

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

+ **Crl. Appeal No. 941/2005**

% *Judgment reserved on: May 12, 2009*
Judgment delivered on: May 15, 2009

ARSHAD Appellant
Through : Mr.Sumeet Verma, Advocate

VERSUS

THE STATE 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

ARUNA SURESH, J.

1. An unknown girl, aged about eight years was noticed by police official sitting near police post, Durga Puri Chowk on 7.6.2003 at about 1.40AM. Information was accordingly sent through wireless to Police Station Shahdara. This information was recorded in DD No.87B Ex.PW-1/A by H.C. Nasir Abbas (PW-1). ASI Krishan Pal (PW-4) was entrusted with the investigation of this case.

2. ASI Krishan Pal along with Const. Ajay Kumar went to Durga Puri Chowk and recorded the statement of the said girl. The said girl disclosed her name as V. (the actual name of the prosecutrix is not disclosed to maintain her dignity). In the complaint Ex.PW-4/B she disclosed that her parents had died in Bangalore when she was very young, that she along with her elder brother Murli came to Delhi and were living on platform No. 1, New Delhi Railway Station along with their grandmother (Daadi) and one lady named Roza. About 2-3 days prior to lodging of the complaint Roza made her to sit in an auto in which a boy was also sitting. Roza told that boy to drop her somewhere. The said boy took her to his house in Gali No. 5. The said boy took her inside a room on the first floor of the house where she stayed for the night. On that night the said boy seeing her alone asked her to be quite on the point of knife, removed her clothes, gagged her mouth and raped her. When he left her alone and came downstairs, she also came downstairs and ran away to the place from where she was recovered.

3. On this statement ASI Krishan Pal made his endorsement Ex.PW-4/C and sent the rukka to the police station for the registration of the case. FIR No. 205/2003 under Sections 363/376 IPC was registered at Police Station

Welcome.

4. Appellant was arrested on 8.6.2003 at 9.10 PM by ASI Rajbir Singh (PW-12).

5. ASI Krishan Pal could not contact the relatives of the prosecutrix at New Delhi Railway Station. He contacted Child Help Line Care and got the prosecutrix medically examined through lady ASI Renu (PW-3). ASI Rajbir Singh recovered the knife and seized the same vide Ex.PW-8/F. He also got bony age of the prosecutrix determined by way of ossification examination and her age was found to be between 6 to 8 years.

6. The appellant was charged for having committed offences under Sections 363/376 IPC on 28.1.2004 and he was put to trial.

7. The learned ASJ found the appellant guilty of having committed offence under Sections 363/376 IPC vide his judgment and order dated 14.10.2005 and sentenced him to undergo life imprisonment and also to pay a fine in the sum of Rs.5000/-, in default simple imprisonment for one year.

8. Aggrieved by the impugned judgment and order dated 14.10.2005 this appeal has been filed by the appellant

challenging his conviction for the above said offences and also the quantum of sentence inflicted upon him.

9. Prosecutrix is the most material witness in this case. Besides her testimony, MLC Ex.PW-3/A and CFSL report EX.PW-12/E and F and the testimony of const. A. Parashad (PW-2) translator are other material evidence for the prosecution which need due consideration and deliberation.

10. At the time of the incident prosecutrix did not know Hindi. The investigating officer ASI Krishan Pal, therefore, took the assistance of Const. A. Parashad, the translator to record her statement on 8.6.2003 at 8.00 AM. Const. A. Parashad has categorically deposed that as the prosecutrix was unable to express herself in Hindi, therefore, whatever she stated in Telegu was translated by him in Hindi. The prosecutrix as PW-5 has also deposed that her statement Ex.PW-4/B was recorded by the police after her recovery with the help of a translator.

11. However, at the time when she was examined in the court on 13.1.2005 i.e. after about two years of the date of the incident she had made her statement in Hindi as she had learnt Hindi during her stay at Children Home for Girls, Department of Social Welfare, Nirmal Chaya Complex. She

was sent to the Children Home by the court for the simple reason that her family members could not be located or traced out by the investigating officer at New Delhi Railway Station, nor he could get proper assistance from the prosecutrix about the details of her family members and their place of residence. Undisputedly she belonged to Bangalore from where she along with her brother came to Delhi after the death of her parents and started living at the Railway Station. She was an orphan girl. She remained at Children Home for Girls since 11.6.2003 i.e. after her recovery till 12.4.2009 when her custody was finally handed over to her maternal grandparents on our directions issued on 27.2.2009. During her stay at the Children Home she was given proper education and she had passed out Vth class when her custody was handed over to her maternal grandparents at Village Vankat Giri, District Chittur, Andhra Pradesh with the assistance of the local police.

12. Prosecutrix in her statement as PW-5 has deposed:-

“About one year back I was residing at Bangalore. My father Badshaw as well as mother Malika had died. I was brought by my brother Murli to Delhi. We were residing at plat-form No. 5 at New

Delhi Railway Station. My grandmother was also living with us. One Roza was also living there. Roza made me to sit in a autorickshaw around 1.00 P.M. alongwith a boy i.e. accused present in court. (The witness has pointed out towards the accused) I do not remember his name now. He took me to his house. The gate of his house was of green colour. The accused sent his wife out of the room, inserted cloth in my mouth, gagged it and committed rape with me. The accused had also pointed out a knife to me. I felt pain at my private part and I was left alone in the house. Thereafter I came outside after jumping the small wall of the house. The police met me and my statement was later on recorded after getting the help of a translator. My statement Ex.PW-4/B bears my thumb impression at point 'A'. Now I have learnt Hindi and I am making my statement in Hindi language today. (At this stage a packet sealed with the seal of CFSL Calcutta is opned). One Salwar Ex.P-1 which was seized by the police vide memo Ex.PW-3/B is the same which I was wearing at the time of rape. I pointed out the place of rape to the police. Now I do not know the name of the accused."

13. From her testimony it is clear that she was a young girl on the date of the incident when she was raped by the appellant. Being a young girl, she has described the instance of rape in the manner in which she could possibly explain it without mincing any words. She identified the appellant as the boy who had raped her. She also identified her Salwar

Ex.P-1 which was found to have semen stains on serological examination by CFSL, Calcutta in its report Ex.PW12/E and F.

14. Learned counsel for the appellant has argued that an adverse inference is liable to be drawn against the prosecution under Section 114 of the Evidence Act for withholding the evidence of neighbours, Roza, Murli and grandmother of the prosecutrix and also the statement of the prosecutrix recorded under Section 164 Cr.P.C. (as per the testimony of investigating officer.)

15. Non examination of Roza and Murli as well as the grandmother of the prosecutrix stands fully explained on the record. Roza who was living with the prosecutrix, her brother and grandmother at the Railway Station could not be traced out. Similarly, Murli, the brother of the prosecutrix and her grandmother could not be located by the investigating officer despite search at the Railway Station. Even otherwise examination of these three persons by the prosecution would not have yielded any fruitful results as they are not the witnesses to the incident. No inference, therefore, under Section 114 of the Evidence Act can be drawn against the prosecution for withholding the evidence of Roza, Murli and grandmother as well as the neighbour who probably was

narrated the incident by the prosecutrix.

16. ASI Rajbir Singh in cross-examination though stated that he got the statement of the prosecutrix recorded under Section 164 Cr.P.C. subsequently deposed that he did not get the statement recorded under Section 164 Cr.P.C. Under the circumstances when the prosecutrix did not know Hindi and could not converse in Hindi, the possibility of her statement being recorded by the Magistrate under Section 164 Cr.P.C. is minimized. The Investigating Officer stating wrongly that he got her statement recorded under Section 164 Cr.P.C., may be for failure of memory due to lapse of time or under misconception of fact. Since no such statement was recorded, it cannot be said that prosecution has withheld the statement of the prosecutrix recorded under Section 164 Cr.P.C. as there existed none.

17. It is further submitted that from careful scrutiny of the testimony of the prosecutrix it is obvious that entire incident had taken place in the house of the appellant, he had sent his wife outside the room and thereafter he raped the prosecutrix, the prosecutrix came out of the house after having been raped and jumped the small wall of the house in a single day which is at material variance with the

prosecution case. He submitted that in her cross-examination the prosecutrix contradicted herself when she said that she did not tell the name of the accused to the police and the wife of the accused alone was present in the house. She did not remember about the Galat Kaam and she did not know what the accused did to her. According to him, the discrepancies as highlighted by him are inherent contradictions and without any corroboration her testimony cannot be relied upon as it seems to have been made under threat of investigating officer.

18. We do not find the contradictions as highlighted by the learned counsel for the appellant as inherent contradictions or material discrepancies causing dent to the prosecution case. The prosecutrix was examined in the court after about two years of the incident. She was a young child of about eight years of age at the time of the incident. With the lapse of time her memory was bound to fade a little. Therefore, the variations in the examination and cross-examination of the prosecutrix are natural.

19. The prosecutrix has fully supported the prosecution case in material particulars.

20. Learned counsel for the appellant has brought to

our notice certain overwriting of the word 'torn' in place of 'hymen intact' and the fabrication of signatures of Dr. Sonal which according to him are clearly visible. Therefore, according to him the MLC has been fabricated on behest of the investigating officer.

21. Dr. Sonal is the signatory of the MLC of the prosecutrix. She could not be examined by the prosecution as she had left the hospital. However, this MLC has been proved in evidence by Dr. Richa Aggarwal (PW-13) who identified the handwriting and signatures of Dr. Sonal on the MLC.

22. Dr. Richa Aggarwal in her cross-examination admitted that there is overwriting and it is initialed. She identified the signatures/initials of Dr. Sonal on the overwriting at point 'B' in the MLC. This overwriting pertains to the word 'torn' which was written on the word 'intact'. To clarify the correction/overwriting made, the word 'torn' is also mentioned above the overwriting in brackets.

23. Perusal of the MLC Ex.PW-3/A suggests that the scribe of the document had been making various corrections at various places including the name of the prosecutrix, her religion, her entry regarding status and the name of the

doctor appearing as MO/SR suggesting that the scribe of the document, prepared at 2.45 AM, was not careful in making the entries properly. The opinion of the doctor that hymen 'torn' initialed by Dr. Sonal after overwriting cannot be ignored or side away with simply because, initially the word 'intact' was written and thereafter there was an overwriting on this word when word 'torn' was written. The overwriting is in the hand of the same person with the same pen and ink who has prepared the MLC. We find no reason to disbelieve the opinion of the doctor under these circumstances.

24. It is not essential that in a forceful sexual intercourse there has to be an injury and bleeding per-vagina and also that hymen must also have a tear. Similarly, perennial tear sometimes may not occur in rape cases. In small children the hymen is not usually ruptured. Dr. Sonal did find vagina moist and erythematous. In other words the doctor found the redness of skin of the vagina which could be as a result of injury or irritation.

25. On examination the doctor found nail marks on the neck of the prosecutrix. Such marks are possible when the victim offers resistance when she is sexually assaulted. Doctor's opinion as per the MLC clearly indicates that the

prosecutrix was ravished on the intervening night of 7-8/6/2003 by the appellant.

26. Learned counsel for the appellant has tried to develop a theory that it was the taxi driver who had raped the prosecutrix as is indicative from the MLC itself but, the investigating officer ASI Rajbir Sing who had earlier arrested one Yasin, the taxi driver, released him on acceptance of Rs.5000/-. Since the appellant failed to meet the demand of ASI Rajbir Singh, he was falsely implicated.

27. However, these submissions do not lead us anywhere. There is no evidence on record to indicate that ASI Rajbir Singh had earlier arrested Yasin, the taxi driver and released him on receipt of Rs.5000/- or that he had demanded Rs.50,000/- from appellant's mother for his release. Once the core of the prosecution case is proved, these small probabilities are of no consequence.

28. In a rape case conviction of the offender can be based on the sole testimony of the rape victim may be a child provided it inspires confidence of the court. In a rape case the testimony of the victim is vital and seeking corroboration of her statement relying upon the same as a rule would amount to adding insult to injury unless the court finds

compelling reasons requiring corroboration of her statement.

29. In this case the testimony of the prosecutrix inspires full confidence in the court. Her testimony read with the opinion of the doctor in the MLC and the serological report Ex.PW-12/E and F of the CFSL, which indicate presence of human semen on the Salwar of the prosecutrix clearly bring home the guilt of the appellant that he raped a young girl of eight years of age who was an orphan and was living on the platform.

30. This is not a case where the prosecutrix or any of her family members had gone to the police station to lodge a complaint against the appellant. It was the police officer who had found her sitting near police post, Durgapuri Chowk at the dead of the night. She was rescued by the police officers and was got medically examined.

31. It is pertinent that her statement was recorded by the investigating officer ASI Krishan Pal only after her medical examination when it revealed that she had been ravished by someone. It was the prosecutrix who in her statement had given the detail description of the house, its surroundings and the gali number. Not only this, she led the police to the house of the appellant and identified him. It was on her

identification that the appellant was arrested. She also identified the appellant in the court.

32. The trial court, therefore, rightly held that it was the appellant who had raped the prosecutrix after providing her shelter in his own house unconcerned with the feelings of his wife.

33. For the reasons discussed above, we find no merits in this appeal and the same is accordingly dismissed.

ARUNA SURESH, J.

PRADEEP NANDRAJOG, J.

May 15, 2009
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