

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

+ **Crl.App. 402/2007**

Date of Reserve : 24.09.2009.

Date of Decision: 07.10.2009

PHOOL SINGH

..... Appellant

Through: Ms. Saahila Lamba, Amicus Curiae

Versus

STATE (NCT of DELHI)

..... Respondent

Through: Mr. Navin Sharma, APP for State

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

MOOL CHAND GARG,J

1. This order shall dispose of the aforesaid appeal filed by the appellant under Section 374(2) Cr.P.C. against the judgment of conviction dated 30.03.2007 and order of sentence dated 10.04.2007 passed by the Additional Sessions Judge, New Delhi in Sessions Case No. 133/2004 arising out of FIR No. 472/2004 registered under Section 376 IPC at P.S. Najafgarh, whereby the Ld. ASJ held the appellant guilty for the offence under Section 376 IPC and sentenced him to undergo 7 years R.I. and also to pay a fine of Rs.2000/- and in default of payment of fine to further undergo S.I. for 2 months. Benefit of Section 428 of Cr.P.C. has also been extended to the appellant.

2. This case was registered on the basis of the statement made by the complainant Ram Kumari, mother of the prosecutrix. In her complaint Ex-PW5/A it has been stated by her that, "on 28.07.04 at

about 8.00 PM her daughter X (correct name not given) had gone along with the children from the colony to watch a show. However, she did not return till 11.00 PM. She searched her daughter X at the residence of her sister-in-law residing nearby. She further stated that X had not come back to her. She along with her sister-in-law then searched for X here and there but could not find her. When she went to a nearby plot having a boundary wall she found 'X' lying naked there. Her mouth was gagged with her salwar, she was lying in an unconscious condition and the blood was oozing out from her private parts. She brought X at her house and narrated the incident to her husband. Her husband then made a telephone call to the police on which the PCR reached there and removed 'X' to RTRM hospital." On that basis FIR was registered at P.S. Najafgarh under Section 376 IPC against the appellant. On 29.08.04, the Police party along with the prosecutrix and her mother went towards Tyagi Farm House. They found many persons gathered there. Among the crowd, the prosecutrix identified accused Phool Singh to be the person who had committed rape on her person. Accused was apprehended and his personal search was also conducted.

3. During the course of investigation, the statement of prosecutrix X u/s 164 Cr.P.C. was also recorded on 31.08.04 by the MM, which is Ex.PW7/A. In her statement she had stated:

Meri Mummy ka naam Ram Kumari Hein. Papa ka naam Matdin Hein. Mein Panchavi Class mein padhti hoon. Meri do behan aur ek bhai hein. Mein ghar se khelne ke liye gayi thee. Mein ghar par khana khane ko aa rahi thee. To ek aadmi ne meira muh band kar diya aur kaha vahan par chal. Vahan par tamasha ho raha Hein. Vahan par Bulb jal raha tha. Usne meri Kachchi uttar di. Usne apna pant kachcha uttara tha. Voh meire uppar let gaya. Meire ko do chante mare. Meiri Chahti ke uppar kaat liya. Mein Mummy-mummy boli. Usne mera naam

puchcha. Meine apna naam Anita bataya. Mein usko nahin janti thi. Us aadmi ne Peshab karne vali Chiiz ko meri peshab karne vali jagah par dala thaa. Khoon nikla thaa. Meri Kachchi bheeg gayi. Voh mujhe neeche laya. Usne kaha ki voh ghar chale jayega to mein bhi apne ghar chali jaon. Mein apni Mummy ke paas chali gayi. Meri Mummy ne poocha kya huan, to meine sari baat mummy ko batayi. Mummy ne mujhe davai dilai thi. Mein usko pehchan sakti hoon. Jagah bhi dikha dee thi.

4. The prosecutrix was also medically examined and MLC Ex.PW3/A was prepared. It has been proved by Dr. Aparna Nath, who examined her and deposed in court as PW3. In her deposition she has stated;

I have seen MLC No. 974 dated 28.08.2004 pertaining to Anita d/o Mata Din age 8 years female. On that day I was called by the casualty medical officer to casualty for examining Anita. I examined her and gave my noting at point A to A of the MLC Ex.PW3/A. The notings are in my handwriting and bears my signatures. On examination I found abrasion and bruises present on back also presence of nail scratches on back. Presence of bruises around right breast. On local examination I found slight bleeding from vagina, first degree perineal tear is present which is bleeding, hymen is ruptured. Vagina swab was collected, sealed and handed over to IO. The undergarments of prosecutrix was collected, sealed and handed over to IO.

5. After the completion of investigation, challan was filed by the police in the court of Ld. MM. Learned MM after complying with the provisions of Section 207/208 Cr.P.C. committed the case to Court of Sessions. Thereafter, vide order dated 25.11.2004 charge was framed under Section 376 against the appellant, who pleaded not guilty and claimed trial.

6. The prosecution in order to prove its case has examined 12 witnesses. PW1 proxecutrix "X", PW2 Dr. Rajeev Solanki, PW3 Dr. Aparna Nath, PW4 ASI Chinta Ram, PW5 Ram Kumari, PW6 Ct. Ved Prakash, PW7 Shri Sanjeev Jain, PW8 Dr. Sanjay Kumar, PW9 Rajpal, PW10 HC Hansraj, PW11 SI Nirmal Sharma and PW12 ASI Prabhu Dyal Meena. In his statement under Section 313 Cr.P.C., the appellant

denied his involvement in the commission of the offence as alleged. He raised a plea that he has been falsely implicated in this case but has not led any defence evidence. The Ld. ASJ vide judgment dated 30.03.2007 convicted him under Section 376 IPC and has sentenced him as aforesaid. Thus, this appeal.

7. By this appeal the appellant has assailed the judgment of conviction as bad in law and liable to be set aside on various grounds. He has stated that the Court below failed to appreciate the vital fact that the statement given by the prosecutrix under Section 164 Cr.P.C. was a tutored statement and further her deposition had not been corroborated by any independent evidence. It is further submitted that the MLC Ex.PW-3/A of the prosecutrix records that the prosecutrix was conscious at the time of her admission to the hospital. It has also been submitted that the identification of the appellant by the prosecutrix in crowd in company of the Police on 29.08.04 i.e. after 2 days of the incident and recording of the statement under Section 164 Cr.P.C. on 31.08.04 also creates a doubt in the story of the prosecution. It is submitted that the entire episode is based upon false evidence at the instance of the mother of the prosecutrix. It has also been submitted that the public witnesses were not at all associated with the investigation of the case despite availability of a large crowd at the place from where the appellant has been arrested despite a crowd being there as alleged. It is further submitted that no Test Identification Parade of the appellant was conducted by the police.

8. Ld. APP has supported the impugned judgment by relying upon the statement of the prosecutrix under Section 164 Cr.P.C. which it has

been stated, clearly makes out a case against the appellant under Section 376 IPC. This statement has been reiterated in her deposition in Court. It is stated that the grounds raised by the appellant are not helpful to the case of appellant as the prosecution has established its case beyond reasonable doubt. The prosecutrix X and her mother have fully supported the case of the prosecution and there is nothing to disbelieve their testimonies. It is also stated that the conviction in such cases can always be based upon the sole testimony of prosecutrix where there is no other independent evidence is available to corroborate the incident. Reliance in this regard has been placed upon the judgment delivered by the Apex Court in the case of *State of Maharashtra Vs. Chanderprakash Kewal Chand Jain*, 1990 Cri.L.J. 889. On the point of sentence, it is submitted that the punishment awarded to the appellant is adequate for his ghastly act of committing rape upon a minor girl who has supported her version before the prosecution.

9. I have considered the submissions made by learned amicus curiae for the appellant and the learned APP for the State and have also scrutinized the evidence available on record. I fully agree with the opinion formed by the Additional Sessions Judge that 'X' was subjected to rape by the appellant. In this regard, the Additional Sessions Judge has observed that the testimony of the prosecutrix X under Section 164 Cr.P.C. is wholly reliable and minor discrepancies are of no consequence and thus, convicted the appellant under Section 376 IPC. In her deposition before the Ld. ASJ on 30.03.2005 the prosecutrix, who appeared as PW1, has stated that :

"PW1, Anita D/o Mata Ben, aged 8 years, student of 1st Class, Pipal wala School, R/o New Roshanpura, Najafgarh, 40 Ft. Road.

Q. Kitne Bhai behen Hein?

A. Hum do Behen do bhai hein.

Q. Tumhare pitaji kya kaam karte hein?

A. Papa chunnai ka kaam karte hein. Maa kuch kaam nahin karti.

Q. Sach bolna achcha hein yaa jhoot?

A. Sach bolna.

After going through the above answers, I am satisfied that witness is able to depose in Court. Let her statement be recorded without oath (being recorded under camera)

Mahine ka mujhe pata nahein lekin 2004 kaa vakya hein. Meikn khel dekhne ke liye cycle kaa hamare ghar ke pas gayein thi. Mein khel dekh kar jab ghar aa rahein thi, tab light chali gayi, tab ek aadmi ne mera muhn bheench liya aur pas ke khet mein le gaya. Phir us aadmi ne khet mein meri salwar uttar di. Khet mein hi salwar se mera muhn bandh diya. Jo aadmi mujhe utha kar le gaya tha, phir usne meri kachchi uttar di aur mere sath galat kaam kiya. Galat kaam ka matlab hein usne apni peshab karne wali jagah meri peshab karne wali jagah mein daal di, jisse mujhe khoon nikla. Phir agle din meine accused ko pehchana tha aur phir police ne accused present in court correctly identified by witness by pointing the finger, ko pakad liya tha jisne mere sath galat kaam kiya tha. MM ke samne mera bayan huan tha, mera medical bhi uan tha.

RO&AC
ANITA

ASJ/30.03.05

10. It is well settled that sole testimony of 'Prosecutrix' in a rape case can be relied without any corroboration. Reference can be made to some of the judgments delivered by the Apex Court which are applicable to the facts of the present case also. In the case of Rajoo and Ors. Vs. State of M.P. 2008(15) SCALE 375, it has been held:

8. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies

are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.

11. Some observations made in the case of Om Prakash Vs. State of U.P. AIR 2006 SC 2214 are reproduced hereunder:

13. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section [118](#) and her evidence must receive the same weight as is attached to an injured in cases of

physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short 'Evidence Act') similar to illustration (b) to Section [114](#) which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. This position was highlighted in State of Maharashtra vs Kewalchand Jain AIR 1990 SC 658.

12. In the case of State of Maharashtra Vs. Chanderprakash Kewal Chand Jain (supra), it was held:

16. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must received the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must

necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence. We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness.

13. As far as the grounds raised by the appellant in this appeal are concerned, the Ld. ASJ has already dealt with each ground specifically in following manner:

14. Commission of rape on the person of the prosecutrix, as such, has not been disputed by the Ld. Counsel for the accused. I am also of the view that there is over-whelming evidence on record to prove the commission of rape on the person of the prosecutrix. DD No. 3A dated 28.8.04 was recorded at the first instance wherein it was mentioned that rape was committed on the person of the prosecutrix "X". The prosecutrix was got medically examined. Her MLC Ex.PW3/A was prepared. As per this MLC, the prosecutrix was brought at RTRM Hospital, Jaffarpur by PCR at about 1.30 AM. In the alleged history, there was specific mention of sexual assault on the person of the prosecutrix, aged about eight years. Abrasions and bruises were found present on the back of the prosecutrix. Nail scratches were also found present back on the back of the prosecutrix. There were bruises around right breast of the victim. It was also found that there was slight bleeding from vagina. Hymen was ruptured. PW4 Dr. Aparna who medically examined the prosecutrix proved the MLC Ex.PW3/A. Prosecutrix herself in her testimony before the Court categorically deposed that rape was committed on her person. She is not expected to fake the incident of rape to bring herself in disrepute.

15. Regarding involvement of the accused in the commission of offence, testimony of prosecutrix/victim "X" is material. In her statement before the Court as PW1, the prosecutrix was put number of questions by my Ld. Predecessor to ascertain if she was a competent witness and was able to give rational answers. The Ld. Predecessor found the child "X" competent to depose and recorded her testimony without oath.

16. In her deposition, the prosecutrix categorically deposed that on the day of incident, she had gone to watch a show of cycle near her house. When she was returning after watching the show, the light went off. At that time, one person gagged her mouth and took her to

a field. There the said person put off her salwar and tied her mouth with that. The said person also put off her underwear and thereafter committed rape on her person. She started bleeding. The prosecutrix further stated that on the next day, she identified the accused present before the Court. In her deposition, the accused was identified by the prosecutrix by pointing out her finger towards him. The witness stated that accused was the person who had committed rape on her person. Her statement was also got recorded before the Ld. MM.

17. This witness was cross examined by the Ld. Defence counsel. In the cross examination, the witness stated that she had told the police the color of the accused. Accused was not having any beard on the day of incident. She had never seen the accused prior to the incident. The witness denied the suggestion that accused had not committed rape on her person or that she identified the accused at the instance of the police. The witness denied the suggestion that she was making false statement.

18. Overall testimony of this witness reveals that the factum of rape committed on the person of this witness has not been challenged in the cross-examination. The prosecutrix categorically identified the accused to be the person who had committed rape on her person. No material contradictions or discrepancies have come in her testimony to disbelieve her. No motive was imputed to this witness in the cross examination to falsely identify the accused to be the offender. Prosecutrix herself is a victim in the incident. She must be interested to bring the real culprit to book. She is not imagined to falsely rope in the accused with whom she was having no previous enmity or ill-will. In the cross examination, the accused did not categorically deny his presence with the prosecutrix at the time of incident. Material facts asserted by the prosecutrix in her testimony have remained unchallenged and uncontroverted in the cross examination. Accused did not suggest to this witness if he was present at any other particular place at the time of incident.

19. PW5 Ram Kumari, mother of the prosecutrix has also supported the case of the prosecution and has corroborated the version given by the prosecutrix. In her deposition before the Court also she deposed as to how and under what circumstances her daughter "X" happened to go to see a cycle show and how she did not return till 11 PM. She also stated that on search, the prosecutrix was found lying naked in a plot having boundary wall and she was bleeding from her private parts and was unconscious. This witness stated that on 29.08.04, accused was identified by her daughter. When she along with her daughter and husband had gone with the police towards Tyagi Farm House and many public persons had gathered there and among the crowd, the prosecutrix informed the police that the person wearing white color shirt and black pant was the person who had committed rape on her person. On that, the accused present before the court, was apprehended and he confessed his guilt among the public persons present there. Personal search of the accused was conducted but nothing was recovered therein.

20. This witness was also tested in cross examination. In the cross examination, she stated that she had made efforts for about 2-2 ½ hours to search the prosecutrix. The plot from where her daughter was recovered was at a distance of 8/10 plots from her house. The witness denied the suggestion that the accused was falsely implicated in this case at the instance of the police.

21. Entire testimony of this witness also reveals that no major contradictions have been elicited in her cross examination to discard her testimony. Again this witness being mother of the prosecutrix has no axe to grind to falsely implicate the accused with whom there was no previous enmity. Again no suggestion was put to this witness in the cross examination that the prosecutrix had not identified the accused to be the person who had committed rape on her person among the crowd present there. The accused did not deny his presence among the crowd at the time of his identification by the prosecutrix. The accused also did not suggest to this witness his availability at some other place on the day of incident or at the time of his arrest.

22. Testimony of PW6 Ct. Ved Prakash is also material regarding apprehension of the accused. He in his deposition before the court stated that on 09.08.04 he had joined the investigation. He along with IO and other police officials had gone to Tyagi Farm House where many persons were present. Prosecutrix "X" pointed out towards accused Phool Singh and told the IO that he was the person who had raped her. Accused was arrested and brought to PS. Thereafter he took the accused to RTRM hospital for medical examination. Again this witness has no ulterior motive to falsely depose about the apprehension of the accused at the pointing out of the prosecutrix.

23. PW10 HC Hansraj has supported the version given by PW6 Ct. Ved Prakash. He has also stated in his testimony before the court that on 29.08.04 he had joined investigation near Tyagi Farm House. Many persons were present there. Prosecutrix and her parents were also present there. The prosecutrix pointed out towards a person standing in the gathering and told that "is admi ne galat kaam kiya tha mere saath our ise ne mera muh dabaya tha". The accused was apprehended and on inquiry he disclosed his name as Phool Singh.

28. In the statement recorded under Section 164 Cr.P.C. the prosecutrix categorically stated to the Ld. MM that she could identify the rapist. This statement of the prosecutrix was recorded on 30.08.04 after the apprehension of the accused on 29.08.04.

30. The prosecutrix "X" aged about 8 years, a child witness has no axe to grind to falsely identify the accused and to accuse him of committing rape on her person. She had suffered injuries on her person. Nothing has come on record to show that the statement made by the witness before the Ld. MM or before the Court was tutored to her. Again parents of the prosecutrix were not going to be benefited by tutoring the statement to the prosecutrix to let the real culprit go

scot free. The accused was arrested soon on the next day after the incident and identify of the rapist was fresh in the mind of the prosecutrix at that time.

31. In the statement recorded under Section 313 Cr.P.C., the accused has merely stated that due to enmity, someone falsely gave his name to be the rapist. However, he did not explain as to who was his enemy to name him falsely in this case. He did not allege any enmity with the family members of the prosecutrix. The accused was arrested on 29.08.04 itself. He or his family members did not lodge any complaint against any police official or public witnesses for falsely apprehending him in this case.

32. Shirt of the accused as seized in this case by the doctor who medically examined him. This shirt was also sent to FSL during investigation. As per the FSL report Ex.PX, human blood was detected on it. Accused has failed to explain how the blood happened to be there on his shirt. This also lends credence to the prosecution case.

33. Minor contradictions, improvements and exaggerations which do not go to the root of the case are not fatal to the case of the prosecution.

14. Having gone through the record of the case and the settled law on the subject and the judgment delivered by the Trial Court who has dealt with the issues and has also considered the statement made by the prosecutrix X under Section 164 Cr.P.C., it is clear that she was subjected to inhuman act of rape by the appellant. In fact, the plea of innocence taken by the accused/appellant has not been substantiated by him either from the cross-examination of the witnesses or by leading any defence in this regard. There is no reason to believe that it is a case of false implication when the prosecutrix had very categorically stated about the role of the appellant in the commission of rape upon her. Therefore, taking into consideration the facts and circumstances of the case, I uphold the conviction of the appellant. I also do not find any reason to interfere in the order of sentence awarded to the appellant in view of the age of the prosecutrix. Accordingly the appeal is dismissed. Copy of the order be sent to the

appellant through Jail Superintendent and to the trial court with TCR.
The fee of the amicus curiae is fixed as Rs. 4000/-.

Crl.M.B.987/2007

In view of the orders passed above, the application stands dismissed.

MOOL CHAND GARG, J.

OCTOBER 07, 2009
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