

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. Appeal No. 709/2003**

% Date of Order : May 12, 2009

GURUDEV Appellant
Through : Ms. Rakhi Dubey, Advocate.

VERSUS

THE STATE (NCT OF DELHI) Respondent
Through : Mr. Pawan Sharma, APP
Ms.Richa Kapoor, APP

CORAM :-

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

PRADEEP NANDRAJOG, J. (Oral)

1. Vide impugned judgment and order dated 31.7.2003, the appellant has been convicted for the offence of raping his minor daughter who was aged ten years at the time when the offence was committed.

2. Vide order dated 2.8.2003, the appellant has been sentenced to undergo imprisonment for life for the offence of raping his minor daughter.

3. The fate of the appellant has been sealed on the basis of testimony of his daughter, the child who was raped, and his wife Gita.

4. The daughter was examined as PW-1. The wife of the appellant was examined as PW-2.

5. The testimony of the prosecutrix recorded in court on 2.5.2002 reads as under:

“On 10-8-2001, my mother had gone for her work and I was alone in the house with my younger brothers and sister. My mother generally used to leave me in the house to look after my younger brothers and sisters but my father was not having any regular employment and he used to remain home most of the time. He had committed rape upon my person during day time on 8 days and also used to tell me not to say anybody about it and also used to threaten me that if I told this fact to anybody, he would kill me. The last time he raped me was 4-5 days prior to the date I lodged the report. My report is Ex.PW1/A which bears my signature at point A. I somehow gathered strength and complained my mother and told her entire incident and she brought me to PS where my report was recorded. I was medically examined. Thereafter the accused present in court was arrested vide memos PW1/B. PW1/B bears my signature at point A. I was also produced in the court where my statement was recorded.

At this stage, a sealed envelope containing court seal of Sh. Rajinder Kumar, MM is opened, out of which statement is taken out, my statement is Ex.PW1/C which bears my signature at point A.”

6. In her testimony, the mother of the prosecutrix has

deposed as under:

“I am working as Maid-Servant in kothis of Anand Vihar. In August 2001 my daughter Laxmi aged about 10 years was studying in 2nd standard and used to return home at about 1 p.m. from school. I used to leave for job at about 12 noon and used to return home in the evening. In the month of August, my daughter Laxmi told me that my husband Gurudev has been committing rape upon her for the last two months in my absence. My daughter complained me about pain. My daughter told me that accused used to ask her that she should not complain to anybody about this fact and she told me that accused raped her about 4-5 days before the lodging of report. I brought my daughter to PS and police recorded her statement and registered the case and thereafter my daughter was medically examined in the hospital and accused was arrested. The last episode of rape had been done by the accused on my daughter Laxmi in my presence. She was also beaten. Accused was arrested vide personal search memo and arrest memo which are Ex.PW1/B and PW2/A bears my signature at point B and A respectively. Police recorded my statement and the accused admitted his guilt.”

7. The MLC Ex.PW-3/A of the prosecutrix records that she was examined on 10.8.2001. Hymen was torn. No sign of external injury or fresh rape was noted.

8. The MLC Ex.PW-6/A of the appellant opines that the appellant is capable of performing sex.

9. The learned Trial Judge has held that the MLC of the prosecutrix establishes that she has been subjected to sex. With reference to the testimony of the prosecutrix and

her mother, the learned Trial Judge has held that it stands established that the appellant had been misusing his trust as a father and had been physically abusing his daughter.

10. At the hearing of the appeal today, learned counsel for the appellant has drawn our attention to the statement of the prosecutrix recorded by a Magistrate under Section 164 Cr.P.C. With reference to the said statement, learned counsel points out that there are material variations in the testimony of the prosecutrix, as deposed to in court. It is pointed out to us that in her statement under Section 164 Cr.P.C. the prosecutrix has stated that the first rape committed by her father was at around 1.00 PM in the afternoon and at that time her brother was sleeping in the room. Her father removed her clothes and forced himself onto her. She cried. Her father threatened her to keep quiet under fear of death. In court, she has deposed at variance.

11. We note that while deposing in court the prosecutrix has not stated that when her father first raped her, her brother was sleeping in the room and that she cried. But, we note that she has stated that her mother had gone for work and she was alone in the house with her younger brothers and sisters.

12. It has to be noted that the prosecutrix was aged

ten years when her statement was recorded under Section 164 Cr.P.C. She was aged eleven years when she appeared in court.

13. Omission to state a fact not directly related with an offence and that too by a child witness can never be fatal.

14. That, while deposing in court, the prosecutrix has omitted to state certain facts does not mean that she is a tutored witness.

15. It has to be kept in mind, indeed it has been conceded by learned counsel for the appellant, that the MLC of the prosecutrix conclusively establishes that she has been subjected to repeated sexual intercourse.

16. We have not reasons to disbelieve Gita who has supported her daughter.

17. Learned counsel for the appellant points out at this stage that it is not believable, as deposed to by Gita, that the appellant raped his daughter in presence of Gita.

18. The appellant lives in a slum. As per the testimony of his wife, he is a drunkard. What rationality can one find in the actions of the appellant!

19. Instances are not unknown where lustful fathers have derobed their daughters in front of the family members. Bestiality has no limits.

20. We concur with the view taken by the learned Trial Judge that the appellant is guilty of the offence alleged.

21. Learned counsel for the appellant urges that the sentence may be reduced to ten years.

22. It is not in dispute that the prosecutrix was a minor girl aged ten years when she was raped.

23. The aggravating circumstances which have bearing on the sentence to be imposed are:

a. Abuse of position of trust by the appellant. Being a father of the prosecutrix, obviously, the appellant had the trust and confidence of his daughter.

b. Family is the smallest social unit in a society. The institution of marriage is an institution in which society has a stake. The sanctity of a social institution has been violated by the appellant.

c. The daughter has been subjected to repeated sexual assault by the appellant.

d. The age of the appellant at the time of commission of the crime is around 38 years. He is not an immature person. Being married and father, he knew the moral worth of his acts.

24. Under the circumstances, we are of the opinion that the sentence of imprisonment for life does not require to

be reduced.

25. The appeal is dismissed.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

May 12, 2009
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