

HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL No. 37/2009

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Judgment reserved on 7th July, 2010
Judgement delivered on 15th July, 2010

SHANKAR KUMAR Appellant
Through: Mr. Sumeet Verma, Adv.

Versus

STATE (N.C.T.) OF DELHI Respondent
Through: Mr. M.P. Singh, APP for State

Coram:
HON'BLE MR. JUSTICE A.K. PATHAK

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

A.K. PATHAK, J.

1. Appellant has been convicted under Section 366/376 IPC by learned trial court and sentenced to undergo rigorous imprisonment for ten years and fine of Rs. 1,000/- and in default to face simple imprisonment for one month under Section 366 IPC; rigorous imprisonment for ten years and fine of Rs. 1,000/- and in default to face simple imprisonment for one month under Section 376 IPC. Both the sentences have been directed to run concurrently and benefit of Section 428 CrP.C has also been given to the Appellant.

2. Aggrieved by his conviction Appellant has preferred this appeal.

3. Briefly stated, facts of the case are that FIR under Section 376 of Indian Penal Code (IPC) was registered in the Police Station Pandav Nagar on the basis of statement of Shyam Lal, father of the prosecutrix aged about 3 years, wherein he had stated that on 17th March, 2005 at about 8:30 pm he was sitting outside his juggi bearing no. 197, Dr. Ambedkar Camp, Mayur Vihar Phase – I, Delhi along with his daughter; he went inside the juggi for a short while and on his return he noticed that his daughter was missing; He along with three or four persons of the locality went out in search of his missing daughter towards Delhi Police Apartment where they heard scream of a girl child coming from the side of a nala; He went towards that side and saw the accused lying on his daughter and doing “galat kaam”; He and the persons accompanying him separated the accused from his daughter; He noticed that his daughter was bleeding; Accused was thrashed by the persons accompanying him. Thereafter, he took his daughter to Lal Bahadur Shastri Hospital where she was medically examined.

4. On clinical examination of the prosecutrix, dust and grass material was found around her vagina and external genitalia. On separation of labias fresh marks of injury were noticed around the vaginal orifice. Vaginal swab, grass and dust material was collected by the doctor and sealed and handed over to the Investigating Officer. Doctor opined that injury was possible due to fall or sexual

assault. As per CFSL report neither blood nor semen was detected in the vaginal swab and clothes of the prosecutrix.

5. Accused was also medically examined wherein multiple bruises and abrasion in red colour all over his body were noticed besides tenderness over his nasal bridge with clot in both nostrils. One Clean Lacerated Wound measuring 1 cm x 0.2 cm over the right cheek with fresh clot was also noticed. Underwear and vest of the accused besides his blood sample were sealed by the doctor and handed over to Investigating Officer. Accused told the doctor that he had sustained injuries on being assaulted by the mob.

6. Prosecution has examined eight witnesses in all. Shyam Lal was examined as PW1. Another eye witness Sandhya Verma was examined as PW2. Dr. R.N. Dass, who had medically examined the accused, was produced as PW4. He proved the MLC of the accused as PW4/A. Dr. Chandrakanta Arya, who had medically examined the prosecutrix, was produced as PW6. She proved the MLC of the prosecutrix as Ex.PW6/A and her opinion as PW6/B. SI V.K. Sharma, Investigation Officer of the case, was examined as PW8. All other witnesses are formal in nature being Police officials who had either recorded the FIR, participated in the arrest of the accused or were with the Investigating Officer during the investigation.

7. After prosecution closed its evidence, entire incriminating material, which had come on record, was put to the accused and

his statement was recorded under Section 313 Cr.P.C. Accused simply denied his involvement in the offence. He claimed himself to be innocent. According to him, father of the prosecutrix was inimical towards him as they had a quarrel on some earlier occasion. Accused did not lead any evidence in his defence.

8. Learned trial court has found the testimony of PW 1 and PW2 trustworthy and reliable, duly corroborated by the medical evidence, since fresh injury was noticed on the vaginal orifice of the prosecutrix. It was held that injury marks on vaginal orifice indicated that the penetration was made by the accused; Absence of blood and semen in the vaginal swab would not by itself wash away the guilt of the accused. Plea of accused that he was falsely implicated by the father of the prosecutrix due to an earlier quarrel was discarded on the ground that no such suggestion was put to PW1, inasmuch as, no evidence was led by the accused on this point. Rather in his cross examination, PW1 had admitted that he had no enmity with the accused. On the basis of evidence adduced before it learned trial court concluded that it is the Appellant who had kidnapped and raped the prosecutrix, consequently, convicted him under Section 366/376 IPC.

9. I have also perused the depositions of PW1 and PW2 and find them to be trustworthy and reliable, inasmuch as, their version is duly corroborated by the medical evidence, as the injuries were found on the vaginal orifice of the prosecutrix. As per PW1 and PW2, incident had taken place near a nala. Dust and grass

material found around the vaginal orifice of the prosecutrix supports this version. That apart, injuries found on the person of accused also support the version of these two witnesses that he was given beatings by the mob after they found accused raping the prosecutrix. I also find that PW1 has fully corroborated his statement recorded by the Police as contained in the FIR Ex. PW3/A recorded on the date of the incident. He has fully supported the prosecution case. He has deposed that on 17th March, 2005 at about 8:30 pm he was sitting outside his juggi along with his daughter aged about three years. He went inside the jhuggi for a short while and when he came out he found his daughter missing. He along with three/four persons went towards Delhi Police Apartments. Sandhya Verma had also joined them. They heard shrieks of a girl child coming from the side of the nala. He along with his companions went towards that side and found the accused, who was also residing in the same area, committing rape of his daughter by lying upon her. His daughter was naked below her frock and the accused was wearing baniyan only. They separated accused from his daughter. Accused was caught hold of by the persons accompanying him and was thrashed. His this version has been duly supported by the PW2 Sandhya Verma. As already stated above, medical evidence corroborates this version, as on the separation of labias fresh mark of injuries were found around the vaginal orifice i.e. vaginal cavity. PW6 Dr. Chandra Kanta Arya has opined that the injuries were possible by sexual assault. In these

circumstances, I do not find any reason to disbelieve the statements of PW1 and PW2. In my view, their statements have rightly been accepted by the learned trial court.

10. Learned Amicus Curiae has vehemently contended that in absence of presence of blood and semen in the vaginal swab it cannot be said that accused had committed rape upon the prosecutrix. PW1 had stated that his daughter was bleeding but no blood was noticed by the doctor. I am of the view that this contention needs to be rejected outrightly being devoid of any merit. It is not necessary that in each and every rape case ejaculation has to take place. It cannot be said that unless there is emission of seminal fluid, rape is not complete. Similarly, it cannot be said that for rape to be complete, there must be full penetration. Even slight penetration without emission would be sufficient to complete the offence of rape. Absence of blood is also of no consequence as it might wash away while victim passes urine. In my view, to constitute the offence of rape it is not necessary that there should be complete penetration of the male organ with emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or even an attempt at penetration is quite sufficient for the purpose of rape. In this context, opinion expressed by ***Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) 369***, would be relevant and is thus quoted as under :-

“Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and

rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.”

11. Similar view has been expressed in ***Parikh’s Textbook of Medical Jurisprudence and Toxicology***, which reads as under:-

“Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.”

12. The first explanation to Section 375 of Indian Penal Code, which defines rape also provides that “penetration is sufficient to constitute the offence of rape”.

13. In *Pappu vs. State NCT of Delhi* reported in Manu/DE/0924/2010 a Division Bench of this Court in the similar facts, held as under :-

“That no blood was detected on the vaginal swab of Kumari ‘P’ and no semen was detected therein is neither here nor there in view of the ocular evidence of afore-noted four witnesses; the testimony of Dr.Sangeeta Kumari PW-3 and the MLC Ex. PW-3/A of Kumari ‘P’. It is

possible that the young infant and unfortunate victim passed urine and thereby diminishing the possibility of blood being detected in her vaginal swab. As regards no semen being detected therein, there is no law that unless there is ejaculation, rape is not complete. There is no law that for rape to be complete there must be full penetration.”

14. In the backdrop of the above legal position, I am of the view that non availability of blood and semen in the vaginal swab of prosecutrix, by itself, would not indicate that no rape had been committed by the accused. Injuries on the vaginal orifice of the prosecutrix clearly demonstrates that penetration was there, even though it may be without emission of the seminal fluid. Arguments of the learned Amicus Curiae to the contrary are hereby rejected.

15. Learned Amicus Curiae next contended that the presence of Sandhya Verma at the spot is doubtful. She appears to be a stock witness as she has admitted in her cross examination that she had appeared in several other cases as well. I do not find any force in this contention either. PW3 Sandhya Verma claim herself to be a social worker. She had been espousing the cause of the down trodden and the oppressed class. In this background she has deposed that when she notices any injustice being done to a member of deprived classes she raises her voice and does not hesitate in appearing in their support in court. Her this statement would not make her a stock witness of the Police, inasmuch as, in answer to next very question she denied that she had been regularly appearing in court as a witness. Her presence at the place of incident cannot be found suspicious as she had produced the

accused before the Police officials in the hospital immediately after the incident and a categorical assertion has been made in this regard by PW8 SI V.K. Sharma. PW8 has deposed that Sandhya Verma along with five-seven people came in the hospital and produced Shankar (accused) who was arrested by him. In his cross examination PW8 has reiterated this fact by saying that accused was handed over by Sandhya Verma in the hospital.

16. Learned trial court has awarded minimum sentence to the Appellant as envisaged under Section 376 (2) IPC which provides that if a person commits rape on a woman under twelve years of age he shall be punished with rigorous imprisonment for a term which shall not be less than ten years. *Proviso* to this Section empowers the Court to impose a sentence of imprisonment of less than ten years but for adequate and special reasons to be recorded. In this case no special reason has been brought forward to award lesser sentence than what has been prescribed under the Act. Appellant has committed rape upon a child of tender age which itself shows depravity on his part. Thus sentence awarded by the learned trial court need not to be interfered with.

17. It is well settled that Appellate Court would interfere only if findings of the learned trial court are manifestly absurd or based on wrong appreciation of law. I find the judgment of the trial court to be in consonance with the evidence adduced before it and the law applicable on such facts. I do not find any material illegality,

irregularity or perversity in the impugned judgment and the order on sentence.

18. Accordingly, appeal is dismissed.

19. A copy of this order be sent to Superintendent Jail with the direction that the same be served on the Appellant.

A.K. PATHAK, J

July 15, 2010

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