

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.REV.P. No. 321 of 2008

TARA DUTT

..... Petitioner

Through: Ms. Purnima Sethi, Advocate.

versus

STATE

..... Respondent

Through: Mr. Jaideep Malik, APP.

CORAM:

HON'BLE DR. JUSTICE S.MURALIDHAR

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| 1. Whether 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 Digest? | Yes |

ORDER
29.04.2009

Introduction

1. A 54 year old man, stated to be the father of four children including one married daughter was charged with committing digital rape on a hapless 5 year old girl whose mother was related to him. Unfortunately, the criminal law of our country as it stands does not recognise this form of sexual assault as a heinous crime. As a result the petitioner has been convicted for a far lesser offence under Section 354 of the Indian Penal Code (IPC) for use of criminal force to outrage the modesty of a woman. Notwithstanding the 172nd Report of the Law Commission of India submitted over nine years ago to the Government of India urging that Parliament should replace the present definition of rape under Section 376 IPC with a broader definition of 'sexual assault,' which is both age and gender neutral, nothing has been

done till date. This case, and the growing instances in the recent past of sexual assault of minors, should serve as a wake-up call to make the appropriate amendments to the IPC without further delay.

2. This revision petition is directed against the judgment dated 24th May 2008 passed by the learned Additional Sessions Judge ('ASJ') dismissing Criminal Appeal No. 43 of 2006 filed by the Petitioner thereby upholding the order dated 19th September 2005 passed by the learned Metropolitan Magistrate ('MM') convicting the Petitioner of the offence under Section 354 IPC. It also challenges the impugned order to the extent that it has modified the order dated 19th September 2005 passed by the learned MM sentencing the petitioner to 2 years' simple imprisonment and directed him to suffer two years' rigorous imprisonment (RI).

Background

3. The case of the prosecution has been succinctly set out in the impugned order of the learned ASJ in para 2 as under:

"2. Briefly the facts relevant for the decision of the present appeal are that the complainant Smt. Parvati lodged a complaint before the police wherein SI Sukhdev Singh recorded her statement in which she alleged that on 07.06.1996, she had gone to attend her job of cleaning utensils etc. and when she came back to her home at about 10.30 p.m., her daughter the prosecutrix aged 7-9 years confided in her that the appellant Tara Dutt who was known to the family of the prosecutrix had lifted her in her lap up to bathroom, removed her panty worn by her and

with malafide intention inserted his finger in her vagina. Complaint in this regard was lodged by the mother of the prosecutrix before the police. Medical examination of the prosecutrix was carried on. As per MLC of the prosecutrix, small abrasion on the inner side of labia minora left was found but her hymen was found intact. There were no injuries over perineum.”

4. Initially, the police filed charge sheet under Sections 376/511 IPC against the petitioner. However, by an order dated 17th March 1997, the learned ASJ while hearing the case after its committal remanded the case to the court of the learned MM with a direction that only a case under Section 354 IPC was made out. Thereafter the trial proceeded before the learned MM. The learned MM by an order dated 30th November 2004 accepted an application filed by the prosecution and ordered that charges under Section 377 IPC be framed. The said order of the learned MM was set aside by the learned ASJ by an order dated 7th March 2005 holding that the earlier order dated 17th March 1997 whereby the petitioner was charged only with an offence under Section 354 IPC could not be reviewed.

5. The learned MM on an analysis of the facts convicted and sentenced the Petitioner in the manner indicated. Thereafter the Appellant filed the aforementioned criminal appeal which was dismissed by the learned ASJ in the manner indicated.

Attempts at compounding the offence

6. It requires to be noticed that that an application was filed on 16th May

2003 by the father of the prosecutrix in his capacity as natural guardian before the learned MM stating that a settlement had been arrived at between him and the accused and that the case should be permitted to be compounded. It was stated that the mother of the prosecutrix (who had deposed in 1998 before the trial court as PW 2) had expired and therefore the father of the prosecutrix wished to settle the matter. A sworn statement to that effect was also made by the father of the prosecutrix on 16th January 2004 before the learned MM. In this statement the father claimed that the accused petitioner was his son-in-law whereas in her deposition the mother of the prosecutrix merely stated that the petitioner was of the same village and therefore known to her. By an order dated 30th November 2004 the learned MM dismissed the said application by observing the facts of the case in fact showed that an offence under Section 377 IPC was made out. This order was challenged by way of a Criminal Revision No. 11 of 2005 in the court of the learned ASJ. By an order dated 7th March 2005 the learned ASJ set aside the said order dated 30th November 2004 on the ground that by a previous order dated 17th March 1997 the learned ASJ had concluded that a case under Section 354 IPC alone was made out which was triable exclusively by the court of the learned MM. Consequently, the application for compounding was directed to be considered afresh by the trial court.

7. For a second time, on 1st November 2006, during the pendency of the appeal before the learned ASJ, a fresh application was filed by the father of the prosecutrix seeking the compounding of the offence. The same reason was offered viz., that the mother of the prosecutrix had expired and that

“subject to an apology” from the accused the father of the prosecutrix was prepared to compound the offence. The learned ASJ by the impugned judgment held that since the victim was an innocent girl of around 7 to 9 years and the offence was a grave one, permission for compounding the offence should be refused.

8. In the present petition, among other grounds, it is submitted that the learned ASJ ought to have accepted the application for compounding of the offence where both parties were making a request in that behalf. Reliance is placed on the judgments in *Bandaru Nageshwara Rao v. Neelam Venketeshwara* 1997 CCRJ 650, *Pratap Singh Bhim Singh v. State of Gujarat* 1997 [1] CCRJ, *Methew v. State of Kerala* 1986, *Mahesh Chandra v. State of Rajasthan* AIR 1888 SC 2111, *Santosh Shah v. State of Punjab* 2007 [3] RCR [CR] 600, *Daulatzia v. Govt. of NCT* 1998 [1] JCC 237 and *Gurcharan Singh v. State* 1998 [2] JJC 86.

9. This Court finds that both the learned MM and the learned ASJ were fully justified in declining permission to compound the offence. The crime is indeed a grave one and for want of a more stringent law, which would serve as a deterrent, the petitioner has been sentenced only to 2 years’ RI. It is indeed distressing to note that soon after the mother of the prosecutrix died, the father was willing to file applications on behalf of the prosecutrix on two occasions seeking the compounding of the offence. This is certainly not a case where any indulgence of permitting the parties to compound the offence should be granted.

10. The offence of child sexual abuse is an extremely grave one. Innocent and tender children are abused sexually through a variety of means, one of which is the present case where the petitioner was found having inserted his finger into the private parts of the prosecutrix. Such incidents leave a deep scar on the psyche of the child and has the potential of adversely affecting the child's emotional and mental development. As documented studies show, the trauma the child suffers very often persists through her or his adult life. The book titled "*Bitter Chocolate*" by Pinki Virani (Penguin, 2000) documents several such true stories and brings to light the harsh truth that these incidents are more frequent than what we may imagine and very often goes unpunished by the child suffering the trauma and the attendant sense of shame silently. It is only an understanding mother who can bring out the truth which is what happened in the instant case. Unfortunately, soon after the mother's death, the father was prepared to 'settle' the case with the accused while the victim was still a minor. Obviously therefore she did not have and could not have any say in the matter. It is fortunate that these attempts by the father on two occasions to compound the offence were repelled by the learned MM and the learned ASJ.

11. The decisions concerning applications for compounding offences as cited by the petitioner have no application to the facts of the present case which involves the committing of digital rape on a girl child. Accordingly this Court concurs with the views of the learned MM and the learned ASJ and holds that the present case ought not to have been permitted to be compounded.

The case on merits

12. The submissions of Ms. Purnima Sethi, learned counsel appearing for the petitioner and Mr. Pawan Behl, learned APP for the State have been heard.

13. The petitioner states that the petitioner was a close relative of the mother of the prosecutrix but in the year 1996 when the incident took place, the relationship between the parties was not cordial. It is alleged that a false accusation was made against the petitioner as a result. It is next contended that the prosecutrix PW-1 was tutored by her mother (PW2). It is submitted that it is strange that the prosecutrix did not cry or weep and therefore nothing happened in the manner indicated by her. The medical report also did not indicate any injury on the prosecutrix. It is submitted that her statement was on the basis of hearsay and on the tutoring by her mother who was having inimical relationship with the Petitioner. It is submitted that there were other contradictions in the statement of PW-1 which made her statement unbelievable. For instance it is pointed out that in her evidence PW-1 stated that she narrated the incident to her mother and then to her father and then all of them went to the police station to lodge the FIR whereas PW-2 (the mother of the prosecutrix) stated that her husband was away on duty on that day. It is further pointed out that in her statement PW-1 stated that her mother returned at around 5 pm almost at the same time when the accused left whereas PW-2 stated that she returned at 10 pm. PW-1 stated that her elder brother returned from school at 5 pm whereas schools were closed for summer vacations.

14. This Court has perused the deposition of the prosecutrix PW-1 carefully. Her statement is unambiguous and cogent and reads as under:

“Then I was studying in class first, at that time, time was 5.00, it was evening time. At that time, I was lying upon cot in room. At that time, my jijaji has wake up me despite that I continued to put down. At that time I myself, my jija who is present in the Court and my lovable younger brother were present in room. My jija went toilet for bathroom and at the same time I too felt easing and went to bathroom. My jija picked up me in his lap. My jija has put off my panty and has inserted his hand in my urine place thereafter my jijaji has pulled up my panty then I stood up and he too stood up. Thereafter I came back in room and in my bed my jija took me in his lap and has removed my panty and has inserted finger in my urine place. I started weeping thereafter he put on my panty. I felt chilly like in my urine place. My jija left for his room. Thereafter my mother has laid down me and in the evening we went police station. I went police station with my parents. His name is Tara Dutt.”

15. It must be remembered that PW-1 was 7 years old when she gave the aforementioned evidence before the trial court on 2nd February 1998. In her cross-examination she reiterated as under:

“I have stated the above has happened with me and also at the saying of my mummy.

Police also enquired from me and recorded my statement. Police also took me to doctor. I do not tell the name of my Jija. I do not know the meaning of Jija. I do not know what work my Jija used to do. My Jija used to come and visit our house daily prior to this incident. My Jija never

came to my house after this incident. There are other house near our house. I did not cry but I wept. Police did not seize my pant. My panty was removed upto the bottom of my legs. **My Jija did lay down me on cot but he took me in his god. My Jija did the above incidence in bath room and again repeated it second time. He pull down my panty two times.** It did not bleed but I felt itching (like mirchi). He did it outside bath room while standing.”
(emphasis supplied)

16. In the considered view of this Court when the prosecutrix was in no confusion as to what happened with her, the criticisms of her statement on the basis of some minor contradictions is without basis. Clearly, the young girl of 7 years has a very clear recollection of what happened to her and who did it. The mother of the prosecutrix was examined as PW 2. She fully corroborated the prosecutrix and denied the suggestion of any previous enmity with the petitioner.

17. There is nothing in the deposition of any of the other witnesses that can even remotely help the case of the Petitioner. In the circumstances, this Court finds that no error was committed either by the learned MM or the learned ASJ in convicting the Petitioner for the offence under Section 354 IPC and sentencing him to 2 years’ RI.

No case for release on probation:

18. It was urged by learned counsel for the Petitioner that as on 27th March 2009 the Petitioner had already undergone a sentence of 1 year 2 months

and 23 days and had earned a remission of 3 months and 15 days and therefore the sentence should be modified to the period already undergone. It is also sought to be urged on the basis of the judgments in *Nil Kant Singh Munda v. Satroghan Singh Munda* 2008 CRI. L.J. 315, *Shyamlal Babulal v. State of Madhya Pradesh* 2008 CRI. L.J. (NOC) 235 (M.P.) and *Rajbir v. State of Haryana* AIR 1985 SC 1278 that the Petitioner should be given the benefit of the Probation of Offenders Act, 1958 ('POA'). Having carefully perused the aforementioned judgments, this Court finds that the facts in those cases are not even remotely comparable with the facts in hand. Giving the heinous nature of the present crime committed by a close relative with a helpless 7 years old girl, it is inconceivable how the case of the Petitioner can be even considered under the POA. On the contrary this Court considers that the inadequacy of the law has prevented the trial court from awarding a sentence greater than 2 years of imprisonment.

Need for an urgent change in the law

19. The trial court in the instant case was handicapped by the inadequacy of the law in not being able to charge the Petitioner with an offence graver than Section 354 IPC because in terms of the law as it stands today neither the offence under Section 376 nor under Section 377 IPC stand attracted in the facts of the present case. Also the maximum sentence that can be awarded for the offence under Section 354 IPC is two years imprisonment.

20. It is indeed unfortunate that despite the 172nd Report of the Law Commission strongly recommending a change in the definition of 'Rape'

with the offence of ‘sexual assault’, the Parliament has not taken adequate steps to introduce a deterrent punishment for those indulging in the offence of child sexual abuse.

21. The Law Commission of India in its 172nd Report had recommended a changed definition as under:

“375. Sexual Assault: Sexual assault means –

(a) Penetrating the vagina (which term shall include the labia majora), the anus or urethra of any person with –

- i) any part of the body of another person or
- ii) an object manipulated by another person

except where such penetration is carried out for proper hygienic or medical purposes;

(b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora), the anus or the urethra of the offender by any part of the other person’s body;

(c) introducing any part of the penis of a person into the mouth of another person;

(d) engaging in cunnilingus or fellatio; or

(e) continuing sexual assault as defined in clauses (a) to (d) above in circumstances falling under any of the six following descriptions:

First – Against the other person’s will.

Secondly – Without the other person’s consent.

Thirdly – With the other person’s consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear or death or hurt.

Fourthly – Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the

offender is another man to whom she is or believes herself to be lawfully married.

Fifthly – With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of an stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent.

Sixthly – With or without the other person's consent, when such other person is under sixteen years of age.

Explanation: Penetration to any extent is penetration for the purposes of this section.

Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.”

22. The lacuna in the law was brought out in the judgment of the Supreme Court in *Shakshi v. Union of India 2004 Cri LJ 2881*. The Supreme Court observed in the said judgment as under:

“The suggestions made by the petitioners will advance the cause of justice and are in the larger interest of society. The cases of child abuse and rape are increasing at alarming speed and appropriate legislation in this regard is, therefore, urgently required. We hope and trust that the Parliament will give serious attention to the points highlighted by the petitioner and make appropriate legislation with all the promptness which it deserves.”

23. Despite the Report of the Law Commission of India lying with the Government of India for over nine years and the Supreme Court of India in 2004 hoping that the Parliament would make appropriate changes in the

legislation, it is a matter of grave concern that nothing has been done till date. There are numerous instances of child sexual abuse being reported in the media. The absence of stringent law to deal with it can only have the pernicious effect of the crime continuing undeterred with impunity. Hopefully, this judgment will add to the growing demand for a change in the law consistent with the recommendations and concerns expressed both by the Law Commission of India as well as the Supreme Court of India.

24. For all of the aforementioned reasons, this Court finds no merit in this petition and it is dismissed. A certified copy of this order be sent to the Superintendent of the Jail for being given to the Petitioner. Copy of this order also be sent to the Secretary, Ministry of Law & Justice, Govt. of India forthwith.

S. MURALIDHAR, J.

APRIL 29, 2009
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