

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on:23.01.2014.*
Judgment delivered on 31.01.2014.

+ CRL.A.496/2001

DINESH KUMARPetitioners
Through: Mr.S.P.Singh Choudhary and
Mr. Y.R.Sharma, Advocates.
versus

STATE Respondent
Through: Ms.Fizani Hussain, APP.
+ CRL.A.552/2001
KRIPA SHANKARPetitioner
Through: Mr.S.P.Singh Choudhary and
Mr. Y.R.Sharma, Advocates.
versus

STATE Respondent
Through: Mr.Varun Goswami, APP.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 Appellants Kripa Shankar and Dinesh are aggrieved by the impugned judgment and order of sentence dated 03.05.2011 and 11.05.2001 respectively whereby Kripa Shankar had been convicted for the offence under Sections 363/366/376 of the IPC. He had been sentenced to undergo RI for a period of 1 year and to pay a fine of
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Rs.5,000/- and in default of payment of fine to undergo SI for 6 months for the offence under Section 363 of the IPC. For the offence under Section 366 of the IPC, he had been sentenced to undergo RI for a period of 2 years and to pay a fine of Rs.5,000/- and in default of payment of fine, to undergo SI for 6 months. For the offence under Section 376 of the IPC, he had been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.5,000/- and in default of payment of fine, to undergo SI for 6 months. Accused Dinesh had been convicted for the offence under Section 363/366 of the IPC. He had been sentenced to undergo RI for a period of 1 years and to pay a fine of Rs.5,000/- for the offence under Section 363 of the IPC. For the offence under Section 366 of the IPC, he had been sentenced to undergo RI for a period of 2 years and to pay a fine of Rs.5,000/- and in default of payment of fine, to undergo SI for 6 months. The sentences of both the convicts were to run concurrently. Benefit of Section 428 of the Cr.PC had been accorded to them.

2 The version of the prosecution was unfolded in the testimony of the prosecutrix 'S' examined as PW-6. She had been reported missing from her house since 27.07.1999. She had been recovered on

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09.08.1999. In this intervening period i.e. on 30.07.1999 a missing report had been lodged by her mother Smt. Sombiri (PW-2); initially the FIR had been registered under Section 363 of the IPC. After the recovery of the prosecutrix, her statement was recorded under Section 164 of the Cr.PC by the learned Metropolitan Magistrate Mr. O.P. Saini (PW-10). This was on 12.08.1999. As per her version, on the fateful day i.e. on 27.07.1999 her mother had gone out; there was no electricity; she was alone in the house; Kripa Shankar who was their tenant told her that her mother had suffered an accident and was calling her. PW-6 accompanied Kripa Shankar. When they reached near the bridge, a scooter was standing there. Co-accused Gulab and Dinesh were also there. They forcibly pulled her into the scooter after clamping her mouth with their hands; she was threatened that if she shouted, she would be killed with a knife. She was taken to Kanpur and Jhinja. She was threatened by all of them and also Inderpal (father of Kripa Shankar). She categorically stated that Kripa Shankar had done a wrong thing with her. He brought her back to Delhi on 04.08.1999.

3 After the recovery of the prosecutrix, the FIR which had initially been registered under Section 363 of the IPC was converted to Section

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366/376 of the IPC.

4 The prosecutrix was medically examined by Dr. Geetika (PW-1). On her medical examination, hymen was found missing; her vaginal swab and undergarments had been seized. Her MLC was proved as Ex.PW-1/A.

5 The CFSL vide its report dated 03.08.2000 had detected human semen on the seized underwear of PW-6. Since the sample was putrefied, the blood grouping of the semen could not be detected.

6 During the course of investigation, since the age of the prosecutrix was under question, she had been put to a ossification test. This test was conducted by Dr. A.K. Sharma (PW-14) and as per his report (Ex.PW-14/A), she was opined to be between 15-17 years of age.

7 Accused Dinesh was arrested on 21.10.1999 followed by the arrest of Kripa Shankar who was arrested on 03.11.1999.

8 As noted supra, there are two appellants before this Court. In their statement under Section 313 of the Cr.PC. both the accused have pleaded innocence; submission being that they have been falsely implicated in the present case; further submission being that the mother of the prosecutrix i.e. PW-2 was running a committee from her house

and Rs.50,000/- had to be paid by her which she refused to return and as such she has falsely implicated Kripa Shankar in the present case. This was the defence of both the accused persons.

9 Two witnesses were produced in defence. Mani Ram (DW-1), a neighbour had stated that PW-2 was running a committee; he denied the suggestion that no money was due from PW-2 to any person. Panna Lal (DW-2) a neighbour knew both PW-2 and accused Kripa Shankar. He has stated that PW-2 was doing the committee work. PW-2 has falsely implicated the accused persons. In his cross-examination, he admitted that he has not filed any case against Sombiri (PW-2) for recovery of the amount.

10 The trial Court on the basis of evidence collected by the prosecution both oral and documentary had convicted the accused persons under the aforementioned provisions of law and had sentenced them accordingly.

11 On behalf of the appellants, arguments had been addressed in detail. Written submissions have also been filed. Qua the role of Dinesh, the learned counsel for the appellants has pointed out that he is not assailing his conviction on merits; it is pointed out that out of 2 years

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imprisonment which has been imposed upon Dinesh, he has already suffered imprisonment for 1 year and 5 months. This submission of the learned counsel for the appellant is borne out from the record. Submission of the learned counsel for the appellant being that without prejudice to his rights to address arguments challenging the conviction of co-accused Kripa Shankar, if this Court deems it fit, Dinesh may be released on the sentence already undergone by him.

12 Record shows that the role attributed to Dinesh was that he was known to Kripa Shankar and when Kripa Shankar had, on the false pretext, brought out the prosecutrix from her home, accused Dinesh was standing near the bridge with co-accused Gulab and he had helped the co-accused in forcibly putting the prosecutrix into the TSR. Dinesh was also present at the time when the prosecutrix was in Kanpur and later in Jhinjar. However, no other role has been attributed to him. It is clear from the version of the prosecution that it was accused Kripa Shankar alone who had committed the rape upon her.

13 In this background, keeping in view the fact that Dinesh is on bail since 02.04.2002 and out of 2 years imprisonment, he already having undergone 1 year and 5 months imprisonment and not abused the

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process of bail; his conduct in the jail in this interregnum period when he incarcerated being satisfactory; he being young in years (aged 35 years) and having a family to support, in the interest of justice, it would be in the fitness of things that accused Dinesh be sentenced for the period already undergone by him. Accordingly, accused Dinesh who had already undergone almost 80% of his sentence which has been imposed upon him i.e. 1 year and 5 months out of a 2 years period; he be sentenced to the period already undergone by him.

14 Appeal of Dinesh is disposed of accordingly.

15 On behalf of accused Kripa Shankar, learned counsel for the appellant has pointed out that it is clearly a case of consent. Attention has been drawn to the photographs which had been placed on record and put to the witness in her cross-examination (Ex.PW-6/D1 to Ex.PW-6/D9). Submission being that all the photographs depicts the presence of the prosecutrix with Kripa Shankar; they appear to be happy and cordial. It is submitted that the prosecutrix had willingly and voluntarily gone with the accused. It is pointed out that admittedly even as per the version of the prosecution, she remained missing from 27.07.1999 up to 09.08.1999 i.e. for almost 13 days, when she was in Kanpur and Jhinja. CrI. Appeals No.496/2001 l& 552/2001

and she not having raised any hue and cry in this entire period when she admittedly must have travelled by bus and other public transport, it is a clear case where the prosecutrix had consented to go with Kripa Shankar. Attention has also been drawn to her MLC (Ex.PW-1/A); submission being that no injury has also been noted upon her person. It is pointed out that ossification report (Ex.PW-14/A) also reflects that she is between 15-17 years and although the trial Court had granted benefit of 2 years and the benefit has enured in favour of the prosecution holding the prosecutrix to be a minor is clearly a mis-calculation as this calculation must enure in favour of the appellant. On all counts she must be treated as major. PW-2, the mother of the prosecutrix in her version on oath in Court has also stated that her daughter was 23 years of age on the date of the incident. Second submission being that there are clear improvements in the version of PW-6 which are material and go to the root of the matter and such a witness cannot be relied upon. This is a clear case where the mother of the prosecutrix (PW-2) has falsely implicated the accused as she has failed to refund the committee money which was owed to her. The fact that she was running a committee is substantiated by the testimonies of DW-1 and DW-2.

16 Arguments have been refuted by the learned counsel for the State. It is pointed out that on no count, does the impugned judgment call for any interference. Not only is the version of the prosecution proved through the testimonies of PW-6 and corroborated by her mother (PW-2) and her MLC (Ex.PW-1/A); the CFSL report also fully supports the version of the prosecution. Not only hymen of the victim was found to be torn on her medical examination, her seized underwear had semen stains for which there is no explanation. The age of the prosecutrix as is evident from her versions both under Sections 161 and 164 of the Cr.PC as also her deposition on oath in Court clearly states that she was 13 years on the date of the incident. The fact that she was studying in the 6th class which submission remains unrebutted also shows that the prosecutrix was a minor on the date of the incident. The defence sought to be projected by the accused is based on surmises. Had PW-2 owed any money to the accused, they would have taken some steps to get this money recovered from PW-2.

17 Record has been perused. The submissions of the respective parties have also been appreciated.

18 PW-6 is the star witness of the prosecution. She was the

prosecutrix. She was the injured victim; the injuries being more emotional than physical. Trite it is to say that it is now well settled that the uncorroborated testimony of a rape victim if found to be trustworthy and credible may be sufficient to nail the accused. Corroboration may not be necessary. Each case has to be adjudged on its own factual matrix.

19 PW-6 was admittedly missing from her house since 27.07.1999. She was recovered on 09.08.1999. Although in her statement under Section 164 of the Cr. PC, it has been recorded that she returned back to her house on 04.08.1999 yet the recovery memo and the version of her mother (PW-2) as also that of the Investigating Officer SI Avtar Singh (PW-9) shows that the recovery of the prosecutrix had been effected on 09.08.1999. The date of 04.08.1999 mentioned in the statement of the prosecutrix under Section 164 of the Cr.PC has necessarily to be ignored as a writing error.

20 In her statements under Sections 161 & 164 of the Cr.PC, the prosecutrix has given her age as 13 years. She has stated that she was studying in the 6th class. PW-2 in the missing report which she had lodged of her daughter has given the age of her daughter as 13

years but at one stage i.e. in her deposition on oath before the Court, PW-2 has stated that PW-2 was 23 years of age on the date of the incident. There is no document which has surfaced and understandably so because of her rustic background; they did not have the birth certificate or any school record of the prosecutrix to establish her date of birth.

21 Testimonies of PW-6 and PW-2 being variant on this count; especially as PW-2 has at all times i.e. when her statement was recorded under Sections 161/164 of the Cr.PC as also her deposition on oath in Court which was 1 year later she has not given in her years. PW-2 at one stage gave her daughter's date of birth as 23 years. Keeping in view these differences, the Court had relied the ossification test. This report (Ex.PW-14/A) suggests that PW-2 was between 15-17 years of age. Margin of 2 years had to be accorded. The trial Court has however erred in this regard; this benefit of 2 year must enure in favour of the appellant and not for the prosecution. If benefit has to be given, it must be for the accused.

22 In 1999 (1) Crimes 1 Mahabir Prasad Vs. State the Court while dealing with the age of the prosecutrix, in this context as held as under:-

“On consideration of the entire evidence on record and the judgment cited at the bar, if there can be difference of two years, even in the ossification tests, in that event, the benefit of doubt has to go to the accused.”

23 Relying upon this report (Ex.PW-14/A) granting benefit of margin of 2 years in favour of the prosecution has committed an illegality.

24 Giving benefit of 2 years to the appellant, it must be held that the prosecutrix was more than 18 years and a major on the date of the incident.

25 However, even if the prosecutrix is a major, the question that arises for decision is whether she had consented to be in the company of Kripa Shankar qua her stay of 13 days at Kanpur and Jhijar. Did she go with him with her consent?

26 The concept of ‘consent’ as contained in Section 375 of the IPC has to be understood keeping in mind the provisions of Section 90 of the IPC according to which if consent is given under fear, coercion or misconception, it is not a consent. Section 90 has in fact been couched in the negative language.

27 The version of PW-6 is clear and categorical. She has clearly

stated that she was under threat and pressure when she has been forcibly taken by all the accused persons. Kripa Shankar had brought her out of the house on a false pretext that her mother has met with an accident and she was calling her; she was taken to Kanpur and Jhinjar where she was confined for 9 days and against her wishes; Kripa Shankar had raped her.

28 A young rustic girl, being immature in years and experience having been confined under fear and pressure in a place like Kanpur and Jhinjar which is miles away from her house, obviously had little choice but to stay with the accused. As soon as she was able to leave the house, she came back to Delhi. In this background, in no manner can it be said that there was a consent on the part of the victim and she had stayed for 13 days in Kanpur and Jhinjar along with Kripa Shankar on her own accord. The medical record of the victim shows that her hymen was torn; semen was also detected on her underwear which had been seized and sealed. Admittedly the accused and the prosecutrix had had intimate relations. There being no injury noted in her MLC would also not detract from her otherwise coherent and categorical version as she was admittedly under threat and fear at that time. A passive appearance does

not qualify as consent which has to be free and voluntarily.

29 In fact the whole line of the argument of the learned counsel for the appellant is bordered on consent and this amounts greater importance as this Court has come to the conclusion that PW-6 was a major. Had it been a case where the prosecutrix was a minor, the proposition of consent may not have been relevant.

30 As noted supra, the testimony of PW-6 right from the inception i.e. from the time of recording of her statement under Section 161 of the Cr.PC which was on 09.08.1999 as also her subsequent statement recorded under Section 164 of the Cr.PC on 12.08.1999 and her deposition on oath in Court recorded on 18.08.2000 all corroborate her version that Kripa Shankar had forcibly confined her and committed rape upon her. The fact that Kripa Shankar was known to her is an admitted fact. He was their tenant living in the same house and that is why group photographs depicting both of them together in common company are noted. However, there is no such photograph which has been filed on record which shows any special intimacy between the two to establish the submission of the learned counsel for the appellant that the parties had a close friendship.

31 There was no reason whatsoever for the prosecutrix and her mother to have falsely nailed the accused. The defence projected by the appellant is that the mother of the prosecutrix (PW-2) was running a committee and she had to refund money to the appellant and because she was unable to refund the amount, she has falsely implicated the accused person. This defence is noted only to be rejected. It would be difficult to imagine that Rs.50,000/- each was payable to both Kripa Shankar and Dinesh. If this amount was payable by PW-2 to both of them; Rs.50,000/- not being a small amount, efforts would have been made by them to recover that amount. If not a litigation, at least some kind of a complaint would have been made in this context. No such complaint was made. This defence is nothing but sham and moonshine.

32 Although there are minor omissions and contractions which appear in the version of PW-6 but they have necessarily to be ignored as the gist of her version is on all counts cogent; details of the gory incident have been described by her on all three occasions i.e. before the Investigating Officer under Sections 161, before the Magistrate under Section 164 of the Cr.PC as also before the Court on oath. The medical evidence also shows that her hymen was missing; semen stains were

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also found on her underwear.

33 The sum total of evidence which has been adduced by the prosecution both oral and documentary satisfies this Court that the conviction of Kripa Shankar under Sections 363/366/376 of the IPC calls for no interference.

34 Even on the point of sentence, the minimum 7 year punishment has been imposed upon the appellant. This Court has been informed that out of 7 years of imprisonment, appellant Kripa Shankar has undergone a period of 4 years and 9 months. He be taken into custody to suffer the remaining sentence. Bail bonds cancelled and surety stands discharged.

35 Appeal is without any merit. Dismissed.

36 A copy of this order be sent to the Jail Superintendent for information and necessary compliance.

INDERMEET KAUR, J

JANUARY 31, 2014/A