

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

+ CRL.A. 94/2006

Reserved on: October 13, 2009

Pronounced on: October 23, 2009

CHANDER SHEKHAR Appellant

! Through: Ms. Rakhi Dubey, Advocate

Versus

\$ STATE Respondent

^ Through: Mr. Amit Sharma, Addl. PP for
the State.

CORAM:

HON'BLE MR. JUSTICE V.K. JAIN

1. Whether Reporters of Local newspapers 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?

V.K.Jain, J.

This is an appeal against the Judgment dated 21st January, 2006 and Order on Sentence dated 28th January, 2006, whereby the appellant was convicted u/s 376 and 506 of Indian Penal Code and was sentenced to undergo rigorous imprisonment for 10 years and pay fine of Rs.1,000/- or to undergo simple imprisonment for one month in default u/s 376 of Indian Penal

Code and was further sentenced to undergo rigorous imprisonment for one year u/s 506 of IPC.

2. In nutshell, the case of the prosecution is that the appellant is the step father of the prosecutrix, aged about 9 years at that time, who was residing with her grandfather in Ghaziabad, whereas the appellant was residing in Loni along with his wife and mother of the prosecutrix, Smt. Chanderwati. On 23rd March, 2004, the appellant took the prosecutrix with him on the pretext of taking her to Vaishno Devi. He took her to his house in Shahpur Jat and committed rape on her person. The prosecutrix was left back at the house of her grand-father on 24th March, 2004. Since the prosecutrix had tooth bite and marks of injuries on her body and was finding it difficult to walk, an inquiry was made from her in this regard. She informed her grand-mother that the appellant had raped her twice at Shahpur Jat on 23rd March, 2004 and had also threatened to kill her, in case she disclosed the incident to anyone. The grand-father of the prosecutrix, namely, Sh. Om Prakash went to police station Ghaziabad in the morning of 25th March, 2004. He was asked to go to police station Hauz Khas as the crime had taken place in the jurisdiction of that police station. He then went to police station Hauz Khas and lodged FIR against the appellant.

3. During trial, the prosecutrix was examined as PW-6. She stated that on 23rd March, 2004, the appellant, who is her father,

took her from Ghaziabad to Shahpur Jat, saying that they had to go to Vaishno Devi. The house at Shahpur Jat belongs to her father, Chander Shekhar. In the night, the appellant first removed her clothes and then put his private part in her private part, after removing his own clothes. He also asked her not to disclose the incident to anyone and threatened to kill her if she did so. She also stated that the appellant gave bites on her cheeks and lips. She further stated that on 24th March, 2004 since she was not walking properly, her grand-mother noticing the marks on her face, made inquiry from her. She narrated the incident to her grand-mother. When her grand-father returned home, the incident was narrated to him. Her grand-father first took her to police station Ghaziabad and from there he brought her to Delhi, where the police made inquiries from her and took her to the hospital. She further stated that her statement was recorded before the Magistrate and she had taken the police to the house of her father where he had committed rape with her.

4. The grand-father of the prosecutrix was examined as PW7. He stated that the first marriage of his daughter was solemnized with one Bhagwati Prasad. Thereafter, he solemnized her marriage with the appellant Chander Shekhar. The prosecutrix was born from the wedlock of his daughter with Bhagwati Prasad and was living with him at Ghaziabad, where as the appellant Chander Shekhar was residing at Shahpur Jat, Delhi. He further

stated that the appellant came to his house and said that his mother was going to Vaishno Devi and, therefore, they wanted to take the prosecutrix along with them. He brought her to Delhi and left her back on 24th March, 2004. In the evening of 24th March, 2004, he noticed bite marks on the cheeks and lips of the prosecutrix and found that she was not able to walk properly. On inquiry, she informed him that the appellant had given bites on her cheek and lips and had established physical relations with her. In the morning of 25th March, 2004, he went to Ghaziabad where he was asked to go to police station Hauz Khas. He then came to police station Hauz Khas where her statement was recorded. The prosecutrix was got medically examined and her under-garments were handed over to police. Thereafter they went to the house of the appellant and one Sari which was lying on the bed was seized from there. The prosecutrix also took out one socks lying under the coat. That socks was also seized by the police.

5. PW-8 H.C. Rajesh and PW-10, ASI Vimla, who conducted the investigation, have stated that when they went to the house of the appellant, the prosecutrix took out a pair of socks from under the coat and the same was seized. They have also deposed about seizure of one Sari from the house of the appellant.

6. PW1, Dr. Shalini examined the prosecutrix at AIIMS on 25th March, 2004 and found bite marks over her body. PW4 Dr. Crl.a. 94 of 2006

Meenakshi also examined the prosecutrix at AIIMS on 25th March, 2004 and found injuries on her face and elbow. No injury was found by her on the genital area of the prosecutrix. The hymen of the prosecutrix was found to have an old tear.

7. In his statement u/s 313 of Cr.P.C., the appellant admitted his relationship with the prosecutrix but denied having taken her from the house of her grand-father on 23rd March, 2004. The stand taken by him was that his father-in-law had made false case against him as he was demanding money from him for his purpose. He further stated that earlier also, he was got arrested by his father-in-law on the false allegations that his wife was killed by him, though she is still alive. According to him, the prosecutrix made a statement at the instance of his father-in-law because he had a quarrel with him about 15 days ago and at that time his father-in-law, Sh. Om Prakash had threatened to implicate him in a false case. He has also claimed that during the alleged incident, his wife used to live with his father, along with the prosecutrix.

8. The appellant produced two witnesses in his defence. PW-1 Chanderwati is the mother of the prosecutrix and wife of the appellant. She stated that on 23rd March, 2004 she had come to the house of her father as they were planning to go to Vaishno Devi. The plan was, however, cancelled due to sudden ill-health of her father-in-law. Next day, she came to Loni along with her

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husband. She further stated that on 24th March, 2004, the police came to Loni and took her husband who then was arrested in this case. She has further stated that her father had demanded Rs.50,000/- for the Marriage of the prosecutrix.

PW-2, Kamla Wati is the mother of the appellant. She has stated that father-in-law of her son was demanding Rs.50,000/- from him for the marriage of the prosecutrix. She further stated that on 23rd March, 2004, they were planning to go to Vaishno Devi but the programme was cancelled as her husband fell ill and, therefore, her daughter-in-law came back on 24th March, 2004. She further stated that on that day, the appellant was taken by the police from his house.

9. The learned Additional Sessions Judge has believed the prosecutrix and I see no reason to take a contrary view. Though the prosecutrix is a child who was aged about nine years at the time of her deposition in the court, the preliminary questions put to her by the court leave no doubt that she was capable of understanding the questions put to her and of giving a rationale answers to them. She was asked as to how many brothers she had. The reply given by her is correct. She was asked in which school she was studying and she replied that she was studying in a government school. She was asked as to whether speaking truth is good or telling a lie is good. She gave a right answer by saying that speaking truth is good. She did not fumble on any

questions and gave precise and correct answers. The testimony of the prosecutrix was assailed by the learned defence counsel relying upon her cross-examination in which she stated that her grand-father had told her what she had to say and she had stated accordingly. In my view, the evidence of the prosecutrix cannot be appreciated in piecemeal and has to be examined as a whole. What the court has to see is as to whether the testimony of the witness, if read as a whole, appears to have a ring of truth in it or not. Once this is done and the court feels that the testimony of the witness appears to be truthful, the deficiencies and contradictions pointed out in her examination have then to be considered to take a view as to whether the initial impression formed by the court about truthfulness of the witness stands changed on account of those deficiencies or not. The prosecutrix has given a vivid description of the incident which took place with her on 23rd March, 2004. She also disclosed the utterances made by the appellant at the time of committing rape on her person. She told the court that the appellant had said to her that he would be her husband when she got married. A child of 9 years could not have concocted and attributed such statements to her own father, unless the same were true. As regards alleged tutoring by her grand-father, she specifically stated that though her grand-father had told her about the dirty things done with her, that was actually done by her father ("gandaa karne ki baat

nana ne batai thee papa ne kiya thaa”). If the incident as narrated by the prosecutrix had actually happened with her, it is immaterial if her grand-father had, before she came to the court, asked her to narrate that incident during her examination in the court. A witness who narrates the incident which actually took place with him/her cannot be said to be a tutored witness even if some family members asked her to narrate her the incident in the court. In fact, during cross-examination, she denied that her grand-father had asked her to state in the court about her father coming to Ghaziabad to take her to Vaishno Devi. She voluntarily stated that the day her father came to Ghaziabad, her grand-father had told her that her father had come to take her to Vaishno Devi. She specifically denied the suggestion that on the day of the incident, she was in Ghaziabad and that the appellant had not done anything wrong with her. She also denied the suggestion that tooth biting was given to her by some child in the school.

10. The legal proposition is that since a child is prone to tutoring by her parents, the court may, in appropriate cases, look for corroboration of his/her deposition. In the present case, there is ample corroboration of the deposition of the prosecutrix. The statement made by her to her grand-father soon after this incident being a previous statement can be used for corroboration of her deposition in the court, as provided in

Section 157 of Evidence Act. A perusal of the MLC of the prosecutrix shows that when she was examined by the Doctor, she gave history of the sexual assault on 23rd March, 2004 by her step-father. She was also examined by the learned Metropolitan Magistrate u/s 164 of Code of Criminal Procedure. In her statement before the Magistrate, she specifically stated that her father had brought her to his house in Delhi and in the night had done 'bad act' with her, besides biting of her face and neck and had also said that he would become her husband when she got married. Therefore, the statements of the prosecutrix made to her grand-father, to the doctor who examined her in the hospital and to the Magistrate u/s 164 of the Code of Criminal Procedure fully corroborate her deposition during trial.

11. A perusal of the report of forensic science laboratory Exhibit PX shows that blood was detected on the Sari, which was recovered from the house of the appellant in Shahpur Jat. Blood as well as human semen was detected on a pair of socks which was lying under the cot at the house of the appellant in Shahpur Jat, which the prosecutrix had taken out in the presence of the police officers. There is not an iota of explanation by the appellant for blood being found on the Sari which was lying on the cot and was obviously used as a bed-sheet and blood as well as human semen being found on the socks lying under the coat.

12. It is by now a settled principle of law that there is no rule of law which requires corroboration of the testimony of the prosecutrix, before it can be relied upon. If the evidence of the prosecutrix is found to be cogent and reliable and does not suffer from any basic infirmity or inherent improbability, this should as a general rule be accepted without seeking corroboration, except from medical evidence wherever having regard to the circumstances of the case such evidence should necessarily be forthcoming.

In a leading case *Bhogin Bhai Vs. Hirji Bhai*, AIR 1983 SC 753, the Hon'ble Supreme Court gave a number of reasons to accept the testimony of the prosecutrix in a rape case. One of the reasons given by the Hon'ble Supreme Court was that the parents of an unmarried girl would also want to avoid publicity of such incident on account of social stigma on the family name and family honour. What applies to the parents of the prosecutrix, equally applies to her grand-father with whom she is staying and residing. He would be conscious of the consequence of reporting such a matter to the police, producing the child before the Investigating Officer for recording her statement, and then producing her not only before the Magistrate but also during trial. He would be conscious of the fact that there may be hurdles even in the marriage of the prosecutrix on account of reporting such an incident as not many persons may be willing to

marry a victim of rape. In fact, some of her own friends and neighbours may go to the extent of holding her at least partly responsible for such an incident. He would in fact be reluctant even to produce her firstly before police and then in the court, for inquiry and trial, since a child of tender age is bound to feel quite embarrassed and even scared, when subject to intense questioning and sustained cross examination. Therefore, it is not at all likely that he would set up a false case when it may result in a social stigma being attached to the child and her future being in jeopardy. He would gather courage to take such a step only after he is absolutely sure of the dishonour inflicted on the child.

13. It was pointed out by the learned counsel for the appellant that no marks of injury were found on the genital area of the prosecutrix. The contention was that had she been subjected to rape, she being a child, marks of injury would have been present on her private part. In the facts and circumstances of this case, absence of marks of injury on the person of the prosecutrix is immaterial. It has to be kept in mind that the appellant was not a stranger to the prosecutrix, he being none other than her step-father. A child of 8-9 years was not expected to resist such an act when done by a person who is so close to her. In fact she may not even be capable of understanding the import and intent of what she had been subjected to. Moreover, as stated by the prosecutrix, to the doctor as well as her statement u/s 164

Cr.P.C., this was not for the first time that she was subjected to physical relations by the appellant. She specifically told the doctor that earlier also there was sexual assault on her about 1/½ months ago. In her statement u/s 164 of Cr.P.C., she stated that earlier also the appellant had done dirty things with her, implying that she had been subjected to rape earlier as well. Since the prosecutrix did not offer any resistance at the time the appellant raped her and this was not for the first time that she was subjected to such an act by the appellant, there would obviously be no marks of injury on the vaginal area of the prosecutrix. Therefore, absence of marks of injury on her vaginal area is not incompatible with her having been subjected to sexual assault. It was pointed out by the learned Defence counsel that the doctor did not notice the prosecutrix that the doctor did not notice the prosecutrix facing any difficulty in walking. This, to my mind is of no consequence, as the difficulty which the prosecutrix was facing in waling on 24th March, may have gone with the passage of time.

14. Now, I examine the defence taken by the appellant. As noted earlier, in his statement recorded u/s 313 Cr.P.C., the plea taken by the appellant is that his father-in-law demanded Rs.50,000/- from him 'for his purpose' and since he did not meet the demand, he was implicated in a false case. On the other hand, DW-1, who is the wife of the appellant and is a witness

produced by him, has stated that Rs.50,000/- were demanded by her father, Sh. Om Prakash for the marriage of her daughter. Similar statement has been made by DW-2 Kamlawati, who is mother of the appellant. Thus, there is contradiction in the defence taken by the appellant in his statement u/s 313 Cr.P.C. and the defence as disclosed in the statement of DW-1 and DW-2. According to the appellant, his father-in-law had demanded Rs.50,000/- for his own purpose whereas according to DW-1 and DW-2, the money was demanded for the marriage of the prosecutrix. During cross-examination of PW-7, Om Prakash, the suggestion given to him was that he had asked the appellant to transfer Rs.25,000/- and a plot of 25 yards in the name of the prosecutrix. Admittedly, the prosecutrix was aged about 8-9 years when this incident took place. There could have been no occasion for her grand-father to demand any money from the appellant for her marriage at that stage. The prosecutrix would have been of marriageable age after at least 10 years. Therefore, if her grandfather was to demand any amount from the appellant for her marriage, he would have done so at that time and not 10 years in advance.

15. Though in his statement u/s 313 Cr.P.C., the appellant has claimed that his father-in-law had got him arrested on the allegation of killing his wife, no evidence has been led by him to substantiate this allegation. He further stated that he had a

quarrel with her father-in-law about 15 days ago and during that quarrel her father-in-law had threatened to implicate him in a false case. Admittedly, no report was lodged by the appellant against his father-in-law. Had any threat been extended to him by his father-in-law, he would definitely have reported the matter to the police.

16. It was pointed out by the learned counsel for the appellant that in her cross-examination, the prosecutrix has admitted that there was a quarrel between her step father and her grand-father about 15 days before this incident. I find that according to PW-7, Om Prakash, the quarrel with the appellant had taken place 4 years ago when he had snatched the son of his daughter and had turned her away, but later on there was a compromise and a second son was thereafter born to his daughter. He has specifically denied the suggestion that he had quarrel with the appellant about 15 days before this incident. As noted earlier, no report was lodged by the appellant against his grand-father about the threat alleged to have been given to him. Keeping in view the specific deposition of PW-7, Om Prakash and absence of any report regarding the threat alleged to have been given to the appellant about 15 days before this incident, the statement of the prosecutrix who is a child of about 8-9 years cannot be given much weightage. It is quite possible that the child was referring to the incident which took place about 4 years ago.

17. It was contended by the learned counsel for the appellant that on the date of this incident, the mother of the prosecutrix was at the house of her father in Ghaziabad as is evident from the cross-examination of the prosecutrix where she admitted that it was her mother who had served food to her on 23rd March, 2004. A careful examination of the statement of the prosecutrix would show that on 23rd March, 2004, her mother was not present in the house of her father in Ghaziabad. The prosecutrix has specifically stated in her cross-examination that on 23rd March, 2004, her mother did not accompany her father to Ghaziabad. In fact, she was not aware where her mother was on that day. In the later part of the cross-examination she again stated that when her father came, her mother was in Loni. She further said that her father had come alone and from Ghaziabad he did not take her to Loni but had taken her to Delhi where her mother was not present. Therefore, if the testimony of the prosecutrix is read as a whole, her deposition is that on 23rd March, 2004, the appellant had come alone to Ghaziabad and at that time he was not accompanied by her mother. Her statement that on 23rd March, 2004 when she came back from the school, food was served to her by her mother is either a discrepancy on account of passage of time and fading of memory which is not unexpected from a child of her age or possibly she was referring to her grand mother, who had given food to her on her return from the school.

It would be pertinent to note here that according to DW-1, on 24th March, 2004, she had returned to Loni with her husband whereas DW-2 does not say that when she returned to Loni, she was accompanied by her husband.

18. It was also pointed out by the learned defence counsel that Sh. Om Prakash, grandfather of the prosecutrix filed an application before the trial court on 28th January, 2006 stating therein that whatever was spoken by the prosecutrix was not true and that she was tutored. The trial court has rightly not taken any note of this application, which indicates nothing except that the appellant made fences with his father-in-law at the fag end of the trial and consequently an attempt was made by the father-in-law to help the son-in-law by filing such an application. The trial court has rightly decided the case on the basis of the deposition of the witnesses during trial and without taking into consideration the application filed by the father-in-law of the appellant.

19. A perusal of the MLC of the prosecutrix would show that bite/injury marks were found on her cheeks and lips. The prosecutrix has specifically denied the suggestion that bite mark was given to her by some child in the school. The presence of bite/injury marks on her person is a corroboration of the deposition of the prosecutrix. In fact during cross-examination of PW-7, it was suggested to him that on 23rd March, 2004 at about

9 p.m., the appellant had taken the prosecutrix from his house saying that they were going to Vaishno Devi and would take her with them. Giving such a suggestion implies an admission on the part of the appellant that he had taken the prosecutrix with him on 23rd March, 2005 on the pretext of taking her to Vaishno Devi with him.

20. It was pointed out by the learned counsel for the appellant that there is contradiction in the testimony of PW-8 and PW-11 on one hand and PW-7 Om Prakash on the other hand as regards obtaining the key of the house from where the Sari and socks were seized by the police. According to PW-7, room was opened after taking key from the tenant whereas according to ASI Vimla, the key was taken from the appellant, who was apprehended from a park. In my view, this contradiction is immaterial since there is no dispute that the house at Shah Pur Jat is owned by none other than mother of the appellant and, therefore, was available to him on 23rd March, 2004. DW-2, Smt. Kamlawati who is mother of the appellant has admitted in her cross-examination that she has a house bearing No.21, Shahpur Jat at New Delhi. DW-1 has stated in her cross-examination that nobody was staying on 23rd March, 2004 at Shahpur Jat, New Delhi. Since the house where the crime was committed belongs to the mother of the appellant and at least a portion of that house was available to the appellant, it would be immaterial whether that portion was opened after

taking key from the appellant or from a tenant in that house. Therefore, nothing really turns on this contradiction in the testimony of prosecution witnesses.

21. For the reasons given in the preceding paragraphs, I hold that the appellant has rightly been convicted u/s 376 of IPC for committing rape on the person of his step daughter. Since he had also threatened to kill the prosecutrix in case she disclosed the incident to anyone, he has also rightly been convicted u/s 506 IPC. The conviction of the appellant is, therefore, maintained.

22. Section 376 (2) of IPC provides that whoever commits rape on a woman when she is under 12 years of age shall be punishable with rigorous imprisonment for a term which shall not be less than 10 years. The court may award a lesser sentence only for adequate and special reasons required to be recorded in the judgment.

In *State of Karnataka Vs. Krishanappa* 2000 (1) SCC 372, the Hon'ble Supreme Court held that the punishment in a rape case must depend upon the conduct of the accused, and age of the sexually assaulted female. In *Kamal Kishore Vs. State* 2000 (2) SCC 706, which again was a case of rape, the Hon'ble Supreme Court observed that normally the court has no discretion to award a sentence less than the prescribed sentence and a lesser sentence can be awarded only in extreme rare

contingencies. The court has to be cautious of the fact that a rapist not only violates victim's personal integrity but also leaves an indelible mark on the soul of a helpless female. The legislative mandate is loud and clear, that no person, who commits rape should escape adequate punishment. The appellant in this case took undue advantage of his close relationship with a child aged about 8-9 years. Being her father, though a step father, he was expected to protect the child and take her due care. He, however, chose to act otherwise. The child would never forget the trauma experienced by her at the hands of the appellant and the act committed by him will keep haunting her throughout her life. No leniency should, therefore, be shown when the victim of the rape is a girl of such a tender age. Therefore, there is no valid ground for reducing the sentence awarded to the appellant.

The appeal is hereby dismissed. One copy of this order be sent to the trial court and the other be sent to the Jail Superintendent, Tihar for information of the appellant and for record.

(V.K. JAIN)
JUDGE

October 23, 2009/sk