

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

+ **Crl.App. 466/2007**

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Date of Reserve: 07.10.2009

Date of Decision: 14.10.2009

GAJADHAR

....Appellant

!

Through: Mr.Rajesh Mahajan, Adv.

Versus

\$ STATE

..... Respondent

^

Through: Mr. Navin Sharma, APP.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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

: **MOOL CHAND GARG,J**

1. This order shall dispose of the aforesaid appeal filed by the appellant under Section 374 Cr.P.C. against the judgment of conviction and order of sentence dated 17.04.2007 passed by Additional Sessions Judge, New Delhi in S.C no. 149/2006 arising out of FIR No. 625/2006 registered under sections 376/201 IPC at P.S. Najafgarh, whereby the Ld. ASJ held the appellant guilty by imposing a punishment of R.I for a period of 8 years and also to pay

fine of Rs. 1000/- and in default of payment of fine to further undergo S.I. for One month. Benefit of Section 428 of Cr.pc has also been extended to the appellant.

2. Briefly stated, the case of the prosecution is that the appellant was sent for trial on the basis of the statement of Smt. Sunita Devi (PW2), the complainant, Ex.PW2/A to the duty officer of Police Station Najafgarh alleging commission of rape by the appellant on the prosecutrix/her daughter who was hardly of 9/10 years.

3. In her statement made to police Ex.PW2/A, she had stated that on 29.06.2006 prosecutrix (PW3) went to play in the house of the Gajadhar (appellant). At about 7.00pm when complainant (PW2) went to call the prosecutrix from the house of the appellant, she found her sitting on the gate of the house of appellant weeping. Complainant also found that the blood was flowing on her thighs and legs and she was not able to stand properly due to pain. Complainant then called her husband and neighbour and took the prosecutrix to government hospital Jafarpur. The complainant observed that the blood was coming out from the vagina of the prosecutrix. The prosecutrix told her that she was raped by the appellant.

4. On the basis of the above statement FIR was registered at Police

Station, Najafgarh against the appellant, who was later taken into custody in this case. During the course of investigation, the statement of prosecutrix under section 164 CrPC was recorded on 01.07.2006 by the Ld. MM, which is Ex.PW4/M. This statement was recorded by the Magistrate after satisfying himself about the competence of the child witness to give/make a statement. For the aforesaid purpose following questions were asked by the Magistrate which she replied as under:

- (1) aapko apne pitaji ka naam maaloom hein?
a. Mahender
- (2) Aap kahan rehti ho?
a. Shyam Nagar mein
- (3) Aapka kya naam Hein ?
a. Reena
- (4) AAP kuch batana chahti ho?
a. The child has only noded her head.

5. Looking at the tender age of the prosecutrix I have not asked her any further questions she appears to be frightened & traumatic. I have recorded her statement w/o administering any oath to her.

- (1) Aapke sath kuch hua?
a. Haan
- (2) Kya hua hein?
a. Gajadhar ne bahut gandha kaam kiya mere sath
- (3) Kab aur kahan?
a. Mein geeta ke sath khel rahi thi tab Gajdhar ne mere sath ganda kaam kiya. Mera khoon baha tha Doctoe ne davai lagai.

The prosecutrix is not ready to say anything else.

MM-1.7.07

5. After the completion of investigation, the challan was filed by the police, which was committed to the court of Ld. ASJ, who vide

order dated 05.02.2007 framed charge against the appellant under section 376 IPC, to which the appellant pleaded not guilty and claimed trial.

6. The prosecution in order to prove its case has examined four witnesses. PW1 Dr. Suman, Sr. Resident. PW2 Smt Sunita Devi who is the mother of the prosecutrix. PW3 Ms. Reena is the prosecutrix herself and PW4 is SI Richpal Singh who was the IO of the case. In his statement under section 313 CrPC appellant denied all the allegations against him. He state that he is innocent and has been falsely implicated in this case. Appellant did not prefer to lead any defence evidence.

7. The prosecutrix was also medically examined vide MLC Ex.PW4/F was prepared. The MLC of the prosecutrix was proved by Dr. Suman, who examined the prosecutrix and deposed in court as PW1. In her deposition she has stated:

On 20.06.06, I was posted at RTRM hospital as Sr. Resident Gynae. Reena D/o Mahender aged about 9 yrs female was examined by me. On general examination , I found on both legs trickle marks of clotted blood seen. On local examination blood clots were present in vagina covering the hymen. On removal of clot, hymen of the patient was founf ruptured.

Posterior vaginal tear seen below hymen around 2x2 cm was not bleeding at that time because the blood had already clotted. Two vaginal swab slides were prepared and seen. Blood sample was taken and sealed. Nail Clippings and under garments of the patient were taken by me and were

sealed with the seal of the hospital. The MLC Ex.PW1/A is in my own handwriting which I prepared after examination of the patient and the same bears my signature at point A.

8. The prosecutrix also appeared as PW3 before the ASJ and deposed as under:

Q Do you know the accused present in court?

(I have pointed out the accused to her. She is standing by my side on the Dias, however, she does not look at the accused. Rahter there are tears in her eyes.)

Q Can you tell me the name of the accused present in the court?

A Gajadhar

Q where does he reside?

A In front of our house

Q Do you go to his house?

A Yes

Q Why do you go to his house?

A Does not Answer. But tears are flowing out of her eyes.

Q why do you go to his house?

A To play with Geeta.

Q Was some "Galat kaam" happened with you?

A Yes

Q Who did it ?

A This fellow (i.e. the accused)

Q Where this Galat kaam done by him?

A In the room.

Q How this was done?

A I was caught by the accused forcibly and did it with me.

Q What happened thereafter?

A I came out of room somehow. I was Bleeding. My mother took me to hospital.

9. Based upon the evidence which came on record, the learned ASJ convicted the appellant for having committed an offence under Section 376 and punished him to undergo R.I. for a period of 8 years besides directing him to pay fine of Rs.1,000/- and in default of payment of fine to further undergo S.I. for one month.

10. While assailing the impugned judgment and the order on

sentence, it has been stated by the appellant that:

- i) The Ld. Trial judge failed to appreciate the vital facts, which makes the case of the prosecution doubtful. The incident took place on 29.06.06 , prosecutrix deposed before the ld. ASJ on 01.07.06, it is submitted that the complainant stated that she had informed her husband and nieghbour Urmila but none of them has been examined by the trial court, the only testimony of the prosecutrix which was cryptic as per the observation of the trial court could not become the sole basis of the conviction particularly when the circumstances on record goes to show that it is impossible for anybody to commit any such offence in the presence of her own wife. Therefore the probability factor was brushed aside by the Ld. Trial judge who admitted it as a strong point but did not given any credence to it.
- ii) That the investigation of the case is dismal because neither the wife of the accused has been examined nor the husband of the complainant was examined. Similarly the neighbor Urmila was not examined and even the ld MM who recorded the statement of the prosecutrix under

section 164 was also not examined which shows complete non – application of mind by the 1d Trial Judge who acted emotionally rather than to be judicious in assessing the case of the appellant.

iii) That the statement made by the prosecutrix was a tutored one inasmuch as the victim was only a girl of Nine years at the time of the alleged incident and therefore was a child witness. It is submitted that while giving the statement after two days in the court the prosecutrix was only crying while present in the court and repeated the words of her mother. The statement was given in the presence of mother and police and the delay of two days in recording the statement was never explained by the prosecution.

iv) That the story of prosecution is full of serious discrepancies because nothing was corroborated in furtherance to the bald statement made by the complainant or prosecutrix as it was not clear as to how and why the victim reached the house of the appellant during Odd Hours when the appellant and her wife and daughter was sleeping. The Complainant also not

deposed anything about the fact that when she reached the house of the appellant, whether she found the door locked or open and who all were there in house. It is also state that if the statement of Urmila was recorded than it would have been a different story at all and this shows incurable lapse on part of the IO.

v) That the Ld trial Judge failed to appreciates that the witnesses produced were the interested witnesses and that nobody has supported the claim of prosecutirx that she was raped except her mother. The Police story that appellant confessed his totally wrong. The statement of the prosecutrix recorded later than the arrest of the appellant and therefore obviously is a tutored one. It is submitted that the rulings of Supreme Court on which the Ld. Trial Judge has relied upon are not applicable to facts of the present case.

vi) Regarding the medical evidence it is submitted by the appellant that it is nowhere stated that the injuries on the private parts of the prosecutrix can only be outcome of rape. The Ld. Trial Judge failed in not appreciating the fact that external injuries may have been caused for

various reasons with any blunt/sharp object and she might have hurt herself while playing. It is also submitted that the direct evidence against the appellant is tutored one and doubtful. The reliance by the solely on one child witness in the present case is also not justified. The fact that the gamcha was recovered or the underwear of victim having stains of human semen has neither been substantiated by the prosecution nor was there any material even to form evidence.

11. The counsel for the appellant also submitted that possibility of a lesser offence is also supported by the medical evidence of the appellant, who had no injuries on his male organ. In case rape was committed by a fully grown man on a minor girl having her hymen intact, it is likely that male organ would not bear some injury marks. Reliance in this regard has been placed upon the judgment delivered by Apex Court in *Rahim Beg V. State of U.P* AIR 1973 SC 343. Lastly it is submitted that the prosecution has been failed to prove its case beyond reasonable doubt and the conviction and sentence are equally arbitrary and illegal and therefore liable to be set aside.

12. On the other hand Ld. APP for the State has supported the impugned judgment by relying upon the deposition of the

prosecutrix, who has reiterated her statement under section 164 CrPC. It is stated that the incident took place on 29.06.06 and the FIR was registered on the basis of the statement of the complainant PW 2, who has fully supported the case of prosecution. It is also submitted that PW3 Kumari Reena fully supported the case of prosecution before Trial Court. PW1 Dr. Suman proved the MLC of the Prosecutrix which is Ex.PW1/A. PW4 medically examined the accused and found appellant capable of committing sexual intercourse. MLC of appellant was proved as Ex.PW4/F. It is also submitted by LD. APP for the state that a Bone Age Test of the prosecutrix was conducted wherein age of prosecutrix was asserted 9-10 years which is proved on record vide Ex.PW4/O. FSL reports also proved the case of prosecution which is EX.PW4/P. It is therefore submitted that prosecution has proved its case beyond any reasonable shadow of doubt by the testimonies of prosecution witnesses and the appeal filed by appellant has no merit and liable to be dismissed.

13. I have considered the submissions made by learned counsel for the appellant and the learned APP for the State and have also scrutinized the evidence available on record.

14. It is well settled that competency of a child witness is to be

examined on the basis of his/her preliminary examination when it has to be seen that whether he/she is capable of understanding questions and giving the rational answers. A perusal of the answers given by the prosecutrix goes to show that she had replied the questions to her best and was not tutored by anyone. Reference can be made to a judgment delivered by Apex Court in *Nirutti Pandurag kokate Vs. State of Maharashtra*, 2008 (12) SCC 565, where it has been held:

10. “6. ... The Evidence Act, 1872 (in short ‘the Evidence Act’) does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease—whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer, J. in *Wheeler v. United States* 40 LED 244. The evidence of a child witness is not required to be rejected per se, but the court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. *Suryanarayana Vs. State of Karnataka* 2001(9)SCC 129.

7. In *Dattu Ramrao Sakhare v. State of Maharashtra* 1997(5) SCC 341 it was held as follows:

‘5. ... A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even

in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored.'

15. Taking into consideration the statement made by the prosecutrix under Section 164 Cr.P.C. as also before the learned ASJ where she reiterated her statement, it is clear that prosecutrix was subjected to rape by the appellant who has sexually assaulted her for his lust. In this regard, reliance placed by the Magistrate on the testimony of the mother of the prosecutrix and the medical evidence also justifies the impugned judgment. Even otherwise, there is no reason to disbelieve the statement made by the prosecutrix as being a child witness as she had categorically stated about the role of appellant in commission of rape on her. As far as other submissions made by counsel for the appellant are concerned, they are of no consequence. Similarly, the judgment delivered by the Apex Court in the case of *Rahim Beg Vs. State of U.P.* (supra) is also not applicable to the facts of the present case as in this case hymen of the prosecutrix was ruptured and blood was oozing out of her vagina. 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 prosecutrix.

16. Accordingly the appeal is dismissed. Pending applications, if any, also stand dismissed.

17. A copy of this order be sent to the appellant through Jail Superintendent as well as to the trial Court along with TCR.

18. Fee of the Amicus Curiae is fixed as Rs.5,000/-

MOOL CHAND GARG, J.

OCTOBER 14, 2009
nm/anb.