutrix was of unsound mind and not consistent on her statement, therefore, in such a situation, the case becomes doubtful. And in such eventuality the appellant is entitled for benefit of doubt. Therefore, in my opinion, he cannot be held guilty for the offences punishable u/s 376 Indian Penal Code, 1860.

36. The prosecutrix is consistently stated that she was called in his house by the appellant. He opened her salwar and pressed her breast. In these circumstances, the case against the appellant would at best be of attempt to rape.

37. It is well settled legal position in [Pandharinath Vs. State of Maharashtra](#), that if an accused is charged of a major offence but is not found guilty thereunder, he can be convicted of minor offence, if the facts established indicate that such minor offence has been committed.

38. In the case in hand, the appellant was not charged u/s 376 read with Section 511 Indian Penal Code, 1860; yet u/s 222 Cr. P.C. when any person is charged for the offence, he may be convicted for attempt to commit such offence. Although, against the appellant attempt was not separately charged, however, he can be punished for commission of lesser offence. The lesser offence is attempt to commit rape.

39. Therefore, I am of the considered opinion, the impugned judgment dated 04.02.2009 and order on sentence dated 09.02.2009 are hereby modified. Consequently, appellant is convicted for the offences punishable u/s 376 read with Section 511 Indian Penal Code, 1860.

40. Since the minimum sentence u/s 376 Indian Penal Code, 1860 is seven years, therefore, u/s 511 Indian Penal Code, 1860, it would come to 3 1/2 years. The appellant has already undergone nearly 4 1/2 years, therefore, he is set free forthwith in this case.

41. Crl. A. 285/2009 is accordingly partially allowed.
42. Copy of judgment be sent to the Jail Superintendent, for compliance.
43. Registry to remit back the Trial Court Record henceforth. No order as to costs.