

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 31.10.2019

+ **CRL.A.1200/2016**

HASEEB

..... Appellant

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Appellant: Mr. Dhan Mohan, Ms. Tanu B. Mishra, Mr. Ravi Mishra and Ms. Roshni Rani.

For the Respondent: Ms. Kusum Dhalla, APP for State.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal, *inter alia*, impugning a judgment dated 06.06.2016 passed by the Ld. ASJ Spl. FTC, Saket Courts, Delhi, whereby the appellant was convicted of the offences punishable under Sections 342/376/506 of the Indian Penal Code, 1860 (IPC). The appellant also impugns an order dated 08.06.2016, whereby the appellant was sentenced to six months of imprisonment and a fine of ₹1,000/- (in default of which he would have to undergo imprisonment for a period of one month) for the offence under Section 342 of the IPC; rigorous imprisonment for a period of seven years and a fine of ₹15,000/- (in default of which he would have to undergo

imprisonment for a period of six months) for the offence under Section 376 of the IPC, and; rigorous imprisonment for a period of one year and a fine of ₹3,000/- (in default of which he would have to undergo imprisonment for a period of two months) for the offence under Section 506 of the IPC.

2. The impugned judgment was rendered in connection with a case arising from FIR No. 407/2015 under Sections 342/376/506 of the IPC, registered with P.S. Defence Colony on 09.10.2015. The said FIR was registered at the instance of the prosecutrix, who alleged that she worked as a cleaner at a boutique in the Defence Colony area and had been doing so for the past six years. She alleged that the appellant, who works as a tailor at the said boutique, had raped her on 03.10.2015 at about 10:00 a.m., while she was cleaning the premises. She alleged that the appellant came from behind her and pushed her to the floor, gagged her mouth and proceeded to rape her. Thereafter, he threatened to kill her should she report the same.

3. In order to bring home the conviction of the appellant, the prosecution examined eight witnesses. The Trial Court had evaluated the evidence available and had found the appellant guilty of the offences for which he was charged.

4. The appellant has challenged the impugned judgment on the grounds that, *inter alia*, there are inconsistencies in the testimonies of the prosecution's witnesses and they have contradicted their own statements and the evidence, as obtaining in this case does not

corroborate the testimonies of the witnesses. Further, the evidence, as adduced, is tainted and does not establish that the appellant had committed any offence, beyond the threshold of reasonable doubt.

5. The learned Additional Public Prosecutor (APP) appearing for the State has countered the aforesaid submissions and contends that there was no material inconsistency in the testimony of the prosecutrix and the evidence led clearly established that the appellant was guilty of the offences for which he has been convicted. It is also submitted that the testimony of the prosecutrix is coherent and corroborated by the evidence as adduced and suffers from no inconsistency.

Evidence

6. Before proceeding further, it is relevant to briefly examine the evidence led by various witnesses.

7. The prosecutrix in her statement under Section 164 of the Code of Criminal Procedure, 1973 (CrPC) stated that on 03.10.2015 at about 10:00 a.m., she was cleaning the premises in which the alleged offence had occurred. She states that the appellant also worked in the said premises as a tailor, and was present at the said premises at the material time. She states that the appellant had been troubling her for a few days and would profess his love for her. Even when she told him that she was married and had six children, he would not abate. She further stated that on the aforementioned date, he proceeded to rape her and when she tried to escape, he bolted the door.

8. The prosecutrix – examined as PW-1 – deposed that she had started working at the boutique in the year 2015 and had been working there for a period of two years and her working hours were 09:00 a.m. to 03:00 p.m. She stated that she was employed to clean the boutique. She stated that the appellant was employed to do stitching at the said boutique. She states that on 03.10.2015 at about 10:00 a.m., she was cleaning the room in the basement and there was no one present there at that time. Thereafter, the appellant came from behind her, bolted the door, gagged her mouth and forcibly committed sexual intercourse with her. Thereafter, he picked up a scissor lying nearby and threatened to kill her should she inform anyone of the said incident. PW-1 stated that thereafter, on 09.10.2015, she informed her husband of this incident, who then took her to the police station and got her statement recorded. She stated that she also informed the examining doctor that she had established physical relations with her husband after the alleged incident. She handed over her clothes to the IO, which she deposed that she had washed and worn once again after the alleged incident.

9. In her cross examination, she stated that two more offices surrounded the premises in which the alleged incident had occurred. One of them always remained shut while the other one was an advocate's office. It was stated that two boys, namely, Chhotu and Raj were working at the said advocate's office. She states that the distance between the premises in which she was working and the advocate's office was about one meter and she stated that voices could be heard

from both sides. It was further stated that at the material time, the door of the adjoining advocate's office remained and that Chhotu remains at the said office at all times. PW-1 stated that it was correct that she neither informed her employer nor Chhotu about the incident after it occurred. She further stated that the room in which the alleged incident was stated to have occurred was 9X9 feet and that there were three sewing machines and one cutting table in the said room (after factoring in the three sewing machines and the cutting table, the area left in the room would be about 3X3 feet). Thereafter, she had told the police as well as the Magistrate that the accused had picked up a scissor from the table and threatened to kill her if she informed someone about the said incident. She stated that she had worked till 03:00 p.m. on the date of the alleged incident and stopped working there on 09.10.2015. She informed her employer of the said incident on 07.10.2015, who told her that she did not want to see the police on her premises. She stated that she told her husband of the alleged incident on 07.10.2015 at about 04:00 p.m. She stated that she had informed the police and the magistrate of the foregoing fact, but her statements which were shown to her in Court did not reflect the same. She stated that even though she had the mobile number of the accused, she never called him on the same. She states that it is wrong to suggest that she would call the accused on his mobile phone ten times daily. She stated that she did not receive any injuries due to the alleged incident. She reiterated that she had established physical relations with her husband after the alleged incident and before her medical examination. She stated that it was wrong to suggest that she had told

her husband about the incident on 09.10.2015. She stated that she had lodged the complaint against the accused herself. She states that it is wrong to suggest that there was no space in the room to lie down. She stated that it was wrong to suggest that she had hatched a conspiracy with her husband to extort money from the accused. Further, she stated that Chhotu remained at the adjoining advocate's office twenty-four hours, but Raj did not stay there for twenty-four hours.

10. Ashok Kumar, the prosecutrix husband had deposed as PW-2. It was stated that he got married to the prosecutrix in the year 1998 and that they have six children. He deposed that on finding his wife scared for a few days, she stated that she had been raped by the accused on 03.10.2015 at about 10:00 a.m. in the basement. He that the accused had threatened the prosecutrix and had told her not to inform anyone about the said incident.

11. In his cross examination, PW-2 stated that the prosecutrix informed him of the alleged incident on 07.10.2015 in the evening. Further, he stated that he had established physical relations with the prosecutrix between 03.10.2015 and the date on which the complaint was lodged. He stated that the mobile number 8376092002 remained with him and the mobile number 9540846613 remained with the prosecutrix.

12. Dr. Karnika Tiwari – who deposed as PW-3 – conducted the medical examination of the accused. In her cross examination, she stated that she could not express any opinion on the sexual relations

between the accused and the prosecutrix. She deposed that she did not observe any external injuries on the prosecutrix. And, nor did she find any injury on her private parts.

13. Smt Ravinder Kaur – who deposed as PW-4 – is the owner of the boutique in which the said incident is alleged to have occurred. She stated in her examination in chief that officials of P.S. Defence Colony came to her residence and informed her about the alleged rape on the prosecutrix by the accused. In her cross examination, she deposed that the accused would usually come to work after 12:00 p.m. and that he never came before 12:00 p.m., however, she did not remember at what time the accused came to the said boutique on 03.10.2015.

14. SI Pratibha, P.S. Defence Colony – who deposed as PW-7 – stated in her examination in chief that she endorsed the prosecutrix statement and registered her complaint when she came to the police station for the first time. She further stated that the accused surrendered at the police station on 13.10.2015, in the presence of the prosecutrix. In her cross examination, she deposed that it was correct to state that there was a passage measuring approximately three feet in the basement and that one of the offices in the said basement remained closed. She deposed that she had met Chhotu, who worked in the other office, but he had not told her anything about the alleged incident. She further deposed that it was her who told the prosecutrix employer (PW-4) about the alleged incident of rape. She deposed that the prosecutrix had given her two mobile numbers, but she did not obtain

the CDRs of the same and neither did she verify who the subscriber(s) of the said mobile numbers were. She further stated that PW-4 did not inform her about the duty timings of the accused. She further deposed that she inspected the boutique where the alleged incident took place. She deposed that there were three-four stitching tables and a table for ironing clothes. The available floor space was about 8X3 feet and the room was about 9X9 feet. She deposed that it would be wrong to suggest that it was impossible to commit rape in the space available in the said room. She further deposed that the size of the cutting table was 8X4 feet and that of the sewing machine was 22x36 inches. She stated that she did not get the area photographed. She deposed that it would be wrong to suggest that she did not photograph the room as that would prove that it would be impossible to commit rape in the same. She deposed that it would be wrong to suggest that she prepared a false site plan.

Submissions

15. The learned counsel appearing for the appellant had referred to the testimonies of various witnesses and submitted that the testimony of the prosecutrix could not be relied upon. He states that the same was not corroborated with other evidence and there were several inconsistencies in the statement of the prosecutrix recorded under Section 161 of the CrPC and her testimony. He also submitted that the conduct of the prosecutrix after the incident did not indicate the occurrence of any incident.

16. Ms Dhalla, learned APP appearing for the State countered the aforesaid submissions. She said that it is settled law that conviction for an offence under Section 376 of the IPC can be sustained solely on the statement of the prosecutrix. She also submitted that the trial court had rightly found that the appellant had intimidated the prosecutrix and was also guilty of offences under Sections 342 and 506 of the IPC.

Reasons and Conclusion

17. It is trite law that a conviction for an offence under Section 376 of the IPC can be sustained solely on the testimony of the prosecutrix. The rationale is that the prosecutrix would suffer ignominy on bringing such a charge and therefore, would not make such an allegation if the same were not true. However, it is also equally well settled that if such testimony of the prosecutrix does not inspire confidence and there are grounds to doubt the same, the accused would not be deprived of the benefit of doubt.

18. The evidence obtaining in the present case indicates that there is no evidence whatsoever against the appellant, except the testimony of the prosecutrix. The said testimony of the prosecutrix is also inconsistent with the statements recorded under Sections 161 and 164 of the CrPC.

19. The statement of prosecutrix was recorded on 09.10.2015. In her statement, she had reported that she was working at house no. A-62, Defence Colony, New Delhi, since the past two years. She stated

that there is a tailoring shop/boutique in the basement of the said property and the appellant was employed at the boutique to carry out tailoring work (*silai ka kaam*). She stated that she carries on her work of washing clothes and sweeping from 9:00 a.m. to 3:00 p.m. She had alleged that on 03.10.2015 at about 10:00 a.m., she was sweeping the room in the basement and the appellant had approached her from behind. He had made her fall down (*neechey gira diya*). She stated that he had already stripped off his trouser and had put it aside on the floor. He then muffled her (*muh band kar diya*) and had proceeded to rape her. She also alleged that he had threatened her that if she reported the incident, he would kill her. She stated that she was scared as the appellant had closed the door from the inside and was not permitting her to leave. She stated that after some time, she gathered courage and inform her husband, who had then brought her to the police station.

20. The statement of the prosecutrix was recorded under Section 164 of the CrPC on 10.10.2015. She had repeated the incident as recorded in her statement earlier. However, there was further improvement. She now stated that the appellant had been troubling her and had been expressing his love for her. She stated that she was married and was a mother of six children and even on being informed about the same, the appellant did not back down. She stated that the appellant had raped her on finding her alone at 10:00 a.m. on 03.10.2015, when she was cleaning the basement. She stated that she

tried to get out of the said room, however, she could not do so, as the door was closed.

21. The prosecutrix deposed as PW-1. She deposed that in the year 2015, she was working as a maid in the house (kothi no. A-62, Defence Colony, New Delhi) since the past two years. She stated that her employer ran a boutique in a room of the basement of the said house and she used to clean the same. She identified the appellant and stated that he used to work at the boutique and carried on the work of stitching. She stated that her working hours were from 9:00 a.m. to 3:00 p.m. She stated that on 03.10.2015 at 10:00 a.m., while she was cleaning the room the accused (appellant) had approached her from behind and bolted the door from inside. He gagged her mouth and caused her to fall on the floor. He lowered his trouser and also lowered her *salwar* and forcibly engaged in sexual intercourse. She stated that she would complain to the police. She stated that thereafter, he had lifted the scissors from the table and threatened to kill her if she told. She stated that she got scared and therefore, did not inform anyone about the incident. She stated that on 09.10.2015, after mustering courage, she told her husband about the incident who then escorted her to the police station.

22. The prosecutrix was, thereafter, cross-examined. In her cross-examination, she stated that she had informed about the incident to her employer on 07.10.2015 and had also informed her husband about the same on 07.10.2015 at about 4:00 p.m.. There is variation in the facts as testifying and her cross-examination. In her examination-in-chief,

she had stated that she had informed her husband about the incident on 09.10.2015. However, in her cross-examination, she stated that he had informed her husband about the incident on 07.10.2015.

23. The employer of the prosecutrix deposed at PW-4. She did not support the testimony of the prosecutrix, inasmuch as, she stated that the police had come to her boutique and informed her that accused (appellant) had raped the prosecutrix. Here, the learned APP desired to put a leading question to the witness. He was permitted. However, he did not pose any question or make any suggestion to the effect that the prosecutrix had informed PW-4 about the incident on 07.10.2015, as stated by the prosecutrix in her cross-examination. This Court is of the view that the same is material. The version of the prosecutrix, that she had informed her husband and her employer on 07.10.2015, is not supported by the employer of the prosecutrix (PW-4) and her statement that she had informed her husband on 07.10.2015. The same is inconsistent with the examination-in-chief, where she stated that she had informed her husband on 09.10.2015.

24. The next area which raises a doubt is regarding the presence of the appellant in the said basement at 10:00 a.m. PW-4 (the employer of the prosecutrix) and the appellant had deposed that the appellant used to come after 12:00 noon. She had further testified that “*he never came before 12:00 noon*”.

25. The prosecution did not place in record any material whatsoever, which would establish the presence of the appellant on

the spot at 10:00 a.m. Although it has been brought on evidence that the appellant carries a mobile phone, CDRs were not obtained and if obtained, were not placed on record.

26. The statement of the appellant was also recorded under Section 313 of the CrPC. He too stated that he never went to the said boutique before 12:00 noon. It is also relevant to note that there were two other offices in the basement and admittedly, one of the offices was that of a lawyer and it was admitted that one office boy named Chhotu remained at the said lawyer's office throughout. The prosecutrix in her cross-examination had stated that Chhotu remains in office twenty-four hours. However, Chhotu (the said office boy) was not examined.

27. PW-4 (the employer of the appellant) was also examined. She also did not depose that the appellant had come to the boutique at 10:00 a.m. on the date of the incident. On the contrary, she stated that he never came to the boutique before 12:00 noon. Thus, apart from the statement of the prosecutrix, there was no other material to even establish the presence of the appellant on the spot at the relevant time.

28. Insofar as the incident is concerned, it is admitted by PW-1 in her cross-examination that the distance from the gate of the boutique to the lawyer's office was about one meter and voices can be heard from both sides. Thus, if the prosecutrix had raised any alarm, it would have been heard in the adjoining office. Although it is stated that the incident took place on a Saturday when offices remain closed;

however, since it was also brought in evidence that Chhotu remained in office twenty-four hours – it is reasonable to assume that if any alarm was raised by the prosecutrix, it would have been heard. However, the prosecutrix did not raise any alarm. Ms Dhalla, learned APP, had contended that the prosecutrix was scared that she had been threatened by the appellant. However, the examination of the testimony clearly indicates that the appellant had not threatened the prosecutrix with scissors at the time of the incident. She had deposed that he had picked up the scissors after the prosecutrix had told him that she would inform the police. This was after the offence had been committed. Apart from the above, the version of the prosecutrix that the appellant had threatened with the scissors, is also doubtful since it does not form a part of the statement recorded on 09.10.2015 or the statement under Section 164 of the CrPC, which was recorded on 10.10.2015.

29. Yet another important aspect is the space where the incident allegedly took place. PW-7 had deposed that the size of the room (boutique) was 9x9 feet. The said room had 3-4 stitching machines and a table for ironing clothes. The size of the cutting table was 8x4 feet. The prosecutrix in her cross-examination had deposed that the vacant space in the said room was only 3x3 feet. The prosecutrix had described that she was gagged and pushed to the floor. She had deposed that, thereafter, the appellant had raped her. It is expected that such a forcible act in a cramped space of 3x3 feet would result in

some injuries. However, there were no injuries suffered by the prosecutrix.

30. In addition to the above, the prosecutrix had deposed that the appellant had lowered his trouser and had also lowered her *salwar*. There is minor variation in this testimony and the statement recorded on 09.10.2015. In her initial statement, the prosecutrix had stated that he had already removed his trousers and had put it on the floor. Though these minor consistencies may not be relevant; however, it is important to note that none of the clothes worn by the prosecutrix were torn. The prosecutrix had handed over a *salwar* as well as her undergarments to the IO. None of the two garments had been torn or indicated any distress. It is expected that in a forcible act, as has been alleged, the removal of clothes would result in some distress to the clothes, particularly, given the cramped space in which the rape is alleged to have been committed.

31. The clothes handed over by the prosecutrix also would not yield any evidence since the prosecutrix had washed these clothes and had also worn them thereafter. A medical examination would also do not reveal anything material since the prosecutrix had claimed that after the incident, she had also established physical relationship with her husband. In view of the above, no evidence of the incident was yielded by the medical examination or the clothes worn by the prosecutrix on the day of the incident. As noticed above, the only material fact is that the clothes worn by the prosecutrix did not have any damage.

32. It is important to note the conduct of the prosecutrix. As noticed above, the prosecutrix did not raise any alarm at the material time. Although in her statement recorded under Section 164 of the CrPC, she had complained that the appellant was pursuing her; no such allegation was made in a statement recorded on 09.10.2015 or in her examination-in-chief.

33. She had made no complaint in this regard to her employer or to her husband. Neither the prosecutrix nor her employer had deposed to the aforesaid effect. Her husband has also not deposed that he was aware of the appellant pursuing the prosecutrix prior to the incident.

34. The prosecutrix continued to do her work on the date of the incident and remained at the premises till 3:00 p.m. Clearly, this Court finds it difficult to understand this conduct. Even if the prosecutrix did not report the incident to any person, surely she does not expect to continue working at the premises as she would have done on any other day.

35. As noticed above, there is a delay in filing the FIR.

36. The inconsistencies in the testimony of the prosecutrix and her statement recorded earlier; the fact that the testimony of the prosecutrix is not supported by her employer (PW-4); the improbability of lack of any injury and such forceful act being committed in a cramped space of 3x3 feet; absence of any evidence whatsoever to establish (other than the statement of the prosecutrix) the commission of the alleged crime to establish that the appellant was

present on the spot at the material time; affirmative evidence that the appellant never reported to prior before 12:00 noon; no indication of any forceful incident yielded by the clothes worn by the prosecutrix; lack of any medical evidence, and; the conduct of the prosecutrix, read together, do raise doubts as to the case set out by the prosecution.

37. It is well settled that the testimony of the prosecutrix should not be suspended and her statement is required to be evaluated as that of an injured witness. However, it is not necessary such evidence is not required to be accepted as the absolute truth, even where there are grounds for doubt. The principle that the prosecution must establish its case beyond reasonable doubt, is not required to be diluted. In ***Raju and Others v. State of Madhya Pradesh: (2008) 15 SCC 133***, the Supreme Court had observed as under:-

“10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court.”

38. In ***Tameezuddin @ Tammu v. State (NCT of Delhi): (2009) 15 SCC 566***, the Supreme Court had observed as under:-

“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.”

39. In *Narender Kumar v. State (NCT of Delhi): 2012 7 SCC 171*, the Supreme Court had observed as under:-

“It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: *Vimal Suresh Kamble v. Chaluverapinake Apal S.P. & Anr.*, AIR 2003 SC 818; and *Vishnu v. State of Maharashtra*, AIR 2006 SC.)”

40. For the reasons stated above, this Court is of the view that prosecution had failed to establish its case beyond reasonable doubt. The facts and the evidence obtaining in this case do raise certain doubts as to the testimony of the prosecutrix, which is the only foundation on which the case of the prosecution rests.

41. There is also no evidence apart from the statement of the prosecutrix that she had been intimidated or confined by the appellant.

42. In view of the above, the appeal is allowed. The impugned judgment dated 06.06.2016 and the order dated 08.06.2016 sentencing the appellant, are set aside. The appellant is acquitted of the offences for which he is charged. Admittedly, the appellant is not involved in any other case. Thus, the jail authorities are directed to release the appellant forthwith.

OCTOBER 31, 2019
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VIBHU BAKHRU, J