

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. A. No. 37/2007

% Judgment decided on: 22nd November, 2010

VIRENDER @ BILLU APPELLANT

Through: Mr. Bhupesh Narula, Adv.

Versus

THE STATE OF NCT OF DELHI RESPONDENT

Through: Mr. Arvind Gupta , APP

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? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be
reported in the Digest? | Yes |

A.K. PATHAK, J. (Oral)

1. This Appeal is directed against the judgment of Trial Court whereby appellant has been convicted under Sections 376(2)(f)/363/366 IPC; sentenced to undergo rigorous imprisonment for ten years with fine of ₹1000/- and in default of payment of fine to undergo rigorous imprisonment for one month under Section 376(2)(f) IPC; rigorous imprisonment for five years with fine of ₹500/- and in

default of payment of fine to undergo rigorous imprisonment for fifteen days under Section 363 IPC; rigorous imprisonment for five years with fine of ₹500/- and in default of payment of fine to undergo rigorous imprisonment for fifteen days under Section 366 IPC. Benefit of Section 428 Cr.P.C. has been given to the appellant.

2. Factual matrix of the case, as emerges from the record, is that the prosecutrix, aged about 4 years, had been residing in a jhuggi cluster at Vasant Kunj along with her family. On 17th March, 2003 at about 10 PM mother of the prosecutrix (complainant) along with her daughter Asha had gone out for easing herself. Prosecutrix, her sister Neelam aged about 10 years and brother Prakash aged about 2 years remained in the jhuggi. Appellant, who had been residing in the same locality, came to the jhuggi of prosecutrix, in absence of mother of the prosecutrix, and took her with him on the pretext of giving some money. On her return, when complainant did not find prosecutrix in the jhuggi, she made enquiries from Neelam, who informed that appellant had taken the prosecutrix with him. On a search being made, prosecutrix was found lying behind the jhuggi in an unconscious state. Prosecutrix was bleeding per

vagina. In the morning at about 6:45 AM, complainant informed the police control room about this incident, which in turn conveyed the information to the police station Vasant Kunj, pursuant whereof DD No. 12-A was registered. In the meanwhile, PCR Van had removed the prosecutrix to Safdarjung Hospital, where she was clinically examined by Dr. Pinki Saxena.

3. SI Banay Singh was handed over DD No. 12-A for enquiry, who reached the spot along with Constable Bhanwar Singh and came to know that prosecutrix had already been removed to Safdarjung Hospital. Thereafter, he went to Safdarjung Hospital and recorded statement of complainant wherein she narrated the incident in the manner which has been described in para 2 hereinabove. On the basis of her statement FIR No. 165/2003 under Section 376 IPC was registered at police station Vasant Kunj.

4. On her medical examination prosecutrix was found bearing following injuries:

- “(i) scratch marks on back.
- (ii) abrasions on both legs.

Hymen was torn, minimal bleeding present, posterior fourchette torn and tears extending till anal sphincter.” External genital swab as well as vaginal swab was taken and sealed by the doctor. Pant/pyjama of prosecutrix had been washed by her mother (complainant) but the same was later on brought by her and handed over to the doctor, who sealed the same and handed over to the Investigating Officer. Doctor opined that sexual assault cannot be ruled out.

5. Appellant was arrested. In presence of public witnesses Raj Kumar, Lal Singh and Naresh Chand, appellant got his underwear and baniyan recovered from his jhuggi. He was wearing these clothes at the time of the incident. These clothes were sealed in a pullanda and seized by the Investigating Officer.

6. Appellant was also medically examined in the Safadarjung Hospital by Dr. P. Chikara, who prepared the MLC. Dr. Arvind prepared the detailed report and opined that there was nothing to suggest that the appellant was incapable of performing sexual intercourse.

7. During the investigation statements of prosecutrix, her sisters Neelam and Asha as also of other witnesses were

recorded. Clothes of appellant as also of the prosecutrix, which were seized by the police, along with the external genital swab and vaginal swab of prosecutrix were sent to Forensic Science Laboratory (FSL) and its report was obtained. As per this report, blood was found on the baniyan of the appellant and pyjama of prosecutrix, which was opined to be that of "AB" group.

8. After completion of investigation, appellant was sent to face trial for having committed offences punishable under Sections 363/366/376 IPC by filing a charge-sheet in the court of Metropolitan Magistrate, who took cognizance of the offence and committed the case to Sessions Court for trial, since offence under Section 376 IPC is exclusively triable by the Sessions Court.

9. Charges under Sections 363/366/376 IPC were framed against the appellant on 24th December, 2003 by the Trial Court to which he pleaded not guilty and claimed trial.

10. During the trial, prosecution examined 16 witnesses in all. Complainant (mother of the prosecutrix) was examined as PW1. Prosecutrix was examined as PW11. Sisters of prosecutrix, namely, Neelam and Asha were examined as PW15 and PW5 respectively. These are the material

witnesses to prove the incident. Public witnesses to the recovery of underwear and baniyan of the appellant, namely, Raj Kumar, Lal Singh and Naresh Chand have been examined as PW6, PW7 and PW10 respectively. Dr. Pinki Saxena of Safdarjung Hospital, who had clinically examined the prosecutrix, was examined as PW4A. She has deposed that aforementioned injuries were found on the person of prosecutrix. Dr. Arvind, who had medically examined the appellant was examined as PW2 and he has proved his report as Ex. PW2/A. He has deposed that there was nothing to suggest that the appellant was incapable of performing sexual intercourse. These are the material witnesses to prove the circumstances corroborating the happening of the incident and indicating the culpability of appellant. All other witnesses are formal in nature being police officials, who had been joined with the investigation at one or the other stage. PW14 SI Banay Singh is the Investigating Officer and has deposed about the investigation conducted by him.

11. After prosecution closed evidence, statement of appellant under Section 313 Cr.P.C. was recorded on 27th July, 2005; his additional statement under Section 313 Cr.P.C. was again recorded on 29th July, 2006. In his above statements he was

confronted with the incriminating material which had come on record against him. He denied his complicity in the crime and claimed himself to be innocent. It was stated that he had been falsely implicated in this case. However, no reason was assigned as to why he had been falsely implicated in this case by the witnesses, inasmuch as no evidence had been led by him in his defense.

12. Learned Amicus Curiae has vehemently contended that prosecutrix PW11 is a child witness vulnerable to the tutoring. Her deposition is based on the tutoring of her mother and cannot be relied upon. Even otherwise she is not a trustworthy and reliable witness. Her statement is also not in line with the prosecution story. Statement of PW15 Neelam is also not in consonance with the prosecution version. In the FIR, it was mentioned that appellant had taken the prosecutrix with him on the pretext of giving some money. However, later on, while deposing in the court, PW15 has stated that appellant had taken the prosecutrix with him on the pretext of giving toffee. It is further contended that prosecutrix has not made any categorical statement that appellant had committed rape upon her. She has not deposed that appellant had inserted his penis in her vagina.

Initially, when her statement was recorded, PW11 kept mum and for this reason Trial Judge had made specific observation that she was not able to understand the questions and was not capable of deposing in the court, therefore, discharged her. However, immediately thereafter Trial Judge again recorded her statement by asking general questions, wherein she had stated that the appellant had kidnapped her; he removed her underwear and when she screamed, he gagged her mouth as a result whereof she became unconscious. Thereafter, police van took her with them and at that time her mother was also with her. He contended that even this statement of hers is not sufficient to conclude that appellant had raped the prosecutrix. He further contended this statement, otherwise, was given by PW11 on the tutoring of her mother. As regards PW1 Kamla is concerned, it is contended that she was not present in the jhuggi when appellant had allegedly taken the prosecutrix with him. Her testimony in this regard is hearsay and is inadmissible in law. It is further contended that the medical evidence is not sufficient to connect appellant with the crime. As regards production of underwear and baniyan by the appellant, pursuant to his disclosure statement, is concerned, it is

argued that the same had been planted by the police. So called public witnesses were, in fact, stock witnesses of the police.

13. As against this, learned Additional Public Prosecutor has contended that the prosecutrix was only 4 years of age at the time of incident. She had suffered mental trauma of rape. The scar of rape remained imprinted on her mind when she was produced in the witness box. She was not even aware of the intricacies of court proceedings at the age of 6 years when she entered in the witness box. For these variety of reasons if she remained silent for a brief period and Trial Judge discharged her, would not mean that her testimony has to be discarded. Immediately, when prosecutrix queried as to why her statement was not being recorded, Trial Judge recorded her statement by asking certain questions, regarding the incident wherein she stated that appellant had kidnapped her; thereafter he removed her underwear, when she screamed he gagged her mouth and she became unconscious. This deposition is in line with the prosecution story as the prosecutrix was found by her mother in an unconscious condition at an isolated place behind the jhuggi. PW 15 has corroborated the prosecutrix that it is the appellant who had

taken the prosecutrix with him before she was recovered in an unconscious state. Medical evidence also supports this version and indicates that the prosecutrix was raped since not only injuries were found on her legs and back but she was also bleeding per vagina, inasmuch as her hymen as also posterior fourchette was found torn. It is further contended that the public witnesses to the recovery of underwear and baniyan of the appellant were not even cross-examined. There is nothing to suggest that they were stock witnesses. In fact, these witnesses were residing in the same locality. The recovery of underwear and baniyan of the appellant has been duly proved. As per the report of FSL, AB blood group was found on baniyan of the appellant. Same blood group was identified on the pyjama of prosecutrix. Scientific and medical evidence fully corroborates the prosecutrix's version.

14. I have considered the rival contentions of both the parties. There is no such law that a child witness cannot be believed only because he/she is vulnerable to the tutoring by her/his near and dear ones, more particularly the parents. Testimony of a child witness is to be treated at par with any other witness except that such testimony has to be scrutinized meticulously by the Trial Judge before accepting

so as to satisfy himself that the same is voluntary, unblemished and is beyond the scope of tutoring. Credibility of a child witness would depend upon the circumstances of each case.

15. In **Dattu Ramrao Sakhare v. State of Maharashtra (1997) 5SCC 341** Supreme Court has held as follows:-

“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 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 demeanour must be like any other competent witness and there is no likelihood of being tutored.”

16. Similar was the question involved in **Acharaparambath Pradeepan and Anr. vs. State of Kerala, 2007 [1] JCC 828**

and the Supreme Court held as under:-

“Indisputably, certain factors are required to be considered as regards reliability of the testimony of the child witnesses but it is also an accepted norm that if after careful scrutiny of their evidence

the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of child witnesses.”

17. Thus, in my view a child is competent to testify if he understands the question put to him and gives rational answers thereto. If on careful scrutiny of evidence of a child witness, court is satisfied about the truthfulness of such witness, the same is sufficient to base the conviction independent of any corroboration from other evidence.

18. In the backdrop of above settled legal position, I have carefully perused the testimony of PW11 and I do not find it to be untrustworthy or based on tutoring. PW11 appears to be a natural witness. Trial Judge had put certain general questions to the prosecutrix before satisfying himself as to her competence to depose in the court. I find that all the questions were promptly answered by her. Answers given by her clearly show that she was able to understand the questions and answer the same. At the time when her statement was recorded, she was hardly about six years of age. Incident took place on 17th March, 2003 and at that time she was only 4 years old. Her statement was recorded on 15th February, 2005 after two years of incident. It appears

that mental trauma of rape remained imprinted on her mind and for this reason she became perplexed and when a specific question was put to her as to what was done by the appellant with her, she kept mum for some time. Trial Judge ought to have been more sensitive keeping in mind the trauma of a girl child, who was victim of rape and should not have acted hastily in rendering an opinion that the child was not in a position to understand the proceedings of the court and answer the questions put to her, merely because she had kept silence for some time, after she was asked to explain as to what had happened with her. Immediately after the prosecutrix was discharged, she enquired as to why her statement was not being recorded. It is not the case that after being discharged she had gone outside the room and returned after sometime on being tutored by her mother or any other person. No such fact has been recorded either in the deposition of the prosecutrix or in the order dated 15th February, 2005. It appears that her statement was recorded at a stretch. Thus, it can safely be inferred that for sometime prosecutrix became perplexed and could not answer the question being a child of tender age. There is nothing to indicate that PW11 had again stepped in the witness box after

she was discharged, on the tutoring of either her mother or the police.

19. Relevant it would be to reproduce the testimony of the prosecutrix at this stage, which reads as under:

“Q. What is your name?

A. My name is ____ .

Q. What is your father’s name?

A. Rahul.

Q. What is your mother’s name?

A. Kamla.

Q. How many sisters do you have?

A. I have got two sisters namely Neelam and Asha. Neelam is studying in the hostel and Asha is not studying.

Q. How many brothers do you have?

A. I have got two brothers, namely Prakash and Kalia. I have another brother namely Arun who is living with my sister Asha.

Q. Do you read?

A. No.

Q. Have you been to school?

A. I have gone to school only once. I can count but I do not know how to write the numbers.

Q. Do you know how to read and write in Hindi or English?

A. No.

Q. Do you know where you are present now?

A. I do not know.

Q. Do you know who are standing here in black coats?

A. They are uncles but I do not know.

Q. Do you know why you have come here?

A. No. I do not know.

Q. Do you know the accused.

A. Yes I know him. But I do not know where he resides.

Q. One should speak truth or lie?

A. I should speak the truth.

The witness states that the accused should be hanged. 'Isko Fasi Dedo'.

Q. Why he should be hanged?

A. The accused took me to the mines, which is near to his house.

Q. What did he do with you?

The child is absolutely silent and is not giving any answer.

Certified that after questioning the prosecutrix I am satisfied that she does not understand the proceedings of the court and is not able to answer the questions put to her. Hence the witness is discharged unexamined.

(At this stage the witness has voltd. and questioned the court as to why her statement is not being recorded. She has been asked to state whatever she wants to say. Thereafter the witness has stated that the accused had kidnapped her. Thereafter he had removed her underwear, when she screamed, he gagged her mouth and she became unconscious. The police van came and took me. My mother was with me. I was taken to the hospital. I was checked and administered medicine by the sister/Madam of the hospital. I had not told anything to the police.

XXXX by Sh. S.K. Shoren, Adv. for the accused

I knew the name of the accused. No one had told me his name. At that time when accused had taken me my father was in the hospital. My sister named Asha was present in the house and my brothers Kalia and Prakash were also with me in my house when the accused took me away. My mother was not in the house at that time. When accused was taking me I did not see anyone known to me on the way. It is wrong to suggest that accused had not kidnapped me. It is also wrong to suggest that he had not removed my underwear. It is also wrong to suggest that he had not gagged my mouth. It is also wrong to suggest that I am deposing falsely.”

20. From the perusal of questions put to prosecutrix by Trial Judge and the answers given by her it is clear that she was able to understand the questions and also to answer the same voluntarily and promptly. At one stage, when she was asked to explain actually as to what the appellant did with her, she kept silence for some time but that by itself would not be sufficient to discard her whole testimony. Prosecutrix has categorically deposed that appellant had kidnapped her, removed her underwear and when she screamed he gagged her mouth, thereafter she became unconscious. Injuries found on her legs, back and private parts corroborate the allegations of rape. Torn hymen of the prosecutrix clearly indicates that she was raped. As per prosecutrix it is the

appellant who had taken her with him, removed her underwear and when she screamed gagged her mouth, as a result whereof, she became unconscious. Her this statement coupled with the medical evidence goes to show that it is the appellant who had committed rape upon the prosecutrix.

21. So far as the testimony of PW15 Neelam is concerned, she has also categorically deposed that appellant had taken the prosecutrix with him on the pretext of giving toffee to her and thereafter, prosecutrix did not return. On return of her mother to jhuggi she narrated this fact to her. On search being made prosecutrix was found near the jungle, blood was also oozing out from her private part. PW1 has duly supported this version by saying that on the fateful day she had gone for easing along with her daughter Asha at about 9/10 PM. Prosecutrix along with her sister Neelam and brother Prakash remained in the jhuggi. After she returned from the jungle along with Asha, prosecutrix was not found in the jhuggi. PW15 Neelam informed her that appellant had taken her with him. PW5 Asha has also supported this version. From the testimony of these witnesses it is clear that appellant had taken the prosecutrix with him. These versions corroborate the prosecutrix on this point.

22. Doctor has opined that injuries were possible on account of sexual assault. That apart, blood was found on the baniyan of the appellant which was of AB group and blood of same group was also found on the pyjama of the prosecutrix. Appellant got his underwear and baniyan recovered from his jhuggi in the presence of Raj Kumar, Lal Singh and Naresh Chand. These witnesses have categorically deposed that the appellant got recovered underwear and baniyan from his jhuggi. Their testimony on this part has remained unchallenged. There is nothing to show that there was any past enmity between the appellant and these recovery witnesses. These witnesses were residing in the same locality. There is no reason as to why they would have deposed falsely against the appellant.

23. In the light of overwhelming evidence adduced by the prosecution as discussed above thread bare, I am of the view that Trial Court has rightly convicted the appellant under Sections 363/366/376 IPC.

24. Keeping in mind age of prosecutrix, I am not inclined to interfere with the sentences as awarded by the Trial Court. Section 376(2)(f) provides that whoever commits rape upon a woman who is under 12 years of age shall be punished with

rigorous imprisonment for a term which should not be less than ten years which may extend for life. Prosecutrix was aged about 4 years. She was brutally raped by the appellant at that tender age. His this conduct is no doubt diabolic and perverse. Appellant is not entitled to lesser sentence than the minimum prescribed sentence under Section 376(2)(f) as no special and exceptional reasons could be brought forth in his favour for doing so.

25. For the foregoing reasons, Appeal is dismissed. Copy of the order be sent to Superintendent Jail for serving it on the appellant.

A.K. PATHAK, J.

NOVEMBER 22, 2010

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