

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.A. No. 142 of 2002

Reserved on : February 10, 2009

Date of decision: February 24, 2009.

RAM BHAGAT RAM Appellant
Through: Mr. D.K.Mathur, Advocate.

versus

STATE Respondent
Through: Mr. Pawan Behl &
Mr. Jaideep Malik, APP.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

JUDGMENT
24.02.2009

Dr. S. Muralidhar, J.

1. This appeal is directed against the judgment dated 8th February 2002 passed by the learned Additional Sessions Judge ('ASJ') holding the Appellant guilty of the offences under Section 367 (abduction with a view to being subjected to the unnatural lust of a person) read with 34 IPC and Section 377 (sodomy). The appeal is also directed against the order dated 12th February 2002 sentencing the Appellant to undergo rigorous imprisonment for four years and to pay a fine of Rs.1,000/- and in default further rigorous imprisonment for two months for the offence under Section 367 read with 34 IPC and a similar sentence in respect of the offence under Section 377 IPC with the direction that both sentences

shall run concurrently.

2. By an order dated 8th March 2002 passed by this Court in the present appeal, the sentence awarded to the appellant was directed to remain suspended during the pendency of the appeal.

3. The case of the prosecution is that at about 5 am on 7th October 1995 the victim, who was at that time around 18 years of age, was going to ease himself in the fields in front of the factory in village Tikri Kalan, Delhi where he worked. It is stated that at that point in time the Appellant and the co-accused, both of whom the victim knew from before met him. It is stated that the co-accused asked the victim to give them a sum of Rs.100/- for purchasing liquor. It is stated that the Appellant threatened the victim that if the said sum was not paid they would commit sodomy on him. When the victim refused to pay the money the co-accused caught hold of his hands and Appellant caught both the feet and they took him near a brick kiln which was about half a kilometer away. There the co-accused caught hold of the neck of the victim and closed his mouth by his hand. The Appellant inserted his penis in the anus of the victim and continued doing so for about 5 to 7 minutes. The victim somehow managed to save himself and went to his father and narrated the incident to him. The victim's father took him to the Police Post (P.P) Tikri Kalan and lodged a report with Assistant Sub-Inspector Suraj Bhan (PW 10) who recorded the statement of the victim and sent Constable Sardar Singh (PW 7) to the Police Station (P.S) for

registration of the case. PW 10 then accompanied the victim and his father to the spot and prepared site plan (Ex. PW 10/B) and recorded the statement of the victim's father. He returned to the P.P and commenced a search of the two accused. They were found near a primary school and on the victim pointing them out both were arrested. The victim and the two accused were sent for medical examination. They were examined by Dr. Anil Garg (PW 2) who prepared three separate medico-legal certificates (MLCs) of the examination of each of them. The underwear of the victim, the pant and semen sample of the Appellant were sent to the Forensic Science Laboratory (FSL) for examination. The FSL Report (Ex. PW 10/C) showed the presence of Group A semen on the underwear of the victim and the pant of Appellant. The examination by the FSL took place in 1997 by which time the semen sample was found to be too putrefied to enable detection of its Group.

4. The prosecution examined ten witnesses. The Appellant examined two witnesses, Jai Bhagwan (DW 1) and Randhawa (DW 2) in his defence. The learned ASJ, by the impugned orders, held the Appellant and the co-accused guilty of the offence of aforementioned offences and sentenced them in the manner indicated.

5. Mr. D.K. Mathur, learned counsel for the Appellant submitted that the medical evidence does not corroborate the victim's version that sodomy was committed on him. He refers to the MLC prepared by Dr. Anil Garg (PW 2) which notes that there was no injury in the anal area of the

victim. Further, the surgery notes on the MLC recorded on 7th October 1995 by a different doctor notes that “upon physical examination” there was “no evidence of injury at anal area. No blood stain and semen stain.” According to him, it was not for the defence to have cross-examined the doctor on this point. If the prosecutor failed to get PW 2 to explain the consequence of an absence of injury in the anal area of the victim and the absence of blood or semen stain, then the benefit of the doubt created thereby must enure to the accused. Also, the doctor who prepared the surgery notes was not examined as a witness. Reference is made to certain portions of *Modi’s Medical Jurisprudence and Toxicology* (22nd Edition edited by B V Subrahmanyam) to urge that if sodomy had been committed on a full grown 18 year old person without his consent there should have been injury to the anal area, the presence of blood around the anus or some signs of struggles such as bruises, scratches on the person of the victim. Reliance is placed upon the judgment in *Mirro v. Emperor AIR (34) 1947 Allahabad 97* and *Abdul Salam v. State 2005 [2] JCC 936*.

6. It is next submitted by Mr.Mathur that the opinion of the doctor who prepared the surgery notes and the so-called extra judicial confession made by the Appellant to PW 2 were not put to the Appellant in the form of questions concerning the evidence against him in his examination under Section 313 CrPC. It is submitted that this is fatal to the case of the prosecution as explained by the Supreme Court in *Machander v. The State of Hyderabad AIR 1955 SC 792*.

7. The other points urged are that according to the victim there were many people passing by in that area at the relevant point in time but no public witness was examined. The Appellant and the co-accused were already at the P.S in connection with some quarrel the previous day and they were being falsely implicated in this case. The prosecution story of the victim being asked by the accused to pay Rs.100/- at 5 am to enable them to buy liquor is improbable and unbelievable. Finally it was urged, without prejudice to the above contentions, that the sentence of 4 years' RI was harsh and some leniency may be shown.

8. Appearing for the State Mr.Jaideep Malik, the learned APP posed a question as to why the victim would want to falsely implicate either of the accused in such a serious offence when there is nothing to show that he had any previous enmity with either of them. The testimony of the victim is clear and cogent and has remained unshaken in cross-examination. The identity of the Appellant and his co-accused has never been in doubt. Their presence at the time of the offence is established. He points out that it is not the prosecution's case that there were injuries on the anal area of the victim. It was for the defence to have elicited from the doctor that when the non-consenting victim of sodomy is a full-bodied male then some anal injury was a *sine qua non* to prove the charge of sodomy. No such question was asked of the doctor in his cross-examination. On the contrary, the injuries on the forearm and neck of the victim, and the upper portion of the Appellant's leg corroborate the veracity of the victim's version. An important aspect pointed out by the

learned APP is the absence of smegma on the penis of the Appellant whereas it was not so in the case of the co-accused, which again corroborated the victim's version that it was the Appellant who committed sodomy while the co-accused forcibly held him down. The presence of Group A semen on the underwear of the victim and the pant of the accused is also referred to by Mr.Malik as corroborating the victim's evidence it was the Appellant who sodomised the victim. The other important aspect is that there were injuries on the Appellant as well which the defence is unable to explain.

9. This court has examined the record of the trial court and considered the submissions. The victim, who was examined as PW 5 has stated in is examination-in chief as under:

“On 7-10-95 at about 5.00 am I was going to ease myself in the fields in front of factory where I worked. Rajpal and Ram Bhagat who were known to me earlier who are present in court met me on the way. Accused Rajpal asked me to give 100 Rs. for liquor. Then accused Ram Bhagat threatened me that if Rs.100/- were not paid to me then he would commit sodomy. I refused to pay money. On which accused Rajpal present in court caught my both hands and Ram Bhagat caught both my feet. Then they took me to near brick kiln in fields. Accused Rajpal caught hold off my neck in the field and closed my mouth by hand. Then Ram Bhagat inserted his penis in my anal and continued doing so for 5-7 minutes. Somehow I managed to save myself and then went to my father and informed him. My father took me to Tikri

Police Post. There my statement was recorded by police which is Ex.PW 5/A which bear my signatures at point 'A'. On 7-10-95 when I was returning from P.P. with my father both accused were found near Primary School. Police was with me and both the accused were arrested vide personal search memos Ex.PW 5/B and PW 5/C which bear my signatures at point 'A'. I was taken to D.D.U. Hospital where I was medically examined. My underwear which I was wearing at the time of occurrence was also seized by the Doctor which I can identify. (At this stage a sealed parcel duly sealed with seal of C.F.S.L. is opened). Ex.P-1 is the same underwear which I was wearing at the time of occurrence.”

10. The relevant portion of the cross-examination of PW 5 on behalf of the Appellant is as under:

“I am living in Tikri Village since 1990. I am living as a tenant in house of Jagdish. My duty hours are from 9.00 am to 7.30 pm. My residence at the time of occurrence was at a distance of 200 yards from factory. It is correct that there were fields near my house. It is correct that I always eased myself in out fields. The fields starts from my house. Whenever I use to go to fields to ease myself I had to pass in front of factory. It is incorrect that I was not necessary to pass through the factory by going to field. (Vol. The factory was situated in front of my house.) The brick kiln was at a distance of about half K k.m. from factory. Many people were passing through the fields when I was going to ease myself. It is correct that brick kiln was working in those days and many labourers lived there. When I was caught by both accused no one was present nearby and I had raised

alarm. (Vol. My mouth was closed by accused Rajpal). When I was taken to near brick kiln in the field my mouth was closed by accused Rajpal I had stated before the police that when I was taken to fields near brick kiln accused Rajpal had closed my mouth. (Confronted with Ex.PW5/A where it is not recorded). I continued raising alarm on the way to field near brick kiln but no one else met me on the way. When I was taken to fields near brick kiln even then I was shouting for help. I had not seen labour of brick kiln at the time of occurrence.”

“My signatures were obtained at P.P. on my statement and on two papers in P.S. Nangloi. I remained in the P.S. for about 1 and half hours. From P.S. I was sent to DDU. Accompanied by both accused, three police officials and my father in a three wheeler. We reached Hospital at 12.00 noon. I remained in hospital for about two/two and half hours. I do not know if any clothes of any of the accused was seized by Doctor or not. From Hospital I returned back to my house. Police had not come to my house regarding this case. I had been employment of lanten factory from last two months at the time of occurrence. Owner of the factory of Kapil Gupta. I had not seen either of the accused visiting lanten factory. I knew accused Rajpal becuawe he had been visiting my cousin and accused Ram Bhagat was known to me as he lived nearby. It is incorrect that I did not know accused Ram Bhagat’s name before occurrence. It is incorrect that I had quarreled with both accused in the evening of 6-10-95. It is incorrect that I had gone to P.P. on 6-10-95 and lodged complaint against accused. It is incorrect that police had demanded money from both accused and when both accused refused to pay police in connivance

with me falsely implicated both the accused in this case. It is incorrect that on 7-10-95 at about 5.00 am both accused had never taken me to fields forcibly and accused Ram Bhagat never committed sodomy. It is incorrect that accused had not demanded 100/-Rs. from me. It is incorrect that I had not gone to P.P. on 7-10-95 and my statement was not recorded.”

11. In the cross-examination of PW 5 by the counsel for the co-accused Raj Pal the following suggestions were denied:

“It is incorrect that I had borrowed Rs.300/- from accused Rajpal. It is incorrect that 2-3 days before occurrence accused Rajpal had come to demand his money back and altercation followed. It is incorrect that I falsely implicated accused Rajpal because he had quarreled with me when he demanded back his money. Accused Rajpal had been visiting my cousin and that is why I know him. It is incorrect that accused Rajpal had not held me by hand and had forcibly shut my mouth. I had stated before the police that Rajpal had demanded Rs.100/- from me.”

12. It is plain from the reading of the deposition of PW 5 that neither accused was able to elicit anything which could even remotely break the credibility of the witness. The above examination of the victim took place on 13th October 1998 a full three years after the incident. The victim appears to be clear and cogent as to what happened to him on that day. A non-consenting victim of forced sexual assault in the form of sodomy is unlikely to forget that bitter experience as it is a violation to his right of privacy and deeply offends his right to dignity.

13. Faced with a formidable direct evidence of the victim, learned counsel for the Appellant understandably laid great stress on the medical evidence and in particular the surgery notes of the doctor (who was not examined by the prosecution) which show that there was no injury in the anal area. It must be remembered that it is not the case of the prosecution that there were injuries in the anal area of the victim. The question therefore of the prosecution not being able to prove such fact does not arise at all. The case of the prosecution is that the Appellant committed sodomy on the victim by use of force and with the help of the co-accused. As far as the signs of struggle, there were injuries seen on the person of the victim as well as the appellant. The relevant portion of the victim's MLC reads as under:

“Pt. brought for medical examination
Alleged H/o being committed upon sodomy (catamite)
Pt. informed that sexual act was done by Ram Bhagat
O/E Abrasions + on both arms
-L side of face + eye (lower lid)
-L knee.
C PE :WNC
No Local injury seen at anal area.”

The MLC of the Appellant reads as under:

“Pt. brought for medical examination
Alleged H/o being committed sodomy
Married male with three children
H/o nocturnal intrimesense
Pt. admits to have committed the act.
O/E

C PE :WNC

Bruise + over R upper leg outer part

Male organs well developed

Secondary sexual characters well developed

Smegma-absent.”

The MLC of the Appellant also notes that the pant worn by him was sealed and further that he informed the doctor that “he was not wearing underwear.”

14. If one were to take into account only that portion of the Appellant’s MLC which mentions the injuries on his person, the presence of a bruise over the right leg outer part is significant. This when seen with the abrasions on both the arms and left side of the face and left knee of the victim corroborates the victim’s version of some kind of resistance put up by the victim who in any event was being held captive by two able bodied men. The absence of smegma on the penis of the Appellant, examined a few hours after the incident, and the presence of Group A semen on the underwear of the victim and the pant of the Appellant (as confirmed by the FSL report) are further pieces of corroborative evidence.

15. The effect of the absence of an injury in the anal area of the victim requires to be considered next. The 22nd Edition of *Modi’s Medical Jurisprudence and Toxicology* describes sodomy thus:

“Sodomy is also called buggery and means an anal

intercourse between man and man or between man and woman. It is termed paederasty, when the passive agent is a young boy (catamite). In order that the offence of sodomy be made punishable under s. 377, IPC, it is necessary that penetration, however little, should be proved strictly.”

“A grown-up passive agent may persuade a young boy to act as an active agent to practice the vice on him, but such instances are very rare indeed. Modi had seen only one case in which a passive agent of forty-five to fifty years of age was prosecuted for having persuaded a sixteen year-old boy to having an unnatural connection with him.”

The said text also talks of the signs that can be discovered on a passive agent who is not accustomed to sodomy. These include abrasions on the skin near the anus with pain in walking and on defaecation, as well as during examination. It suggests that:

“(ii) Owing to the strong contraction of the sphincter ani, the penis rarely penetrates beyond an inch, and consequently, the laceration produced on the mucous membrane within the anus with more or less effusion of blood is usually triangular in nature, having its base at the anus and the sides extending vertically inwards into the rectum. Modi had found lacerations internal to the sphincter ani in several cases, but a typical triangular wound only in a few cases. These signs may not be present in cases where the active agent has used lubricants or/and has introduced his penis slowly and carefully without using force into the anus of the passive

agent who is a consenting party.

(iii) Blood may be found around the anus, on the perinaeum or thighs and also on the clothes.

(iv) **Semen may be found in or at the anus, on the perinaeum, or on the garments of the boy too young to have seminal emissions.** Swabs from inside and around the anus must be taken and examined microscopically.

(v) **Signs of a struggle, such as bruises, scratches etc, on his person, if he is a grown-up boy, and if he is not a consenting party.**

(vi) Finding loose foreign pubic hair on garments of a boy in whom pubic hairs have not appeared.

(vii) Lubricant round about the anus or on garments, or recovered by swabs from the rectum also constitute strong evidence of the preparation of the crime.”

16. The above portions of the text are not to be read as a statute but a guidance to the court in assessing the medical and forensic evidence. Certain portions of the text have been highlighted by this court only to show that there may be a variety of factors in determining whether sodomy was committed; some may be present in a case, some may not. The medical and forensic evidence will have to be assessed along with the other evidence on record to determine whether the victim’s version is corroborated or not.

17. As far as the present case is concerned, the examination of PW 2 Dr. Anil Garg who prepared the MLC shows that there was no cross-examination on this aspect by the defence. His examination in chief and

cross-examination read as under:

“On 7-10-95 I physically and medically examined (victim’s name *) aged 18 years brought by Const. Sanjeev to the Casualty of the Hospital with alleged history of sodomy. There were abrasions on forearm left side of the face and left eye lower lid and left knee. No local injury was seen at anal area. The patient was referred to surgery for detailed examination and underwear which patient was wearing was preserved and sealed with the seal of C.M.O. The M.L.C. prepared by me bearing my signatures is Ex.PW 2/A.

On that very day I examined Ram Bhagat s/o Samey Singh aged 34 years and Rajpal S/o Ramphal aged 43 years. The M.L.Cs prepared by me bearing my signatures are Ex.PW 2/B and PW 2/C. Ram Bhagat had an injury on right upper leg outer part male organs of both Ram Bhagat and Rajpal were fully developed and they were capable of performing sexual act. Smegma was present on the male organ of Rajpal, whereas it was missing on the male organ of Ram Bhagat. I had taken the semen sample of both Ram Bhagat and Rajpal and had seized and sealed pant of Ram Bhagat and underwear of Rajpal. The sample and clothes were duly sealed with seal of C.M.O. and all the parcels were handed over to the police.

(the victim *), while M.L.C. Ex.PW 2/A was being prepared had alleged that Ram Bhagat had committed sexual act on him. All the three M.L.Cs. bear my signatures.”

“I had examined all the three, (the victim *), Ram Bhagat and Rajpal at different times and not simultaneously. Most probably all the three patients were produced for

medical examination by Const. Sanjeev. It took about ten minutes examining (the victim *) and same is my reply about two others. The semen sample was taken in presence of constable. Constable on duty was present when semen samples were taken. Only one sealed sample was taken from one person each. I myself had sealed the pulandas. I had not filed any other form except M.L.C. The samples with seal were handed over by 3.00 pm. The absence of smegma need not necessarily being because of any sexual act, but it may be absent due to other reasons like washing, cleaning etc. It is incorrect that I have not seen the sample myself.

Xxxxxx by Sh. D.V. Goel, Adv. for accused Rajpal

Nil. Opp. Given.”

(* the victim's name is concealed to protect his privacy)

18. The submission of learned counsel for the accused is that it was for the prosecution to have had asked questions to the witnesses in regard to the absence of injuries on the anal area is unacceptable. It does not really advance the case of the Appellant. It was not the case of the prosecution that there was injury on the anal area of the victim. Therefore, there was no occasion for the prosecutor to question PW 2 on this aspect. It was the case of the defence that the absence of the injury on the anal area meant that the victim was not a catamite. But no such suggestion was made to PW 2 in this regard. The only suggestion was that the absence of smegma could be due to other reasons like washing and cleaning. However not was not the case of the Appellant that he had a bath before he was being arrested and therefore there was an absence of smegma.

19. This Court is not persuaded to hold that the medical evidence in this case is inconsistent with the evidence of the victim. The medical and forensic evidence on the other hand corroborate his version that he was an unwilling victim of a forced sexual assault.

20. In *Mirro v. Emperor* the victim, was a boy who was “quite grown up”, and when medically examined after the incident did not display any marks of injury on the anal area. In that case the Civil Surgeon qualified these remarks with an observation that “the boy was quite grown-up, and in such case there may be no marks of injury.” The learned Single Judge of the High Court explained the rider stating that it was “somehow inconsistent.” It was held that the medical evidence “does leave a gap in the story of the prosecution and it remains to be considered whether that gap has been filled up or repaired.” There were other factors too. The incident was stated to have taken place around 4.30 to 5 pm in a busy part of Agra “when people go out to market.” The learned Judge observed that “the accused is an undesirable person who has made many enemies and the case is the outcome of that enmity.” This Court is unable to be persuaded to hold that in light of the judgment in *Mirro* the absence of an injury in the anal area of the victim in the present case should be taken to have completely effaced the victim’s clear evidence. As noticed hereinbefore the testimony of the victim appears to be natural and cogent with no dent having been made in his entire cross-examination by the defence.

21. In *Abdul Salam v. State* the victim was a 11 years old boy. The doctor who examined the victim five days after the incident found that there was no injury on the anus. He opined that there should have been some mark of a healed injury. When cross-examined on this point, the doctor deposed that the injury was likely to be caused since the boy was of a tender age. Another doctor who examined the accused stated that he did not find any injury on the penis of the accused. This Court found that there was an inconsistency in the statement of the witness and the medical evidence particularly when the victim was of a tender age. The facts in the present case are different. The victim is a full bodied young adult, and there are other pieces of evidence that prove signs of struggle and the commission of the act by the Appellant. The decision in *Abdul Salam v. State* is of no assistance to the Appellant.

22. Although DWs 1 and 2 were introduced on behalf of the Appellant to speak of some previous enmity, those witnesses only spoke of an alleged quarrel that the accused are said to have had with the villagers. Their evidence also contradicted the earlier suggestion made to the victim that he had a quarrel with the accused on the previous day. In any event, the cross-examination of the victim in this behalf has yielded nothing for the defence. On the other hand, it firmly established the identity of the accused, who were both known to the victim earlier, and their presence at the time of the offence. The learned ASJ has observed that the said defence of the accused of alibi was contradicted by the documents which

clearly showed the presence of the accused in the early hours of 7th October 2005 and soon thereafter when arrested from near the primary school in the area.

23. There is no merit in the contention that since no question was put to the Appellant in his examination under Section 313 CrPC on the opinion of the second doctor who prepared the surgery notes, or regarding the extra judicial confession by the Appellant to PW 2, the entire trial stands vitiated. No prejudice can be said to have been caused to the Appellant since this is not something that the prosecution was relying upon to prove its case. Also, there is nothing therein that can be said to suggest the innocence of the appellant.

24. This court finds no infirmity in either the reasons or the conclusions arrived at by the learned ASJ in holding the Appellant guilty of the offences under Section 367 read with 34 IPC and under Section 377 IPC.

25. Turning to the question of sentence, it is seen that the commission by the Appellant of offence of abduction of the victim with a view to subjecting him to the unnatural lust of the Appellant, punishable under Section 367 IPC with imprisonment for a period which may extend to ten years, stands proved beyond reasonable doubt. The sentence of four years' RI awarded to the appellant on this count is not excessive.

26. As regards the offence under Section 377 IPC, forced sexual assault

on a non-consenting young adult is indeed of a serious nature. For the victim, it is a traumatic experience that he would have to live with for the rest of his life. It is an uninvited invasion of his privacy and right to dignity. In the trial court it was argued for the Appellant that he was a married man with three children with no other earning member in the family and with no previous conviction. In this Court it was urged that he has already undergone served five months' of incarceration. These are not factors that persuade this Court to take a lenient view of the conduct of the Appellant. Considering that the offence under Section 377 IPC is punishable with imprisonment for life or with an imprisonment of either description for a term which may extend to ten years, it cannot be said that the sentence of four years rigorous imprisonment awarded to the Appellant is excessive.

27. Accordingly there is no merit in this appeal and it is dismissed as such. The bail bond and surety bond of the accused are cancelled. The accused be taken into custody forthwith to serve out the remainder portion of his sentence.

S. MURALIDHAR, J.

FEBRUARY 24, 2009
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