

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

+ **Crl. Appeal No. 772/2006**

% **Date of Order : February, 12, 2009**

SHYAM NARAIN Appellant
Through : Ms. Charu Verma, Advocate.

VERSUS

STATE Respondent
Through : Mr. Pawan Sharma, 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?
- (3) Whether the judgment should be reported in the Digest ?

PRADEEP NANDRAJOG, J.(Oral)

1. Noting that Ms. Charu Verma learned counsel for the appellant has been appointed as an Amicus Curiae by the court and her fee has not been fixed, we fix the fee of learned Amicus Curiae at Rs.5,000/-.
2. Vide impugned judgment and order dated 21.10.2005, written very emotionally, learned trial judge has convicted the appellant for the offence punishable under Section

376 (II) (f) IPC.

3. Vide order of sentence of even date, the appellant has been awarded the punishment of imprisonment for life and to pay fine of Rs.5,000/- failing which to undergo RI for six months.

4. Briefly stated the relevant facts are that Baby 'M' aged 8 years, daughter of Binda Saha was taken by the appellant to Lal Bahadur Shastri hospital at around 6.30 P.M. on 29.10.2003 where the young child was referred to GTB hospital, Shahdara. She was admitted at the said hospital at 1.30 A.M. on 30.10.2003 i.e. during the intervening night of 29.10.2003 and 30.10.2003. The young child told the doctors, as recorded in the MLC Ex.PW-10/D, that she had suffered a fall in the toilet at 2.00 P.M. on 29.10.2003 and that the injuries on her person was a result of the said fall.

5. However, Dr.Anjay Yadav who examined the young child was not convinced with what the child was telling him. The reason is obvious. It is to be found in the MLC, where the condition of the young child was recorded. The same is as under:-

“O/E – Apprehensive look, G.C. fair, pallor mild, P-96/m, BP 110/80, heart NAD. No bruises seen on body. Breasts and secondary sexual characters not

developed. P/A Soft, liver spleen not palpable. No shifting dullness, no area of tenderness. L/E – On separation of labia, a tear of 1.5 approx. to 2 cm. seen from posterior fourchette towards anus just 1 cm. short of anal opening and same tear extending upto hymen. Clot was seen in her vagina, anal opening was intact, no area of bruise seen on perineum. Bleeding per vagina was present. Decision for examination under anesthesia and repair of vaginal perineal tear taken. Patient was admitted in septic labour room and shifted to gynae emergency operation theatre. On examination under anaesthesia, showed same findings as above but in addition a tear of 3 cm approximately was seen in left vaginal wall from hymen into the vagina. Bleeding was positive. Apex of tear seen, tear stitched in layers, cervix seen healthy, no bleeding through OS. In view of EUA, findings under anesthesia high index of suspicion of sexual assault was made although the child and her uncle were denying of any such episode.”

6. But, even to a layman, hence much more to a doctor, it is stark naked, that the child was compelled to wrongly state that she had suffered the injuries due to a fall in the toilet. The injuries speak for themselves. The child was obviously brutalized and raped in a most beastly manner.

7. The child insisted that the injuries were due to fall. The appellant who took Baby ‘M’ to the hospital also stood by said fact.

8. The Duty Constable at the hospital, a man of prudence, dutifully informed the local Police Station i.e. P.S. Kalyanpuri, informing that Baby ‘M’ was admitted at the hospital

and her condition was as recorded in the MLC. The said information was recorded at the Police Station at 2:40 P.M. vide DD entry No.18-A, Ex.PW-10/B on 30.10.2003.

9. The child remained at the hospital for six days and was discharged. So traumatized was the young child that she continued to stand by her version of having suffered the injuries consequent upon falling inside the toilet of her house.

10. Obviously, the story could not have been digested by a person of ordinary prudence. How could her parents digest the said story?

11. It is obvious, the concerned mother of the young girl kept on questioning the girl and probably coaxed her to tell truth. As time passed by, the mother of the child was able to gain the confidence of the young traumatized child, who broke down before her mother on 10.11.2003 and told her that the appellant had raped her and had threatened her that if she disclosed the said fact to any person, her life and the life of her family members would be in danger.

12. The father of the young girl forth-with proceeded to the Police Station and informed the police what was told by his daughter. His statement, Ex.PW-3/A, was recorded and based thereon, the FIR in question was registered.

13. In the statement Ex.PW-3/A, Binda Saha told the police that his daughter had informed her mother that she had wrongly been stating that she had suffered the injuries as a result of a fall in the toilet. She told her mother that the appellant had raped her.

14. The appellant was apprehended and sent for trial; charged with the offence of raping Baby 'M' aged 8 years (a minor).

15. It may be noted at this stage that the appellant is a tenant in the same building in which the family of Baby 'M' resides.

16. It is but apparent that the fate of the appellant depended upon the deposition of Baby 'M' in court.

17. She was examined on 13.10.2004 as PW-1.

18. Her deposition reveals that the court questioned her to ascertain, whether she was aware of the sanctity of the court. After questioning Baby 'M' and recording a satisfaction that Baby 'M', aged about 10 years when she appeared in court, understood the questions put to her the court examined her.

19. She deposed that her maternal uncle used to reside in Gulabi Bagh and that she was brooming her house and nobody was present, as her parents had gone to the house of

her maternal uncle and her siblings had gone to the school; her parents had told her to look-after the house. She deposed that at around 1.00 in the after-noon, Shyam Narain the accused present in court came to her house and started a vulgar talk. He gave her some intoxicated drink and took her to a room. She fell unconscious and the accused raped her and she told him that she would narrate this fact to her parents, at which the accused threatened, that if she disclosed this fact to her family members he would inflict knife blows upon her and her family members. She deposed that the accused told her that she should tell her parents that she received the injuries when she slipped in the toilet. Thereafter, the accused took her to the hospital. She was bleeding from her private parts. The accused first took her to LBS hospital where he was told to take her to a big hospital, upon which the accused took her to a hospital adjacent to her house. That initially she told her parents that she had sustained injuries as a result of a fall in the toilet because she was scared and hence she gave wrong facts.

20. She was cross-examined. In cross examination she stated that the police met her in her house and in the hospital and that the police did not make any document in her presence.

She admitted that whenever police came to her house, they met

her family members and that she had a talk with the police at the Police Station. She said that she went to the hospital only once. That in the hospital, she was sleeping and the police did not meet her. She stated that there are six rooms in the house and tenants reside there. There is no boundary wall between their tenements and hers. That people reside in the neighbourhood and that the neighbours had gone for duty at the time of the occurrence. That initially there were three doctors and that she did not disclose the facts to the doctors, who got angry and threatened her. That they asked her to tell the true facts. That they told her not to say that she had fallen in the bathroom. That her father met her at the hospital and he was accompanied by her mother. That she told her parents that she had fallen in the bathroom, but did not remember the date of the occurrence. She admitted that one aunty had talked to her, but could not disclose her name. She informed that the aunty had met her near the Police Station. She stated that: *"My parents had told me to speak about these facts which I have stated today. They were also telling me to depose like this in the house as well. My neighbour had also asked me to make such statement before the police. I am deposing these facts at their instance"*.

21. The court put a question to her *"Whether the accused raped you or not?"*

22. She answered, *"I was raped by the accused"*.

23. Indeed, there is no other evidence worth noticing, except to complete the record, the fact, that after Baby 'M' told the reason of her injuries and the FIR was registered, she was again examined at GTB hospital on 10.11.2003 and as per MLC Ex.PW-4/A, rape of the young girl was confirmed.

24. In his statement under Section 313 Cr.P.C. the appellant denied each and every question put to him and stated that he was innocent and had not committed the crime. He stated that he had been falsely implicated and had taken the girl to the hospital to save her life. He stated that he was not aware that Baby 'M'; had been raped and that he took her to the hospital when he came to know that she had been raped. The doctor inquired from her who raped her, but she did not make any statement and insisted that he had brought her to the hospital. That he informed the doctor that he was a neighbour of Baby 'M' and that the complaint against him was false. He stated that parents of Baby 'M' had threatened to implicate him unless he confessed his guilt.

25. It may be noted at the outset that the appellant did

not disclose in his statement as to what attracted him to go to the house of Baby 'M'. He did not disclose as to under what circumstances he chanced to see Baby 'M'.

26. The learned trial Judge has noted that the MLC Ex.PW-10/D evidenced that Baby 'M' was raped, a fact reaffirmed in the second MLC Ex.PW-4/A.

27. Noting that the clothes which Baby 'M' was wearing and were removed by the doctors at the hospital when Baby 'M' was examined at GTB hospital on 30.10.2003, were reported not to be having any semen stains as per FSL report Ex.PW-10/F, the learned trial Judge has opined, and in our opinion correctly, that absence of semen stains was an irrelevant factor when the tell tale physical condition of Baby 'M' showed penetration of her vagina. So forceful was the penetration that the tear had reached the anus.

28. Indeed, at the hearing of the appeal today, Ms. Charu Verma, learned counsel for the appellant does not dispute the fact that the MLC of the young girl conclusively establishes that Baby 'M' was raped.

29. Reverting back to the decision of the learned trial Judge, it has been held that while appreciating the conduct of a young victim, her mental condition and the traumatized mind

has to be kept in view while appreciating the deposition of the victim.

30. The learned trial Judge has held that there was no reason to disbelieve Baby 'M' that she did not tell the true facts at the first instance as she was under a threat given by the appellant that if she told the truth, not only she, but other family members would be harmed by him.

31. The learned trial Judge has held that there was nothing to disbelieve Baby 'M' with reference to her cross examination.

32. At the hearing of the appeal today, learned counsel for the appellant urges that Baby 'M' cannot be believed for the reasons:-

- (a) Firstly she did not remember the date of the incident.
- (b) She has used the expression:- '*the accused raped me*'; counsel urges that for a child aged about 10 years, it is not believable that Baby 'M' would have used the expression that she was raped. Counsel urges that experience shows that girl of tender age referred to a sexual act as "ganda kaam".
- (c) In her cross examination Baby 'M' admitted that the doctors threatened her and told her not to say that she had fallen down in the bathroom. Further, she admitted that her

parents had told her to speak about these facts which she was deposing in court and that they also told her to depose like that in the house as well. She further admitted that even her neighbours had told her to make such statement before the Police Station.

Thus, counsel urges that Baby 'M' has herself admitted that what she deposed in court was at the behest of her parents, and as told by them and additionally at the behest of the neighbours, and as told by them.

33. The second submission made by learned counsel for the appellant is that if the appellant was the perpetrator of the crime he would not have been taken Baby 'M' from hospital to hospital and ensure that she get treatment. Counsel urges that conduct of a rapist is to abandon the victim and run away.

34. Learned counsel next urges that in her deposition, Baby 'M' has categorically stated that the appellant made her drink some intoxicating drink and thereupon she became unconscious. Counsel wonders as to how Baby 'M' who was unconscious could state that it was the appellant who had raped her. Counsel urges that if Baby 'M' was unconscious how could she see the appellant rape her.

35. Lastly, counsel urges that the mother of Baby 'M' i.e.

Laxmi PW-2, has turned hostile.

36. Taking the last submission first, we note that Smt. Laxmi PW-2, has fully supported the case of the prosecution, inasmuch as she deposed that initially her daughter insisted that she had received the injuries as a result of fall, but as time passed by, she told the truth to her after a few days of the incident and told her that the appellant had gagged her mouth, took her underwear and raped her. That she further informed her mother that the accused had kept a knife on her neck and she was threatened not to tell said fact to anybody.

37. For a trivial reason i.e. the witnesses wrongly stating the date to be 30.10.2003, but the actual incident being of 29.10.2003, rather than seek permission of the court and put a clarificatory question as to what was the date when the incident took place, the learned Public Prosecutor got the witness declared hostile so that he could cross examine her. The only question which he put to the witness was, whether it was correct that the incident took place on 29.10.2003. The witness immediately corrected herself by saying that it was correct that the incident took place on 29.10.2003 when she and her husband had gone to the house of her brother and the other children had gone to the school.

38. Indeed, PW-2 has not turned hostile. Indeed, PW-2 has supported the case of the prosecution.

39. Dealing with the other submissions in the same chronological order, it is true that Baby 'M' has used the expression that she was raped; an expression which a young girl aged 10 years who comes from a humble background would presumably not use. But, that means nothing, in the facts of this case.

40. Firstly, depositions are recorded in English after the statement made in vernacular by witnesses are translated by the court. It is thus possible, that while recording the testimony of Baby 'M', as a result of translation of what she deposed, the expression rape was used. The second reason could be that the child herself used the expression having learnt about the same at the hospital. There is evidence to justify said inference. As noted above, Baby 'M' was insisting in the hospital that she had sustained the injuries when she fell in the toilet. There is evidence that the doctors were not believing her. There is evidence that everybody around was not believing her. It is apparent that the doctors around her were speaking that Baby 'M' should be coaxed to speak the truth as it was obvious that she had been raped. Baby 'M' would have heard that

expression N number of times in the hospital. Thus she became familiar with the word 'rape' and as to its meaning and hence used the same.

41. That Baby 'M' has stated during cross examination that she was forced by the doctors to tell the true facts and that the doctors were angry at her and told her not to keep on saying that she had fallen, shows the truthfulness of the contemporaneous facts. Far from discrediting Baby 'M', the same corroborates her version that she was under a threat when she was brought to the hospital by the appellant.

42. Obviously, in view of her physical condition, the doctors and everybody around, would be coaxing the young girl to come out with the truth. When she kept on saying that she had suffered the injuries when she fell down, the doctors certainly would have told her that they do not believe what she was saying. May be, in frustration, a doctor may have raised his voice hoping that her fear may be broken by counter fear. This certainly would not be a threat. It would be an attempt of a socially conscious doctor trying to reach out to the truth.

43. When the young girl admitted in the cross examination that her parents told her to speak about the facts which she stated in court and that they told her to depose in the

manner as she has deposed, as also that the neighbours also did so is explainable. From the facts noted above, it is apparent that it took ten days for Baby 'M' to come out of the trauma and the fear, and speak the truth. She was raped on 29.10.2003. Till 10.11.2003 i.e. for over eleven days, she maintained that the injuries were a result of her falling in the toilet. Her fear was over come and her confidence was restored on the 12th day. This child would certainly be having the trauma and the fear etched somewhere in her memory and therefore her parents encouraged her to speak the truth.

44. What further truthfulness of the statement of Baby 'M' can be available, other than that she truthfully told the court that indeed her parents had coaxed her to say what she spoke? Indeed, she did not try to fabricate a lie that her parents never coaxed her.

45. We must understand the difference between tutoring a person and coaxing a person to speak the truth. More so, when it is a case of a child rape victim and the victim has been threatened by the accused.

46. We are satisfied that Baby 'M' has truthfully spoken the facts in court.

47. The second submission is that if Baby 'M', as deposed

by her, was given an intoxicating drink before she was raped and became unconscious thereafter, how could she say that the accused had raped her?

48. A few days back we had an occasion to deal with one such similar argument, but in a different context.

49. A child witness in the said case had deposed against his father to the effect that his father picked up a quarrel with his mother outside the room, pushed her inside the room and closed the door. He further deposed that his father lit the matchstick and set his mother on fire, who screamed and rushed to the door, unlocked the same and ran towards the bathroom to douse the flame.

50. It was urged in said case, as to how a young child could see, behind the close door of a room that his father had lit a matchstick and set his mother on fire.

51. We had opined that a human mind is very creative. It perceives events which are bound to happen with reference to a preceding and succeeding event.

52. In the said case we had opined that a child, who sees his father pick up a quarrel with his mother and further sees his father take the mother inside the room and lock the room, obviously does not see what was happening inside. A second

later, he sees his mother on fire and rushing out; the mind would immediately connect the event which in turn connects the preceding and succeeding event i.e. the event that the mother was set on fire.

53. We had opined, that the child was speaking the truth, as a human mind perceives a fact, which had to take place and without which, the preceding and succeeding fact which he saw, are disconnected.

54. The same thing has happened in the instant case.

55. The child remembered that the appellant had entered her room and made vulgar talk with her and made her drink something which intoxicated her. Of course, when she became unconscious she would not know what happened. But when she regained conscious, she saw her condition. The appellant was there. She connected her physical condition when she was conscious with her physical condition when she regained consciousness and immediately perceived as to what had happened during the period she was unconscious.

56. This does not mean that she is lying.

57. It is also not out of place to note that Baby 'M' has deposed that when she regained consciousness, the appellant threatened her not to disclose the true facts and told her that if

she did, not only she but even other family members would face his rage. Thus, when the appellant said that to her, her human mind told her that it was the appellant who was the culprit for why else would he threaten her not to speak the truth.

58. The third submission pertaining to the conduct of the appellant is explainable consistent with his guilt.

59. Yes, it is true, that ordinarily and normally, a rapist would flee from the scene of crime, as indeed, any other criminal, who achieves the purpose of his intention would do.

60. But, in the instant case, the MLC Ex.PW-10/D shows the physical and mental condition in which Baby 'M' was, soon after the rape. If left by herself, the young girl may have bled to death. It is also possible that the appellant did not want her to be left by herself, to be saved by somebody else, for he had a fear that if he was away from Baby 'M', there was a possibility that Baby 'M' would speak the truth. His presence in the sight of Baby 'M', would be a continuous threat to Baby 'M' and under fear of the appellant, she would not speak the truth.

61. A criminal mind acts differently than what a normal and prudent mind would do. Rules of prudence sometimes fail while dealing with a scheming mind.

62. While referring to the examination of the appellant

under Section 313 Cr.P.C., we had noted that the appellant did not state as to what led him to the house of the victim or under what circumstances he chanced to meet Baby 'M'.

63. In our opinion the non explanation by the appellant as to how he saw Baby 'M' or under what circumstances he chanced to see her, are crucial.

64. It shows that indeed, the appellant did not chance upon, to see Baby 'M'. Had he said so, he would be required to explain the circumstances under which, he chanced to see Baby 'M'. The appellant did not want to take the risk of explaining the said circumstance and hence remained quiet.

65. How the appellant met Baby 'M', and under what circumstances, is a fact solely in his knowledge. The prosecution has no means to ascertain the said knowledge or give proof thereof.

66. An adverse inference is required to be drawn against the appellant for not disclosing the said fact which was within his personal knowledge.

67. It shows that the appellant did not meet Baby 'M' when she was in an injured condition. He was present with Baby 'M' when she was fine. He was present with Baby 'M' even when she suffered injuries and he remained present even

afterwards.

68. Before concluding, we may note that the MLC Ex.PW-10/B, contents whereof have been reproduced by us in para 5 above, conclusively establish that Baby 'M' was raped.

69. Indeed, learned counsel for the appellant did not dispute that Ex.PW-10/B needs no further corroborative evidence.

70. We note that learned counsel for the appellant had argued that the appellant could not be the rapist.

71. To complete the narration of a fact without which the decision would be incomplete, we note, that after he was apprehended, the appellant was examined at LBS hospital on 11.11.2003 by Dr. Ravish Gupta and as per MLC Ex.PW-5/A, it was recorded, *"From the foregoing examination, I find nothing to suggest that the said accused is incapable of performing sexual act."*

72. We find no infirmity in the impugned judgment and order which has held, that the appellant had raped Baby 'M' and hence had committed an act which is punishable under Section 376 (II) (f) IPC.

73. On the sentence, it would suffice to note that not only is it a case of rape of a minor girl aged 8 years, but also, the

commission of the offence is pervaded with brutality. The trauma which the young child would face all her life warrants a sentence of imprisonment for life and the fine as imposed by the learned trial judge.

74. The appeal is dismissed.

(PRADEEP NANDRAJOG)
JUDGE

February 12, 2009
vk

(ARUNA SURESH)
JUDGE