

**HIGH COURT OF DELHI**

**CORAM: HON'BLE MR. JUSTICE SURESH KUMAR KAIT**

**HON'BLE MR. JUSTICE MANOJ JAIN**

**Date of Decision: April 1, 2024**

CRL.A. 495/2023

**PAWAN SHARMA AND ORS ... .. Appellant**

**VERSUS**

**STATE GOVT OF NCT OF DELHI .....Respondents**

**Legislation and Rules:**

Sections 328, 366, 342, 34, 376D of the Indian Penal Code (IPC)

Section 164, 313, 437A of the Cr.P.C.

**Subject:** Criminal appeal against convictions under Sections 328, 366, 342, 34, and 376D IPC involving allegations of kidnapping, unconsciousness-inducing, and gang-rape.

**Headnotes:**

Convictions and Sentences – Challenging Grounds – Appellants convicted under Sections 328/366/342/34 and 376D IPC – Sentenced to rigorous imprisonment for life with fines – Appeal grounds included lack of evidence, uncooperative prosecutrix, inadequate investigation, and reliance on inconclusive FSL report – Prosecutrix a major at the time of the incident. [Paras 1-2]

Prosecution Story and Investigation – Information received about kidnapping and rape of 'G' – Medical examination at LHMC followed by arrests in native village – Discrepancies in statements under Section 164 Cr.P.C. and trial testimony – Issues raised on the handling of mobile CDR and PCR form. [Paras 4-7, 22, 28]

Witness Testimonies and Evidence Assessment – Contradictory statements from prosecutrix ('G'), her parents, and inconsistencies in investigation details – Lack of incriminating evidence against appellants – Prosecutrix disowned initial complaint, stating it was under family influence – Parents' testimony did not corroborate prosecution's case. [Paras 11-20]

DNA Report and Physical Evidence – DNA report's significance questioned due to procedural gaps – No injuries suggestive of forcible assault found in medical examination – Issues with evidence handling and lack of key witness testimony regarding evidence chain – DNA evidence not conclusive of non-consensual act. [Paras 27, 29-32]

Court Decision – Acquittal – Appeals allowed due to insufficient evidence and unreliable testimonies – Accused acquitted of all charges – Bail bonds to remain valid for six months as per Section 437A Cr.P.C. [Paras 33-36]

Referred Cases: None.

Representing Advocates:

For the Petitioner: Dr. Harshvir Pratap Sharma, Senior Advocate with Ms. Stuti Jain, Mr. Akshu Jain, Mr. Akul Krishnan and Mr. Amit Kumar, Advocates

For the Respondents: Ms. Manjeet Arya, APP for State

## **JUDGMENT**

### **MANOJ JAIN, J**

1. All the four appellants have been held guilty and convicted for offences under Sections 328/366/342/34 IPC & Section 376D IPC and have been sentenced, *inter alia*, to rigorous imprisonment for life with fine and in-default sentence.
2. The impugned judgment has been assailed, *inter alia*, on the following grounds:-
  - (i) *There is not even iota of evidence on record which may indicate that prosecutrix had been abducted by the appellants much less sexually assaulted. She has not whispered even a single word against the appellants either during the investigation or during the trial and, therefore, there was no reason or occasion to have held them guilty.*
  - (ii) *The parents of prosecutrix have also not supported the case of prosecution.*
  - (iii) *Investigation has been carried in a very shoddy manner as call details of the mobile of prosecutrix were not collected which would have unearthed the falsehood in the prosecution version.*

- (iv) *In view of the completely unsupportive and hostile testimony of prosecution and there being no other eyewitness of the alleged incident, learned Trial Court had committed grave error in holding the appellant guilty merely on the basis of FSL report which is also not sufficient, in itself, to link the appellants.*
- (v) *Learned Trial Court did not appreciate the fact that prosecutrix was major at the relevant time and, therefore, such DNA report, if even it was to be believed, did not carry any value.*
3. In the aforesaid backdrop of the contentions, let us come to the prosecution story.
  4. On 29.07.2018, HC Ashok (PW5) of PS Nihal Vihar received information through PCR that one girl, who had been kidnapped and raped by four persons, was able to escape from their clutches and was present at Mandi House, Metro Station. HC Ashok along with Ct. Munni reached there. They met 'G' (*name withheld*) who was immediately taken to Lady Hardinge Medical College (LHMC) for medical examination.
  5. After such medical examination, she and her mother came to PS Nihal Vihar and 'G' then revealed that she had left her house for 'Shiv Mandir' to offer worship. At a short distance from her house, one vehicle came from behind. Thereafter, someone caught hold of her and put one handkerchief on her nose which made her unconscious. When she regained consciousness, she found herself naked in one room with all the appellants whom she knew already as they were natives of her village. They all were also naked and claimed that she had been brought to Water Plant situated at Ballabhgarh. They all, without her consent and in a forcible manner, made physical relation with her and confined her there. In the morning, they all left her on the road and thereafter she managed to reach Delhi.
  6. At her instance, police arrested all of them from their native village of District Mathura, UP.
  7. It would also be worthwhile to mention here that statement of 'G' was also got recorded under Section 164 Cr.P.C. but in her such statement made on 01.08.2018, she rather claimed that she had left her home without telling anyone as she was under tension. She claimed that she went to her village and since she reached there very late, out of fear, she got recorded FIR. Despite being asked, as to whether she wanted to say anything else, she did not utter any further word. All in all, in her such three lines statement made under Section 164 Cr.P.C., she never claimed that she had been kidnapped and sexually assaulted by anyone, much less by the appellants.

8. Be that as it may, charge-sheet was filed and all the four appellants were directed to be charged for offences under Sections 328/366/342/34 IPC & Section 376D IPC vide order dated 20.05.2019. They all pleaded not guilty and claimed trial.
9. Prosecution examined five witnesses viz. PW1 ('G'), PW2 SI Koyal (IO), PW3 (father of 'G'), PW4 (mother of 'G') and PW5 HC Ashok Kumar.
10. We also find that various documents were admitted by the accused during the trial.
11. Testimony of 'G' was recorded on 11.07.2022 and in her such statement, she simply reiterated what she had claimed when she was examined under Section 164 Cr.P.C. In her deposition, she, categorically, claimed that she had gone to her village at Mathura of her own as she was having tension. She claimed that since she had gone missing, her family members started searching for her. She came back from Mathura next day and FIR was got registered out of fear. She claimed that she did not remember anything else. She though admitted that complaint was bearing her signatures but supplemented that such complaint was lodged under the influence of her family members and that she did not want to go to PS for lodging any complaint. She also deposed that she was told that since she had gone missing, it would bring bad name to the family and, therefore, she was required to lodge complaint. She also claimed that she had stated the same thing before the learned Magistrate.
12. During her deposition, all the appellants were shown to her.
13. She did identify them claiming that she knew them as they were residents of her native village but she did not utter anything further against them. She was cross-examined by the prosecution with the permission of the Court. Despite her exhaustive cross-examination, she denied that she had been abducted or raped by the appellants.
14. In her such cross-examination conducted by the prosecution, she admitted that she had made call to the police but pleaded her ignorance whether such call was made by her from Mathura or Delhi. So much so, she claimed that her phone was taken into possession by the police. Though she admitted her signatures on various documents but reiterated, in no uncertain terms, that complaint had been given by her under the influence of her parents. Thus, she apparently disowned the contents of all such documents, including her own complaint.

15. Testimony of her parents also does not serve the purpose of prosecution.
16. PW-3/father of 'G' did claim that he learnt from his wife that their daughter was not at home. He deposed that after few days, they learnt from one police official of PS Nihal Vihar that his daughter had lodged complaint against the accused. He claimed that his daughter did not inform him about any incident or about her said complaint. He claimed that he did not know as to against whom, such complaint had been lodged. According to him, police had also not informed him about anything.
17. Since he was found resiling from his previous statement made to the police during investigation, he was cross-examined by the prosecution but despite that he failed to recognize any of the accused. He claimed that he never made any statement before the police. Admittedly, when he was cross-examined by the prosecution, he claimed that his wife/PW-4 had told him that their daughter had been kidnapped and raped but fact remains that mother of 'G' has not said anything in this regard. According to her deposition, when their daughter was not available at their residence, she searched for her but there was no clue. However, on the same day in the evening, one police official came to their home and informed them regarding lodging of complaint by their daughter and then they brought her back. She categorically claimed that her daughter had not shared anything with her despite the fact that they made inquiries from her. She claimed that she did not know as to against whom her daughter had lodged complaint Ex. PW1/A. When she was cross-examined by the prosecution, she denied that her daughter had told her that she had been kidnapped and raped by the appellants herein.
18. Thus, testimony of parents of 'G' also does not help the prosecution case in any manner whatsoever.
19. We may hasten to add that if father of 'G' is to be believed, 'G' was missing for few days whereas according to her mother she returned same evening, when she had gone missing. Both such versions are not in synchronization with prosecution case as she allegedly returned next morning.
20. Moreover, as already noticed, case of prosecution was that complaint was lodged by 'G' in the presence of her mother but her mother has taken complete somersault and has denied any such thing.

21. PW2 IO-SI Koyal & PW5 HC Ashok remained associated with the investigation and they have merely proved various documents which had been prepared during investigation. Fact remains that they are in no position to depose about the actual incident of kidnapping and rape. They came into picture only when the incident had taken place and call was received through PCR.
22. It is quite baffling and mysterious as to why the police did not collect the CDR details of mobile of 'G'. It would have certainly thrown valuable light about vital details. As already noted, as per 'G', her mobile was seized by the police. It seems that no effort was made to obtain the Call Details Record and to place the same on record. Holding back such valuable piece of evidence has to be taken as a circumstance against the prosecution. We will not mince any word in commenting that Call Details Record of 'G' would have also reflected her location which could have even strengthened the case of prosecution but is not explicable as to why such valuable piece of evidence was not bothered to be collected. Thus, a golden opportunity went begging.
23. Section 313 (1) (b) Cr.P.C. comes into play when the prosecution witnesses have been examined. Before any such accused is called for his defence, it becomes the duty of the Court to explain the circumstances appearing in evidence against him.
24. 'G' and her parents have not supported the case of prosecution and there is nothing on record which might indicate that on 28.07.2018 at about 10.00 AM, all the appellants had put handkerchief on the face of 'G' due to which she became unconscious and thereafter gang-raped. There is no fact, evidence or circumstance indicating the same. Despite that, learned Trial Court put question to the above effect to all of them.
25. Quite possibly, learned Trial Court seems to have got carried away by the fact that in her first statement Ex. PW1/A, which has been otherwise disowned by her during trial, she had incriminated all the appellants.
26. Learned Trial Court also did not give any weightage to the fact that such statement was made by her on 29.07.2018 and immediately thereafter when she was produced before the concerned learned Magistrate, she, in her statement under Section 164 Cr.P.C., categorically claimed that she had left the home of her own and same version was reiterated by her in the witness box. In such a situation, there was virtually nothing which could have

indicated that she had been kidnapped and then confined and gang-raped. As per the case of prosecution, 'G' had been gang-raped by four persons. Such sexual assault was forcible in nature and against her wish and consent and in such a situation, there should have been some injury on her body suggesting forcible sexual assault. However, MLC (Ex. P-3) tells a different tale as the concerned doctor did not notice any fresh injury. He also did not find any fresh bleeding. Hymen rupture was found, albeit, to be the old one. Moreover, when 'G' had lodged her report, she had categorically claimed that she knew all the accused persons who were native of her village but despite that it is not explained why she has given the name of one of the accused as 'Rohit' and later corrected the same by claiming that name of such accused was 'Ved Prakash @ Sonu'. This also makes her version untrustworthy.

27. It is also quite apparent that she had made call from her own mobile to PCR but for the reasons best known to the prosecution, PCR form has also not been placed on record.
28. Learned Trial Court has got swayed away by DNA report. Such DNA report also does not carry any significance for multiple reasons.
29. Firstly, the exhibits in question were collected from the hospital by Ct. Munni and she handed over to the same to IO at PS. These were kept at malkhana and from malkhana, these were brought to laboratory by one another police official. Neither Ct. Munni nor malkhana incharge or for that matter the constable who had deposited the pullandas with FSL has been examined. This assumes importance because of there being some mismatch between number of parcel deposited in malkhana and number of parcels received in FSL. FSL had received six parcels and it is not explained as to why two sample seals were not sent along with the exhibits. Such specimen seal was of immense importance as it could have established that there was no tampering with the seal.
30. Secondly and more importantly, FSL result, on which learned Trial Court seems to have relied upon very heavily has not even been put to the accused under Section 313 Cr.P.C. This was serious omission as conviction primarily seems to be based on such DNA report.
31. Last but not the least, it is admitted case of prosecution that 'G' was major at the relevant time and even if semen was detected on the 'legging' of victim and the DNA extracted from the same matched with the DNA profile of the



accused persons, it could not have been automatically assumed that it was a case of sexual assault, particularly when 'G' has not uttered even a single word in this regard. It could have been also taken as a case of consensual physical relationship.

32. Be that as it may, in view of our foregoing discussion, we are of the view that there was not enough material on record to prove the case of prosecution. No incriminating word has been whispered by 'G' and her parents. Investigation is also not upto the mark as neither PCR form nor CDR of mobile of 'G' were placed on record. Keeping in mind the fact that 'G' was major at the relevant time, DNA report, which was not even put to the accused under Section 313 Cr.P.C., does not carry any value.
33. Resultantly, we allow the appeal and acquit all the accused persons of the charges.
34. All the appellants are already on bail. However, in terms of Section 437A Cr.P.C., bonds submitted by them shall remain valid for a period of six months from today and sureties shall stand discharged automatically after expiry of said period of six months.
35. Appeal stands disposed of in aforesaid terms.

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