

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

% Judgment Reserved on: 13.08.2009
Judgment delivered on : 25.08.2009

Crl. A.No. 965/2006

ISHWAR CHAND

..... Appellant

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr.D.M.Bhalla, Advocate

For the Respondent : Mr.Amit Sharma, Addl. Public
Prosecutor

**CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER**

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment ? | Yes |
| 2. | To be referred to Reporters or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

RAJIV SHAKDHER, J

1. Rape is abominable. What makes it worse is when a child is subjected to it. The Prosecutrix's injury and humiliation is compounded when it is her own father who is the perpetrator of the crime. There are scores of children in our cities, towns, and villages who are subjected to unwanted physical contact by adults. Most of it does not get reported. When it does get reported, they are subjected to the same gruelling process of testimony and cross-examination in an unfamiliar, unfriendly and often unnerving court room atmosphere to which a hardened

criminal is exposed. The result is incoherent testimony which is then torn to shreds by a skilful lawyer trained to pick holes and point out inconsistencies and contradictions; cast doubts about the prosecution's case and probalise his innocence. It is the time that the legislature considers bringing about changes, at least in certain areas as regards the role of judges, and therefore courts from being umpires in a typically adversarial system to donning an inquisitorial role. Offences against children may perhaps be an area to bring about this change. There is an imminent need for the legislature to look closely at the following issues, in respect of, offences related to children:-

- i) The role of defence lawyers - should it be reduced to a bare minimum, perhaps restricted to only questions of law.
- ii) Should the investigations in respect of offences against children be court driven.
- iii) Is there a need for a specialised agencies to deal with investigation related to offences against children.
- iv) Should the specialised agency have access to an expert-- such as a child psychologist.
- v) Should we not have courts which deal exclusively with offences against children.

1.1 A beginning could be made by re-visiting the provisions of Section 25 of The Commissions for Protection of Child Rights Act, 2005, (in short the 'Child Rights Act') wherein the State Governments are mandated to establish Children's Courts. It may perhaps be wholesome to enlarge the scope and ambit of the Child

Rights Act to bring within its fold offences against children as prescribed in the IPC.

2. In the instant matter, the prosecution case is thus:- Smt. Bimla, who is wife of the accused, on 19.09.2005 in the course of altercation was thrown of the roof of the house by the accused. Smt. Bimla left the house along with two of her three daughters; the prosecutrix who is the youngest was left behind. To be noted that the accused was booked for the said offence under Section 107/151 of the Cr.P.C. and kept in custody. The oldest child, that is, the son had left the house much earlier due to the unbearable behaviour of the accused. In the night of 19.09.2005, it is alleged the accused came home drunk. The prosecutrix being alone and vulnerable, was an easy prey. The accused forced himself on the prosecutrix and committed rape. Smt. Bimla (PW2), that is the mother, was informed the next day by the prosecutrix. Out of shame, Smt. Bimla (PW2) found it difficult to discuss the incident. Finally, after two months, she informed her brothers, which is when the incident was reported to the police. The prosecutrix was sent for medical examination. The medical examination revealed that prosecutrix's hymen was torn. Based on the complaint, a FIR was registered on 27.11.2005. On 08.12.2005, the prosecutrix was presented before the learned Magistrate for recording her statement under Section 164 of the Cr.P.C.; which was not recorded, since the learned Magistrate was of the view that the prosecutrix was tutored by Smt Bimla (PW2), i.e., the mother. Much has been made out of this aspect of the matter. I shall deal with this at a later stage.

3. Finally, on 03.01.2006, prosecutrix's statement was recorded by the learned Magistrate under Section 164 of the Cr.P.C. After completion of investigation, a charge sheet was filed.

4. Prosecution examined six witnesses. The main witness was the prosecutrix (PW1). The prosecutrix in her testimony, related her ordeal to which she was subjected to, on the night of 19.09.2005. Her testimony, being crucial for arriving at a decision, is extracted hereinafter:-

"The accused present in the court is my father. In one night my father pushed my mother Vimla Devi from the roof. My mother received injury in the said incident. On that date my mother went to the house of my maternal uncle. I was alone at home alongwith my father. In the night when I was sleeping in the cot, my father removed my Kachchhi and raped me. I informed my mother on telephone in the morning. My mother reached home and I found that my mother was also injured. I informed my mother about this incident when my mother came to my house. My statement was also recorded before a Magistrate and I had signed my statement in which I had disclosed about the incident.

At this stage a sealed envelope duly sealed with seal of BG is opened out of which proceedings recorded u/s 164 CrPC taken out and shown to the witness. Witness identified her thumb impression at point A on EXPW1/A. (Ld. Metropolitan Magistrate Sh Brijesh Garg declined to record statement on the ground that she was under the influence of her mother) At the time of incident I was studying in 3rd class in MCD school. My statement was recorded by Metropolitan Magistrate, carbon copy of which is EXPW 1/B. I was medically examined in the hospital.

XXXXX by Sh Ramesh Kumar, Advocate amicus curie.

I did not make noise at the time of incident because my father had bolted the room from inside. After committing the rape my father went on roof for sleeping. At that time no one was in the house except my father. I did not disclose this incident to anyone in the locality before informing to my mother. My father was under the influence of liquor

in that night and he used to drink. I told to the police how the incident had taken place. I told the police that incident had taken place in the night. My undergarments were not seized by the police. No blood oozed out on commission of rape upon me. Before committing rape, my father gave me slaps repeatedly on my face and I was not in a position to resist him. My mother and my Mama Pawan were present at the time of my medical examination. I told about the incident to police before my medical. No neighbour reached the spot in the night of incident. I telephoned my mother from STD. My mother reached home on next day. It is wrong to suggest that I am deposing falsely under the pressure of my mother. It is also wrong to suggest that no rape was committed upon me by my father. I have come to the court from my house along with my mother. This is the same house where rape was committed and same belongs to my Grandmother, however my grandmother does not live with us. I am the youngest child in my family.”

4.1. The mother, Smt Bimla (PW2) corroborated the fact that the prosecutrix was left behind on the date of the incident in the house, in the care and custody of the accused, and that she was raped by the accused.

4.2. Dr Chitranjan Behera (PW3) deposed in respect to the result of the medical examination of the accused. She specifically proved the MLC of the accused (Ex.PW3/A). She stood by her opinion that the accused was capable for performing sexual intercourse in normal circumstances.

4.3 Dr Sagarika Aggarwal (PW4) has proved the MLC (Ex.PW4/A) of the prosecutrix. She has deposed that the hymen was torn. She also deposed that the “Introitus admits one finger”. In her cross-examination she affirmed that the prosecutrix was examined on 25.11.2005, and that the MLC was prepared immediately after the examination of the prosecutrix.

She testified that she was not in a position to opine whether the hymen was torn recently or otherwise as there was no bleeding at the point in time when the examination took place. She went on to depose that she had not given any opinion that rape had been committed as she was not certain about the commission of the offence. She also testified that these were not any old or fresh vaginal tear found on examination of the prosecutrix. In her opinion it was not possible for her to say whether there was partial penetration or complete penetration or no penetration. On being asked by the court as to what she meant by her endorsement on MLC that patient was unco-operative, she explained that since the child was of a tender age, i.e., ten years, it was difficult for her to make her understand as to why she was being subjected to a medical examination.

4.4 Lady SI Aneema Lakra (PW5), who was the Investigating Officer in the case proved the FIR (Ex.PW5/A). She also deposed with respect to the fact that the site plan (Ex.PW5/B) was prepared by her. She also testified with respect to the fact that an application was moved by her on 03.01.2006 for recording the statement of the prosecutrix before the learned Magistrate, being Ex.PW5/F, wherein the statement of the prosecutrix was recorded on the same day. She also deposed with respect to the fact that proof of the prosecutrix's birth from the Municipal Corporation of Delhi, Kanya Vidyalaya, Fatehpur Beri, Delhi which is marked as Ex.PW 5/H; was collected by her. She refuted the suggestion that the mother of prosecutrix was allowed to tutor the prosecutrix before her statement was recorded under Section 164 of Cr.P.C.

4.5 ASI Jagdish Chander (PW6) testified that on 27.11.2005 when he was posted at the Crime Against Women Cell, he had recorded the statement (Ex. PW6/A) of the mother (PW2) of the prosecutrix. He testified with regard to the endorsement by him on the statement (Ex.PW6/A). He stated that after recording of the statement of the mother of the prosecutrix a rukka was handed over to Head Constable Raj Kumar, which formed the basis for registration of FIR under Section 376 of the IPC at PS Mehrauli. He deposed that further investigation in this case was marked to WSI Aneema Lakra. He also deposed that the appellant-accused was formally arrested on 24.12.2005 as he was already in custody in the Kalandara No.107/151. In his cross-examination he admitted the fact that prior to registration of the complaint by Smt. Bimla (PW2), with regard to the rape of the prosecutrix, her complaint against the accused was pending in the CAW Cell.

Submissions of counsel

5. Mr.Bhalla for the appellant has vehemently argued that the appellant has been falsely implicated by the wife i.e., Smt. Bimla (PW2). This he says is borne out from the following:-

- i) there is a two month delay in filing the FIR;
- ii) contradiction in the testimony of her mother and prosecutrix's as regards who brought the prosecutrix to her uncle's house on 20.09.2005, that is, the day after the incident; the mother herself or the uncle;
- iii) in the statement of the prosecutrix under Section 164 of Cr.P.C., there is a reference to the older sister

being present who was also subjected to molestation.

There is no reference to the sister (Tulsi) in the prosecutrix's deposition in court;

iv) Tulsi's (i.e., Sister's) statement was not recorded.

The sister curiously was not cited as a witness; and

v) Lastly, the prosecutrix could not be relied upon. This is evident from the fact that in the first instance, the learned Magistrate did not record her testimony as he found her to be influenced by the mother (PW2).

6. Mr Amit Sharma, learned APP on the other hand submitted that:-

i) Conviction could be founded, in law, on the sole testimony of the prosecutrix if, otherwise found reliable. No further corroboration was required;

ii) Delay cannot be the basis for exonerating the accused if, other evidence points to the guilt of the accused.

6.1. He went on to submit that there is nothing to demonstrate that, the wife would implicate the accused falsely, especially, in the background that there were no aggravating circumstances which intervened between the date of incident and the day the complaint was lodged, in the instant case, vis-a-vis the relationship of PW2 and the accused, which could be cited as the motivating cause instigating the institution of a complaint of rape, against the accused. The accused was already booked in the incident in which, the wife (PW2) was thrown of the roof.

6.2. In support of his submissions Mr.Amit Sharma, learned APP relied upon the following judgments ***State of Himachal Pradesh vs. Asha Ram AIR 2006 SC 381*** and ***State of Himachal Pradesh vs. Shree Kant Shekari AIR 2004 SC 4404.***

REASONS

7. Two principles of law have clearly emerged over years in the context of an offence of rape in the indian milieu as obtaining today. First, there is no impediment in arriving at a finding of conviction based solely on the testimony of the prosecution, which is, otherwise trustworthy. Law does not mandate corroboration. Corroboration is a self imposed rigour which courts apply to themselves whenever required in the given facts and circumstances of a case. Second, a mere delay in lodging a complaint or registration of a FIR cannot be a ground for viewing with suspicion the testimony of the prosecutrix. (see observations in ***Sri Narayan Saha & Anr. vs State of Tripura (2004) 7 SCC 775*** which has been followed in ***S. Ramakrishna vs State (2009) 1 SCC 133***)

8. With the aforesaid principles in mind, let me examine the evidence brought on record in the present case. The testimony of PW1 clearly establishes that the day the accused had pushed her mother, Smt. Bimla (PW2) from the roof of the house, the mother went away to her brother's house and that she was alone at the home along with the accused. The prosecutrix (PW1) has also deposed that the accused committed rape while she was alone at night with the accused. The prosecutrix has also

testified that she informed her mother about the incident the following day. The prosecutrix has also testified with respect to the fact that her statement was recorded under Section 164 of the Cr.P.C. before the learned Magistrate. She has in the cross-examination reiterated the commission of rape by the accused. The prosecutrix (PW1) has clearly deposed that she was unable to resist her father in view of the fact that she was repeatedly slapped by him. She has denied the suggestion made to her that she was deposing under the pressure of her mother (PW2), and that a rape was committed on her by the accused.

9. Smt. Bimla (PW2), the mother, has testified that she was informed by the prosecutrix that the accused had subjected her daughter (PW1) to sexual intercourse in the night, on the day she had left the house with her other daughter Pooja. She explained her reason for the delay in lodging the complaint; which was, simply put, fear social stigma. She has testified that a complaint was lodged with the Police only after her brothers persuaded her to do so.

10. On appreciation of the testimonies of the prosecutrix (PW1) and Smt. Bimla (PW2), I find that in substance they are consistent and trustworthy. The fact that in the statement made before the learned Magistrate on 03.01.2006 the prosecutrix also referred to presence of her sister Tulsi, is not material, especially when one keeps in mind the tender age of the victim, and the time gap between the date, when the incident took place and the date on which her testimony was recorded in court. The prosecutrix has not resiled from her testimony, despite her

tender age, that the accused had subjected her to sexual intercourse. Similarly, I am not impressed by the arguments made by the learned counsel for the appellant that the testimony of the prosecutrix (PW1) cannot be relied upon as there is a contradiction between her deposition in the court, and the statement made by her under Section 164 of the Cr.P.C before the learned Magistrate. To drive home the point he had referred to that part of the prosecutrix's testimony where she has stated that on the day after incident it was her mother (PW2) who brought her to the home of her uncle, while in the statement made by the prosecutrix under Section 164 of the Cr.P.C. she has deposed that it was the uncle who brought her back to his house, the following day. This discrepancy, according to me is not material. The reason for the same is possibly the time gap between the date of the incident and the date when her testimony was recorded.

10.1. It is important to note also that the defence made no suggestion to the prosecutrix with regard to the purported contradiction at the point in time when she deposed with respect to the incident in court. Had the suggestion been made, it would perhaps then have given an opportunity to the prosecutrix to explain the aforementioned discrepancies which are now pointed out by the learned counsel for the appellant.

11. The testimony of Dr Chitranjan Behera (PW3), who physically examined the accused, opined that the accused was capable of performing sexual intercourse in the normal circumstances. Furthermore, the testimony of Dr Sagarika

Aggarwal (PW4), who examined the prosecutrix, reaffirmed her opinion which is recorded in the MLC of the prosecutrix (PW4/A) that hymen was torn.

12. A cumulative appreciation of the testimony of prosecutrix (PW1), Smt. Bimla (PW2) and those of the Doctors (PWs 3 & 4) leaves no doubt in my mind that the accused subjected the prosecutrix to sexual intercourse on the night of 19.09.2005. I find no merit in the submissions of the learned counsel for the appellant that the accused has been falsely implicated by the wife Smt. Bimla (PW2). In my view Mr Amit Sharma, learned APP's submissions deserves to be accepted that since the accused was already in custody pursuant to his physical abuse of the wife Smt. Bimla (PW2), there was no possible reason for her to implicate the accused by filing a complaint that accused had raped the prosecutrix. It is also improbable, for the reason that in the Indian milieu, it would be very difficult for the mother to expose a young child (PW1) to public scrutiny in respect of a crime which was committed by her own father.

13. In order to buttress his submission the learned counsel for the appellant has referred to a judgment of the Division Bench of this Court in the case of ***Ankush Gupta vs State Crl.A.No. 462/2007 dated 06.08.2009***. He has, in particular, relied upon the observations made by the Court in Paragraphs 40 and 41. A reading of the facts obtaining in the said case would show that the benefit of doubt was given to the accused in that case as apart from the accused at the spot where the incident of murder took place another person by the name of Raju was also nabbed by the mob

which had collected at the scene of crime. This fact was discovered by the Court on perusing the case diary of the investigating officer. The case diary also revealed that the investigating officer had interrogated Raju and thereafter set him free. However, Raju as per the record maintained by the investigating officer in his case diary had revealed that he had witnessed the crime and that it was the accused who had committed the murder. As a matter of fact, the media had flashed the news that, Raju was the one who had been arrested for the murder. The Court gave the benefit of doubt to the accused on this ground, amongst other, that even though Raju was the one who had witnessed the crime, he was neither cited as a witness nor as an accomplice. It is in these circumstances that the Court came to the conclusion that the prosecution had not been able to prove its case against the accused beyond reasonable doubt as there were many questions which remained unanswered. The facts obtaining in the present case are different.

13.1 As discussed above, the prosecutrix (PW1) has not resiled from her testimony that the accused committed the rape. The fact that she had referred to Tulsi being present at the time of the commission of the offence in her statement under Section 164 of the Cr.P.C. before the learned Magistrate does not, in any manner, dilute her testimony as regards the commission of the offence. Once it is accepted that a conviction can follow based on the sole testimony of the prosecutrix if it is otherwise found trustworthy, the fact that the statement of Tulsi was not recorded or she was not cited as a witness by the prosecution does not, in any manner, in my view, impact the case of the prosecution. In evaluating the

testimony of a witness, specially a child witness, it would perhaps be appropriate to refer to following observations of Justice V.R. Krishna Iyer (as he then was) in the case of ***Inder Singh & Anr. vs The State (Delhi Administration) (1978) 4 SCC 161 at page 162 paragraph 2:***

“2. Credibility of testimony, oral and circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect. If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many, guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes. Judicial quest for perfect proof often accounts for police presentation of fool-proof concoction. Why fake up? Because the court asks for manufacture to make truth look true? No, we must be realistic.”

14. In the present case the age of the child is not in dispute. The report of the Radiologist which is marked Ex. A has been admitted by the accused. Furthermore, it is not the defence of the accused that age of the child was aged around ten years on the date of the incident.

15. Therefore, in view of the discussion hereinabove and having considered the evidence produced before the court below, as also, the findings returned in the impugned judgment, I am of

the opinion that the prosecution has been able to prove its case beyond reasonable doubt. In the circumstances, the impugned judgment is sustained.

20. The appeal is accordingly dismissed.

AUGUST 25, 2009
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RAJIV SHAKDHER, J