

Narender Kumar vs State(N.C.T.Of Delhi) on 25 May, 2012

Equivalent citations: AIR 2012 SUPREME COURT 2281, 2012 (7) SCC 171, 2012 AIR SCW 3391, AIR 2012 SC (CRIMINAL) 1100, 2012 (3) CALCRILR 19, 2012 (5) SCALE 657, 2012 ALL MR(CRI) 2400, 2012 CRILR(SC MAH GUJ) 590, (2012) 115 ALLINDCAS 80 (SC), 2012 CALCRILR 3 19, (2012) 114 CUT LT 1121, (2012) 4 MH LJ (CRI) 417, (2012) 3 CRILR(RAJ) 590, (2012) 3 CHANDCRIC 345, 2012 (115) ALLINDCAS 80, (2012) 3 ALLCRILR 459, (2012) 2 MADLW(CRI) 720, (2012) 190 DLT 1, (2012) 2 KER LJ 698, (2012) 2 CURCRIR 351, (2012) 2 DLT(CRL) 619, (2012) 3 MAD LJ(CRI) 707, (2012) 2 ORISSA LR 383, (2012) 52 OCR 607, (2012) 3 ALLCRIR 3007, (2012) 5 SCALE 657, (2012) 2 UC 1290, (2012) 78 ALLCRIC 137, (2012) 2 CRIMES 311, 2012 (2) ALD(CRL) 631, 2012 (4) KCCR SN 261 (SC)

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Bench: Dipak Misra, B.S. Chauhan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.2066-67 OF 2009

Narender Kumar

...Appellant

Versus

State (NCT of Delhi)

...Respondent

JUDGMENT

Dr. B.S. CHAUHAN, J.

1. These appeals have been preferred against the impugned judgment and order dated 25.3.2009 passed by the High Court of Delhi at New Delhi in Criminal Appeal No.53 of 2000, by which it has affirmed the judgment and order of the trial Court dated 7.12.1999 passed in Sessions Case No. 77/99, convicting the appellant under Section 376 of Indian Penal Code, 1860 (hereinafter called 'IPC') and awarded the punishment of rigorous imprisonment for a period of 7 years vide order dated 8.12.1999 and imposed a fine of Rs.2000/- .

2. Facts and circumstances giving rise to this case are that:

A. Smt. Indira PW.1 (prosecutrix) filed an FIR No.886/98 dated 16.9.1998 to the effect that when she was going from village Khirki to Chirag Delhi on that day at about 8 p.m., the appellant met her near Ganda Nala, he caught hold of her hand and dragged her towards the bushes on the edge of the road and committed rape on her. She could not raise the noise due to fear. After commission of the offence, the appellant left her there and ran away. The prosecutrix went to her husband at his working place and from there went to the police station alongwith her husband to lodge the FIR.

B. The prosecutrix was medically examined. Appellant was arrested on 1.11.1998. Statement of the prosecutrix was recorded under Section 164 of Code of Criminal Procedure, 1973 (hereinafter called 'Cr.P.C.') on 20.11.1998 before the Metropolitan Magistrate, New Delhi. After completion of investigation, charge sheet was filed against the appellant under Section 376 IPC on 21.4.1999. Prosecution examined 11 witnesses in support of its case. The appellant, in addition to his own statement under Section 313 Cr.P.C., also examined 2 witnesses in defence.

C. On conclusion of the trial, the learned Sessions Court vide judgment and order dated 7/8.12.1999 convicted the appellant for the offences under Section 376 IPC and imposed the sentence as referred to hereinabove.

D. Aggrieved, the appellant preferred Criminal Appeal No.53 of 2000 before the High Court which has been dismissed vide impugned judgment and order dated 25.3.2009.

Hence, these appeals.

3. Shri Yakesh Anand, learned Amicus Curiae, has submitted that Indira, prosecutrix (PW.1) cannot be relied upon because there have been material contradictions in her deposition. She had been confronted on large number of issues/facts with her statement under Section 161 Cr.P.C. Embellishments/improvements had been of such a large magnitude that her statement itself

became unreliable. The prosecutrix was an unchaste woman, having illicit relationship with many young persons. The courts below erred in not appreciating properly the evidence of the defence witnesses examined by the appellant. The medical evidence, in a case like this where the prosecutrix was married and 25 years of age, is inconsequential. Thus, the appeals deserve to be allowed.

4. Per contra, Smt. Rekha Pandey, learned counsel appearing for the respondent-State has opposed the appeal vehemently contending that the appellant has rightly been convicted on the sole testimony of the prosecutrix and both the courts below have appreciated the facts in correct perspective. The findings so recorded by the courts below do not warrant any interference. Thus, the appeals are liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties and perused the record.

6. The Trial Court as well as the High Court recorded conviction of the appellant merely placing a very heavy reliance on the deposition of the prosecutrix and considering the deposition of Dr. Nisha (PW.9). Admittedly, the defence version taken by the appellant in his statement under Section 313 Cr.P.C. and the deposition of two defence witnesses to the extent that the prosecutrix had developed intimacy with the appellant and some other young persons and Sahib Rao (PW.3) her husband, had raised the grievance in this regard, have not even been referred to by either of the courts below, though the law required the court to appreciate the defence version and decide its veracity in accordance with law.

7. In order to test the veracity of the deposition of Smt. Indira –Prosecutrix (PW.1), it may be relevant to make reference to the same. In her examination-in-chief she stated as under:

“The accused was not personally known to me prior to the day of incident, except that he had teased me prior to the incident and I lodged the complaint with the parents of the accused and with the police. I have not given any copy of the complaint to the police in this case. It is incorrect to say that the accused had been living in my house about one year prior to the day of the incident.” In cross-examination she could not point out as which part of her Salwar had been torn. Prosecutrix, when in the dock was confronted on various points with her statement under Section 161 Cr.P.C. and the said contradiction read as under:

(i) I had also told the police in my statement that I had raised alarm at the time of rape.

(ii) The accused was not personally known to me prior to the date of the incident except that he had teased me prior to the incident and I lodged the complaint with the parents of the accused and with the police.

So far as the “injury on her person” is concerned, she deposed as under:

“I did not receive any injury except scratches on my throat and I had told the doctor about the incident.”

8. Sahib Rao (PW.3), husband of the prosecutrix in his cross- examination admitted that he knew the appellant very well as both of them had been the residents of the same village. He further admitted that there used to be quarrel between him and his wife. Sahib Rao (PW.3), was also confronted with his statement under Section 161 Cr.P.C. on various narrations.

9. Dr. Nisha (PW.9) deposed as under:

“There were nail marks on her breast and from that I say that she might have been raped. The nail marks which were found on the breast of the victim could have been self-inflicted....On internal examination of the victim, it could not be found that she was raped except seeing her condition that her clothes were torn and there were nail marks on her breast.” (Emphasis added)

10. SI, Lekh Raj (PW.6) who was posted at P.S. Malviya Nagar, New Delhi was examined and he deposed as under:

“On the night intervening 30.10.1998 and 1.11.1998 , complainant Indira came to the P.S. at about 11.45 p.m. She told me that the person who had committed rape on her is sitting on a stop of Khirki. Thereafter, I alongwith complainant and Constable Jagat Singh went there and accused present in court was arrested on the pointing out of Indira by me.....The arrest memo of accused Ex.PW.1/F was also prepared.....

.....No public person from the area was called from where the accused was arrested. I did not prepare the site plan of the place from where the accused was arrested. The prosecutrix Indira had come to me on that night in the police station alone. The distance between the house of the prosecutrix and police station is 3 Kms.”

11. R.N. Chowdhary (PW.11), Investigating Officer deposed that there was fencing just near the road and there was electricity pole installed at the divider of the road and the electricity was on. The residential houses were at some distance and the road was situated at a distance of about 20 paces from the place of occurrence.

12. The appellant in his statement under Section 313 Cr.P.C. stated as under:

“I was having good relations with family of the prosecutrix and we were staying in the same village. The prosecutrix desired to keep me in her house, to which I refused and for that reason, the false case has been planted on me. I am innocent and I have been falsely implicated in this case by police at the instance of the prosecutrix and her husband as I did not accept the proposal of the prosecutrix to live in her house. Her husband has also given severe beatings to the prosecutrix on that account.” (Emphasis added)

13. Chandan Singh (DW.1) was examined by the appellant in defence who deposed that he knew Indira (Prosecutrix) and her husband being their neighbour. The prosecutrix was having intimacy with the appellant for the last 3 years. His house is at a distance of 40 yards from the house of the prosecutrix. There remained quarrel between prosecutrix and her husband. Her husband Sahib Rao (PW.3) did not like the entry of appellant in his house.

14. Surendra Kumar (DW.2) supported the defence version stating as under:

“I know Sahib Rao and his wife Indira. Sahib Rao had been working in my ration shop for last 7 years. Sahib Rao used to tell me that one boy whose name I do not know used to visit the house of Sahib Rao which was not liked by him and for that reason the husband and wife had been quarreling. The said boy, who is present in the court had come to my shop also alongwith Indra.”

15. If the evidence on record referred to hereinabove is appreciated, the following picture emerges:

(i) Prosecutrix and appellant were known to each other for a long time and there had been some relationship/intimacy between them.

(ii) Sahib Rao (PW.3), husband of the prosecutrix did not like the said relationship.

(iii) There has been some incident two-three days prior to the actual incident on 16.9.1998 as Indira-prosecutrix had lodged some complaint against the appellant in the police as well as with the parents of the appellant.

(iv) The complaint lodged by the prosecutrix two-three days prior to

16.9.1998 with the police had never been placed on record.

(v) The alleged incident dated 16.9.1998 had occurred on the side of the main road which remains busy and had sufficient light and in spite of the fact that the prosecutrix raised hue and cry, nobody came to help her.

(vi) There are contradictions on the issue as to whether the prosecutrix went to the working place of her husband and from there she proceeded to police station with him as evidence on record is also to the contrary i.e she straightaway went to the police station and one Constable had gone and called her husband.

vii) Medical evidence does not positively support the case of the prosecution as Dr. Nisha (PW.9) deposed that seeing her condition and torn clothes it could be said that the prosecutrix might had been raped.

viii) Admittedly, there is a most material contradiction in the medical evidence and ocular evidence. Dr. Nisha (PW.9) had categorically recorded in the report and deposed in the court that the

prosecutrix was having nail marks on her breast though the case of Indira-prosecutrix had been that she was having nail marks on her throat.

(ix) Deposition of Lekh Raj (PW.6), S.I., about the arrest of the appellant between intervening night of 30.10.1998 and 1.11.1998 at about 11.45 p.m., seems to be improbable. According to him, the prosecutrix walked from her house to the police station at a distance of 3 Kms. at midnight to inform the police that the appellant was sitting on the stop of Khirki, Press Enclave. The witness reached there with prosecutrix and police constables. He found the appellant sitting at the said stop and from there he was arrested. The witness did not prepare the arrest memo with the help of any independent witness. If the appellant was sitting at the bus stop at midnight some other persons could have been also there.

(x) The defence version taken by the appellant and depositions of Chandan Singh (DW.1) and Surendra Kumar (DW.2) in support thereof, have not only been ignored/brushed aside by the courts below rather no reference has been made to the same.

(xi) The contradictions referred to hereinabove and particularly in respect of the nail marks on her body could not be said only to be minor contradictions which did not go to the root of the matter. Some of the contradictions/embellishments/improvements are of greater magnitude and had serious impact on the case.

(xii) The F.S.L. report dated 6.5.1999 reveal that the blood stains/semen on the prosecutrix kurta/salwar belonged to the AB blood group though the blood group of the appellant is "O" (+) and thus, the FSL report does not support the case of the prosecution.

16. 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

508).

17. Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate improvements on material point with a view to

rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence. (Vide: Suresh N. Bhusare & Ors. v. State of Maharashtra, (1999) 1 SCC 220)

18. In *Jai Krishna Mandal & Anr. v. State of Jharkhand*, (2010) 14 SCC 534, this Court while dealing with the issue held:

“The only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality, the story projected by the prosecutrix was so improbable that it could not be believed.”

19. In *Rajoo & Ors. v. State of Madhya Pradesh*, AIR 2009 SC 858, this Court held that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. The court however, further observed:

“.....It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication..... there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.”

20. In *Tameezuddin @ Tammu v. State (NCT of Delhi)*, (2009) 15 SCC 566, this Court held 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.”

21. Even in cases where there is some material to show that the victim was habituated to sexual intercourse, no inference of the victim being a woman of “easy virtues” or a woman of “loose moral character” can be drawn. Such a woman has a right to protect her dignity and cannot be subjected to rape only for that reason. She has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone. Merely because a woman is of easy virtue, her evidence cannot be discarded on that ground alone rather it is to be cautiously appreciated. (Vide: *State of Maharashtra & Anr. v. Madhukar Narayan Mardikar*, AIR 1991 SC 207; *State of Punjab v. Gurmit Singh & Ors.*, AIR 1996 SC 1393; and *State of U.P. v. Pappu @ Yunus & Anr.*, AIR 2005 SC 1248).

22. In view of the provisions of Sections 53 and 54 of the Evidence Act, 1872, unless the character of the prosecutrix itself is in issue, her character is not a relevant factor to be taken into consideration at all.

23. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide:

Tukaram & Anr. v. The State of Maharashtra,, AIR 1979 SC 185; and Uday v. State of Karnataka, AIR 2003 SC 1639).

24. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

The court must act with sensitivity and appreciate the evidence in totality of the background of the entire case and not in the isolation. Even if the prosecutrix is of easy virtue/unchaste woman that itself cannot be a determinative factor and the court is required to adjudicate whether the accused committed rape on the victim on the occasion complained of.

25. The instant case is required to be decided in the light of the aforesaid settled legal propositions.

We have appreciated the evidence on record and reached the conclusions mentioned hereinabove. Even by any stretch of imagination it cannot be held that the prosecutrix was not knowing the appellant prior to the incident. The given facts and circumstances, make it crystal clear that if the evidence of the prosecutrix is read and considered in totality of the circumstances alongwith the other evidence on record, in which the offence is alleged to have been committed, we are of the view that her deposition does not inspire confidence. The prosecution has not disclosed the true genesis of the crime. In such a fact-situation, the appellant becomes entitled to the benefit of doubt.

In view of above, the appeals succeed and are allowed. The judgment and order dated 25.3.2009 passed by the High Court of Delhi in Criminal Appeal No. 53 of 2000 and that of the trial court

dated 7.12.1999 are hereby set aside. The appellant is on bail, his bail bond stands discharged.

Before parting with the case, we would like to record our appreciation to Mr. Yakesh Anand, learned Amicus Curiae for rendering commendable assistance to the court. Mr. Anand shall be entitled to Rs. 7,000/- as his fees payable by the State Government.

.....J. (Dr. B.S. CHAUHAN) .

.....J. (DIPAK MISRA) New Delhi, May 25, 2012
