

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Crl.A.No. 809/2006

% Reserved on : 17th November, 2009

Date of Decision: 2nd December, 2009

RAJESH KUMAR TIWARI Appellant

! Through: Ms. Charu Verma, Adv.
Versus

THE STATE Respondent

Through: Addl. PP for the State.

* **CORAM:**

HON'BLE MR. JUSTICE V.K. JAIN

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| 1. | Whether the 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 the Digest? | Yes |

: V.K. JAIN, J.

1. This is an appeal against the judgment dated 27th July, 2006 and order on sentence dated 28th July, 2006, whereby the appellant was convicted under Section 376 of IPC and was sentenced to undergo R.I. for 7 years and to pay a fine of Rs.2,000/- or to undergo S.I. for two months, in default.

2. The case of the prosecution, as disclosed in the FIR lodged by the prosecution, is that on 2nd April, 2004 at about 10.30 PM, when the prosecutrix and her younger sister

were coming from a hotel after taking food, the appellant, who used to sell cassettes near Hanuman temple, Connaught Place, slapped the sister of the prosecutrix as well as the prosecutrix and took her to a park behind the temple. After removing his pant and underwear and salwar of the prosecutrix, he committed rape with her. When the prosecutrix raised alarm on account of pain, one Rajesh Kumar from Prayas, an NGO having an office there, reached there and the appellant, who was trying to run away from the spot, was apprehended.

3. The prosecutrix came in the witness box as PW-8 and stated that she along with her younger sister used to indulge in begging and live on the footpath of Hanuman Mandir, Connaught Place, since her parents died about three years prior to this incident, and her grandmother brought her to Hanuman Mandir and left after dropping them there. This witness was cross-examined by the learned Addl. PP and during cross-examination, she initially denied that when she along with her sister was coming from the hotel at about 10.30 PM, the appellant slapped her sister and took her to the park behind temple, but later she admitted that the appellant had slapped her as well as her

younger sister and had taken her to the park behind the temple and in the park, he had committed sexual intercourse with her after removing her salwar as well as his pant and underwear. She also admitted that as she felt pain on account of the bad act done by the appellant with her, she raised alarm and the appellant was apprehended by Rajesh Kumar and others, who reached there on account of the alarm raised by her. She also admitted that she as well as the appellant were taken to the Police Station and she, thereafter, was taken to the hospital and was medically examined. She also admitted that her statement was recorded before Metropolitan Magistrate. She further admitted that being afraid of the appellant, she did not identify him, but later on identified him before the Court. During cross-examination by the learned defence counsel, she stated that the appellant had taken her to the park behind the temple. She denied the suggestion that no bad act was done with her. Thereafter, this witness was again cross-examined by the learned Addl. PP and she stated that on the day of this incident, the appellant was apprehended on the spot by Rajesh Kumar of Prayas. She specifically admitted that the appellant was seen by her earlier also and

he had done bad act with her. During cross-examination by the learned defence counsel, she denied the suggestion that by bad act means relationship of brother and brother. She also denied the suggestion that the appellant had not done any bad act with her and that she had implicated him in a false case. She, however, admitted that her statement recorded by the police had been read over to him.

4. PW-7 Rajesh Kumar has stated that on 3rd April, 2004, he was Incharge of Prayas Shelter Project at Hanuman Manir, Connaught Place. He further stated that on that day at about 10.30 PM when he was inside the Project Office, he heard the shriek of a girl and he immediately reached the spot after jumping boundary wall and saw that the appellant Rajesh had kept one child over her lap. He saw the appellant wearing his pant at that time and also noticed that undergarment of the girl was down from her body. On seeing him the appellant started running away, but, he blocked his way and informed the police, who came to the spot and took the appellant as well as the prosecutrix to the Police Station. During cross-examination, he denied the suggestion that the place of incident is not visible from the

wall and stated that there was only one bush/small tree at the spot.

5. PW-3 Smt. Superna Sethi has stated that on receipt of a call from Rajesh Kumar, a social worker of Prayas Institute, she went to Police Station, Connaught Place. The child was present there. On enquiry by her, the child told her that she was raped by Rajesh Tiwari and he also pointed out towards accused Rajesh Tiwari, who was present in the Police Station at that time. In cross-examination, she stated that she had talked to the prosecutrix for about 15-20 minutes and she had also told her that the appellant had given two slaps on her face and taken her to the park where he raped her.

6. PW-1 Dr. Meeta Chauhan examined the prosecutrix on 3rd April, 2004 vide MLC Ex.PW1/A, and opined that sexual intercourse could not be ruled out. After examination of the prosecutrix, she handed over her salwar as well as vaginal and cervical swab and smear to the IO. In cross-examination, she stated that she had given opinion on the basis of the fact that the prosecutrix was an unmarried girl and her hymen was torn. She explained that use of the word 'raw' meant that there was fresh tear. She also

explained that in case of a specific injury, the hymen can be torn, but the vagina cannot be dilated. PW-2 Dr. V.K. Srivastava examined X-Ray report of the prosecutrix and opined that her age was between 12-14 years on the date of examination by him. During cross-examination, he stated that there was a difference of 2-3 months on either side, in the age given by him. He explained that he had already considered the margin, while determining the age.

7. PW-6 Sh. Narender Kumar, Metropolitan Magistrate has stated that he had recorded the statement of the prosecutrix Ex. PW6/B on 6th April, 2004. PW-15 SI is the IO, who went to the spot on 2nd April, 2004 at about 10.45 PM, where Rajesh Kumar had caught hold of the appellant and the prosecutrix was also standing there. He recorded the statement of the prosecutrix and arrested the appellant.

8. In his statement under Section 313 Cr.P.C. the appellant denied the allegations against him. He has, however, admitted that his pant was taken by the IO in the hospital. According to him the police implicated him in this case as there was a quarrel between him and Rajesh about 13 days before this incident.

9. It is true that the prosecutrix has been rather shaky during her examination in the Court, but, a careful analysis of her statement leave no reasonable doubt that the appellant had taken her to a park behind Hanuman Mandir and had committed rape with her. It appears that the prosecutrix was under some kind of a pressure from the appellant on the day she was examined in the Court. This is borne out from her admission during cross-examination by the learned Addl. PP to the effect that initially she did not identify the appellant as he was scared of him and later on she identified him before the Court. The testimony of a witness particularly of a minor girl coming from poorest strata of the society, having very little education and sustaining herself by begging, cannot be discarded merely on account of her not being consistent throughout her examination. The duty of the Court is to carefully analyze the evidence of such a witness, albeit with caution, and look for corroboration, of her testimony. The Court would not be justified in discarding her testimony as a whole merely because she was not firm throughout her examination. The duty of the Court is to ascertain – where does the truth lie. An overall analysis of the statement of the prosecutrix does

show that she was raped and it was none other than the appellant who committed rape with her.

10. There is ample corroborative evidence on record, which leave no reasonable doubt that the appellant had actually committed rape on the person of the prosecutrix. The testimony of PW-7 Rajesh Kumar, which I see no reason to disbelieve, his presence in the Project Office of Prayas of Hanuman Mandir, Connaught Place having been confirmed by PW-3 Smt. Suparna Sethi, shows that when he reached the park, he found the prosecutrix on the lap of the appellant. At that time the undergarments of the prosecutrix were down from her body. There is no explanation from the appellant as to why the prosecutrix was on his lap and why her undergarments were down, when she was seen by PW-7. The testimony of Rajesh Kumar shows that he had reached the spot on hearing the shriek of the prosecutrix. There is no explanation from the appellant as to why he had gone to the park, why the prosecutrix was found in the park with him and why she had shrieked while in the park. The testimony of the prosecutrix shows that she had shrieked on account of the rape committed with her. The appellant tried to run away on

seeing PW-7, but was not allowed to do so. The conduct of the appellant in trying to run away, is yet another corroborative circumstance appearing in evidence against him.

11. A perusal of the report of FSL shows that blood was found on the salwar of the prosecutrix and human semen was found on the salwar and shirt of the prosecutrix, as well as on her underwear and on the pant of the appellant. The prosecutrix as well as appellant were taken to Police Station and then to hospital directly from the spot. There is no explanation from the appellant as to why semen was present on his pant, which admittedly he had handed over to the police in the hospital. It is true that the appellant being young boy, there could be many reasons for semen being found on his pant, but then he has to tell the Court under what circumstances semen was found on the pant, which he was wearing at the time when incident took place.

12. The presence of blood on the salwar of the prosecutrix, coupled with presence of semen on her salwar and shirt and underwear as well as on the pant of the appellant, when examined in the light of the deposition of PW-7 Rajesh Kumar, leaves no reasonable doubt that the appellant had

committed rape on the person of the prosecutrix and that is why the blood was found on the salwar of the prosecutrix and semen was found on her clothes as well as pant of the appellant. The presence of semen and blood has to be viewed in the light of the fact that the prosecutrix was found on the lap of the appellant, in a park behind the temple at about 10.30 PM and at that time the underwear of the prosecutrix was down from her body, whereas the appellant was wearing his pant. In fact, even if the deposition of the prosecutrix is all together excluded from the consideration, there is adequate circumstantial evidence on record, in the form of deposition of PW-7 coupled with the presence of the semen and blood, as detailed above, to prove the guilt attributed to the appellant.

13. In the present case, the deposition of the prosecutrix finds corroboration not only from the deposition of PW-7 Rajesh Kumar and the presence of blood and semen on her clothes and semen on the pant of the appellant, it also find corroboration from the deposition of PW-3 Smt. Suparna Sehti, who had talked to the prosecutrix soon after the incident and to her the prosecutrix had disclosed that the appellant had taken her to a park after giving two slaps on

her face and had raped her. The statement made by the prosecutrix to PW-3 can be used as corroborative piece of evidence as provided in Section 157 of Evidence Act.

14. It was pointed out by the learned counsel for the appellant that the prosecutrix could be more than 16 years of age as her age during ossification test has been determined between 12-13 years and there can be variation of 2-3 years in the age determined by ossification test. According to PW-2, Sh. V.K. Srivatava, who is a Radiologist, he had already considered the margin while determining the age. I, however, need not go into age of the prosecutrix as this is not the case of the appellant that he had committed sexual intercourse with the prosecutrix with her consent. Also, there is a statutory presumption under Section 114-A of Evidence Act that the sexual intercourse was committed without the consent of the prosecutrix. Moreover, the deposition of prosecutrix leaves no doubt that rape was committed without her consent and that is why she had shrieked.

15. It was pointed out by learned counsel for the appellant that no injury was found on the person of the prosecutrix, which indicated that she was not subjected to sexual

intercourse. In support of his contention he had referred to a decision of Supreme Court in 'Rahim Beg v. State of U.P.' AIR 1973 SC 343 he also contended that since the appellant was a young man, no adverse inference should be drawn against him on account of presence of semen on his pant.

16. In my view, the absence of marks of injury would not necessarily rule out commission of rape in each and every case. Absence of marks of injury is only one of the factors to be taken into consideration while evaluating the evidence produced by the prosecution. Since the prosecutrix, a young orphan girl aged about 12-14 years, had been intimated by the appellant, before he took her to the park and there was no other person in the park at that time, she was not in a position to put up a tough resistance. A perusal of the MLC of the prosecutrix would show that though no external mark of the injury was found present, the vaginal was otherwise soft and her hymen was found torn. There was also a fresh tear and her vagina could admit one finger. Dilatim of the vagina also indicates recent intercourse. This, coupled with the presence of the blood on the salwar of the prosecutrix and presence of semen on her clothes as well on the pant of the appellant, when

viewed in the light of the fact that the appellant as well the prosecutrix were taken to the Police Station and then the hospital directly from the spot, leaves no reasonable doubt about sexual intercourse with the prosecutrix. In the case relied upon by the learned counsel for the appellant, the rape and murder took place in the morning of August 3, 1969, whereas the appellant was arrested on 4th August, 1969. It was in these circumstances, that the Hon'ble Supreme Court noted that Rahim Beg being a young man of 22 years and the langot, seized by the police, being old, it could be said how old the semen seen were and that the semen seen on the langot of the young man could exist because of variety of reasons and would not necessarily connect with the evidence of the rape. The appellant in the present case having been taken to the Police Station and then to the hospital directly from the spot, and the having not given any explanation for presence of semen on his pant, it would be open to the Court to take the presence of the semen as an incriminating circumstance against the appellant.

17. For the reasons given in the preceding paragraphs, the appellant, in my view has rightly been convicted under

Section 376 of the Indian Penal Code. The appellant having been given the minimum prescribed sentence of 7 years and there being no special circumstance justifying awarding of a lesser sentence to him, I find no ground to interfere with the sentence awarded to him.

18. The appeal is devoid of any merit and is hereby dismissed.

(V.K.JAIN)
JUDGE

DECEMBER 02, 2009
AG