

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

+ **Crl.App. 618/2007**

Date of Reserve: 23.09.2009

Date of Decision: 06.10.2009

JITENDER

..... Appellant

Through: Ms. Purnima Sethi, adv.

versus

STATE

..... 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 Yes
to see the judgment?
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 appeal arises out of a judgment delivered by the Addl. Sessions Judge, Rohini Court, Delhi in Sessions Case No. 65/06, whereby the appellant was convicted under Section 376/324/343 IPC and Section 23 of the Juvenile Justice Act vide judgment delivered on 21.04.2007 and has been sentenced to undergo R.I. for 10 years under Section 376(2)(f) of the IPC besides payment of fine of Rs. 2000/- and in default to further undergo R.I. for 2 months. The appellant is also sentenced to undergo R.I. for a period of 2 years under Section 324 IPC and further for a period of 1 year under Section 343 IPC and S.I. for 6 months under Section 23 of the Juvenile Act. All the sentences were ordered to run concurrently. The appellant was also given the benefit of Section 428 of Cr.P.C. The appellant is in custody since 19.07.2004 and has completed a period of more than 7 years in judicial custody.

2. The aforesaid judgment was delivered in a case arising out of FIR No. 632/02 registered at P.S. Nangloi under Section 376/342/325/324 IPC read with Section 23 of the Juvenile Justice Act, 2000, on the basis of an information received and recorded vide DD entry bearing no. 29B on the evening of 18.04.2002. On that basis Police undertook investigation & reached at the spot where the prosecutrix a minor girl aged about 5 to 6 years was found locked. After breaking open the locks, the prosecutrix was taken to Sanjay Gandhi Memorial Hospital where she was medically examined. Swelling was found on her body. Doctors gave the details of the injuries recorded in the MLC. The prosecutrix was also examined by a lady doctor (Gynae) who also gave a report that Hymen of the prosecutrix was torn and perineal tear was extending up to anal margin. Statement of the prosecutrix was also recorded, when she stated that accused, his step-father, who had been living with her mother after her real father deserted her mother, while she used to live alone after her mother would go for work in the morning and would come in the evening, used to tie a piece of cloth on her eyes, remove her panty and insert something in her private part (genitals). Due to this, she had lot of pain. When she used to cry the accused used to beat her on her hands with a wooden danda and one day he hit her on her head with the danda. She also stated that on 18.07.2002 when her mother went outside for work and did not come in the night, accused/appellant beat her with danda on her head, hands and back. She received injuries on the fingers. Accused again did 'galat kaam' with her, removed her panty, tie her eyes and put something in between her private part. On that basis FIR under Section 376/342/325/324 IPC & 41.1 Juvenile Justice Act was registered

at PS Nangloi & the same was investigated.

3. After completing the investigation, the challan was filed. The Magistrate committed the case to the court of Sessions who framed charges under Section 376/343/324/326 IPC read with 23 of the Juvenile Justice Act against the appellant who pleaded not guilty and claimed trial.

4. Prosecution examined 16 witnesses out of which statement made by Dr. Monika Gaur PW2, Dr. Ashish Sehgal PW4, Dr. Anil Sharma PW5 and the complainant PW15 besides the statement made by I.O. Shri K.K. Tiwari as PW16 are material and have been relied upon by the Addl. Sessions Judge by convicting the appellant as aforesaid. Some portion of the judgment which throws light on the merits of the case and deals with the evidence which has come on record are reproduced hereunder:

8. PW2, Dr. Monika Gaur examined the victim on 18.07.02 and stated to be found following injuries upon the prosecutrix on local examination:

1. Bruise around 7 X 5 cm on the left inner thigh extending to the groin.
2. Bruise around 4 X 4 cm on the left labia majora and a swelling over lying it and also extending on the mons pubis. Both bruises reddish purple in colour.
3. Hymen is torn.
4. Perineal tear extending upto anal margin involving skin, subcutaneous tissue and part of the muscle layer with slough in the bed.
5. Forchette is torn.
6. Vaginal swab taken and sealed and handed over to the constable who had accompanied her.

She noticed multiple bruises of different colours on the entire body i.e. arms and the legs of the victim child. In medical terms, we call it battered baby syndrome. She further stated that the above noted injuries were clearly indicative of forced sexual intercourse. The above said findings are given in the MLC of victim which is Ex-PW2/A.

9. PW3, Dr. Chetna Chauhan, examined accused. She found abrasion on his right side of forehead. He was given injection. His undergarments were sealed. His detailed report is Ex-PW3/A bearing his signature at point A.

10. PW4, Dr. Ashish Sehgal, deposed that on 18.07.07 I was posted as CMO at SGM hospital. On that day victim aged 6 years was brought to him by Ct. Gurbaksh Singh. She gave the history of assault by her father on her both upper and lower limb. She also gave the history of repeated sexual assault by her father. On examination there was swelling on the middle part of right thigh and left leg and incised wound of 4 X 1 cm was observed in the web of index and right finger. MLC in this regard is Ex-PW4/A which bore his signature at point B.

11. PW5, Dr. Anil Sharma Sr. Resident Orthopaedics, who also examined the victim, deposed that he found multiple bruises with swelling and deformity, right femure and left leg. He also observed multiple heat scar mask all over her body. She was in a traumatic condition as she was afraid of her step father. MLC in this regard is Ex-PW5/A which bore his signature at point A.

12. PW6, Ld. MM, Shri Rajinder Kuamr deposed that he recorded the statement of victim in his own handwriting and the same is Ex-PW6/A. He had also issued a certificate of correctness of the statement which is Ex-PW6/B.

13. PW7, Ct. Virender who was posted as duty constable at SGM hospital deposed that on 19.07.02 IO, SI K.K. Tiwari brought the victim for medical examination and he had handed over the sealed vaginal swab slides and undergarments of the victim along with sample seal.

14. PW8, Ct. Gurbaksh Singh deposed that on 18.07.02 he was posted at PS Nangloi. On that day received DD No. 29B and went to gali no. 67. A lot of public persons gathered there and house was locked from outside. People informed that they ahd heard the cries of the child from inside, the lock was broken. A child aged about 5-6 years was sitting inside the room and was not wearing any clothes. There were blue marks on her body and also swelling. The child was given clothes to wear and special police officer was called at the spot. Victim child was taken to SGM Hospital and IO recorded statement there and handed over the Tehrir in the PS and FIR was registered.

The accused also arrested on 19.07.2002 and was medically examined at SGM hospital. He signed the arrest memo vide memo Ex-PW8/A and personal search memo vide Ex-PW8/B both bearing his signatures at point A.

22. PW-15, the victim deposed that accused was his step father and her mother started living with him when her real father deserted her mother. Four years back when she was six years old her mother used to go for a work with a Doctor aunt and used to come in the evening. During that time she used to remain alone with the accused Jitender. Accused used to tie a piece of cloth on her eyes and remove her panty. Then he used to insert something in her private part (genitals) from where she used to pass urine, which caused her lot of pain. On crying the

accused used to beat her on her hands with a wooden danda. One day he hit her on her head with the danda.

On one occasion when her mother went outside for work and did not come in the night. Accused beat her with danda fitted with iron patti on her head, hands and back. She also received cut injuries on the fingers. Accused gain did 'galat kaam' with her, removed her panty, tie her eyes and put something into her private part. Police came to her house, took her to PS and then to hospital where she was medically examined. Her statement was recorded which is Ex-PW15/A. Her statement was also recorded before the Ld. MM which is Ex-PW6/A and she put her thumb impression at point B & C. She was asked a leading question by Ld. APP in which she replied that she stated before the Ld. MM in Ex-PW6/A that accused put his urinated portion into her vagina but she could not tell if the accused to do the above act after removing his clothes as her eyes were closed with a piece of cloth.

5. A perusal of the cross-examination of PW15, the complainant, goes to show that nothing material has been brought out in her cross-examination which may falsify her version. Rather the witness has very categorically stated that she was not making a statement under instructions of her mother as was suggested by the accused. The prosecutrix also denied the suggestions that her mother was a lady who used to extort money from various persons. Some portion of the cross-examination which goes to show that the witness was conscious of her statement made in the examination-in-chief and which point out the role of the appellant in this case is also reproduced hereunder for the sake of reference:

When accused used to commit wrong act with me I could not raise alarm as he used to put a cloth in my mouth. On the day of incident I had raised alarm when on hearing my cries I was rescued. Before that I was not able to do so. My mother did not used to beat me. My mother was not with me when I was rescued by the police. She had come later on from her place of work at the hospital. She had remained with me throughout in the hospital. Accused was committing the above mentioned act for only one or two days from the day of incident. It is incorrect to suggest that I am deposing against the accused under the fear of my mother or that the accused had not

committed any wrong act with me as stated by me above. Today I have come with my mother. It is incorrect to suggest that my mother had instructed me to make the above statement. It is incorrect to suggest that some persons from our neighbourhood used to come to our house and they used to commit wrong acts with me. It is incorrect to suggest that accused was not present in the house for the last 2 or 3 days of the incident. Vol. He had gone in the morning only. It is incorrect to suggest that I am deposing falsely or the accused had not committed any wrong act with me. Police had recorded what I told the police and then my thumb impression was obtained by the Police on the same. At the time of incident I was not going to school and the contents were not even read over to me. I had given my statement to Ld. Metropolitan Magistrate of my own and not on the tutoring of police officials who had accompanied me to the court.

6. After the prosecution evidence was completed, the statement of appellant was recorded under Section 313 Cr.P.C. but he has not been able to give any satisfactory explanation as to why the prosecution witnesses deposed against him and has not been able to show that he has been falsely implicated in this case. Some answers given by the appellant in his statement under Section 313 Cr.P.C. are reproduced hereunder:-

Q.16 Why PWs have deposed against you?

Ans. They are false and interested witnesses.

Q.17 Why this case is registered against you?

Ans. It is a false case.

Q.18 Do you want to lead any DE?

Ans. Yes

Q.19 Do you want to say anything else?

Ans. I am innocent. I have been falsely implicated. In fact, the mother of the prosecutrix gave severe beatings to her one day prior to the registration of the case and did not give her food to eat. Since prosecutrix was hungry she tried to cook bread and in this process fell down from the slab of kitchen and fell down in a iron basked and suffered injuries. When I came back in the evening, I provided medicines to her. I also noticed swelling on her private parts and enquired from her mother but she did not give me proper reply. Next day, in the morning I went to work and when I came in the evening, I came to know through my neighbor that

prosecutrix had been taken by her mother to the police station. After looking inside my home, I went straight to the police station and there I was falsely implicated in this case I am innocent.

7. However, no defence evidence has been led on behalf of the appellant to substantiate his innocence.

8. Taking into consideration the evidence where the prosecutrix, who was hardly 5 to 6 years, categorically implicated the appellant in committing the crime and the circumstances in which she was rescued from a place where she was kept under lock and her medical examination, the Trial Judge was rightly persuaded to come to a conclusion that it was the accused who had committed the crime. The technical objections which were sought to be raised in this matter have also been dealt with by the Trial Court while delivering the judgment. Some observations made by the Trial Court in this case which reflects the discussion had by the Trial Court on various points raised by the defence are also reproduced for the sake of reference:

27. Before coming to the conclusion it shall be fruitful to discuss the judgment of Hon'ble Supreme Court in the case titled as Visveswaran V/s State in AIR 2003 SC 2471, in which it is held that "the approach required to be adopted by courts in rape cases has to be different. The cases are required to be dealt with utmost sensitivity, Courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the Courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by Courts while evaluating evidence."

28. That the argument of defence counsel that no blood of Semen was found on the clothes of the victim has no force. In this regard I place my reliance on a recent judgment of Hon'ble Supreme Court in 2007 IV AD (SC) 171 titled as Ramkripal Vs. State of M.P. wherein is held that Sine qua non of the offence of rape is

penetration & not ejaculation. No semen doesn't mean no rape. Accused had not raped the victim for the first time, so there was no question of any active bleeding. Infected perineal tear was suggestive of forced sexual intercourse.

29. The victim was coherent, natural, cogent and stable at the time of examination. Her statement was recorded on the same day by the IO. There is no delay in this respect and by the time mother had not met the victim. Mother of victim met the IO in the night so there was no question of tutoring the victim. During her medical examination she told every doctor that she was assaulted and ravished by her step father. On a leading question by prosecutor during her examination, she admitted that she told the Ld. Metropolitan Magistrate that accused used to put his urinating portion into her vagina.

30. I have gone through the statement of Dr. Monika Gaur who has clearly stated that there was bruise around 4 X 4 cm on the left labia majora and swelling extended to mons pubis. Hymen and forchette was torn. She firmly stated that the injuries mentioned extending up to anal margin together with bruises all over the body were clearly suggestive of forced sexual intercourse.

31. During cross examination, she reaffirmed that there was reported sexual assault on the victim so her injuries had not healed at the time of examination by her.

32. Complainant disclosed to the Baby Counsellor, PW14 that her step father used to put his penis into her vagina.

33. During her statement under Section 164 Cr.P.C. before the Ld. Metropolitan Magistrate, she clearly stated that her step father used to put her urinating portion into her vagina.

34. Victim was a child of appx. 6 years, at the time of occurrence. No doubt can be pointed towards her testimony. Reliance is placed on the judgment of Hon'ble Supreme Court in the case titled as "Karnel Singh Versus state, AIR 1995 SC 2472" in which it was held that No lady would stake her reputation by leveling false allegations of rape.

35. It is worth noting that a man may tell lie but the circumstances do not do so. Circumstantial evidence is an important piece of evidence and if the same is trustworthy, the same alone is sufficient to prove the case. In any event the same is sufficient to lend corroboration to the oral testimony of whatever minor nature the same may be.

36. In view of the circumstances of this case prosecution has been able to prove the victim used to live alone with her step father when her mother was away at work.

37. It was further proved that there were injuries on the private parts suggestive of forced sexual intercourse.

38. Victim was seething under pain when she was examined by PW2 she refused the doctor to put any finger in her vagina for manual check up.

39. Bruises, abrasion on her entire body, deformity in arm is clearly suggestive of an inhuman approach of accused towards a child of 6 years who is his step daughter.

40. The blindfolding of child before the commission of offence clearly suggests only one thing i.e. the guilt intention of accused. As he was the step father of the victim probably he didn't want victim to see him naked and also wanted to protect himself so that the victim being an adolescent would not be able to make out his misdeed done with her.

9. I have gone through the grounds taken in the appeal on behalf of the appellant and have also given my thoughtful consideration to the submissions made by learned counsel for the appellant who wanted to raise defences such as implication of the appellant by the mother of the prosecutrix and the conduct of the mother to show that she was a lady of easy virtues and was in the habit of black-mailing people though no such evidence was brought on record. Ms.Purnima Sethi, Advocate appearing for the appellant, has moved an application for leading additional evidence not along with the appeal but in 2009 i.e. when the case was ripe for hearing not pertaining with the present case but regarding the conduct of the mother of the prosecutrix which, prima facie, I do not find of any relevance. Moving of this application is nothing else but an effort to create confusion and does not help the appellant in any way. The documents relied upon only goes to show that in one case registered at the instance of Laxmi Devi, her previous husband was acquitted. Even if those documents are taken on their face value, it would not exonerate the appellant from this case.

10. In the above circumstances, I find no infirmity in the judgment

delivered by the Addl. Sessions Judge holding the appellant guilty of committing offences under Section 376(2)(f), 327/343 IPC & 23 of the Juvenile Justice Act. I also do not find any reason to interfere with the sentence awarded to the appellant. Thus, the appeal is dismissed.

11. Copy of this order be sent to the jail Superintendent for information of the appellant. TCR along with the copy of the judgment be sent back.

12. In view of the aforesaid, all pending applications are also dismissed.

MOOL CHAND GARG, J.

OCTOBER 06, 2009
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