

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. A. No. 530/2008

% Judgment delivered on: 9th November, 2010

SUNIL KUMAR

..... APPELLANT

Through: Mr. Rajesh Mahajan, Adv.

Versus

THE STATE (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? | No |

A.K. PATHAK, J. (Oral)

1. Appellant has been convicted under Section 376 IPC by the Trial Court; sentenced to undergo rigorous imprisonment for a period of ten years and to pay fine of ₹ 10,000/-; in default of payment of fine to undergo simple imprisonment for a period of six months. Benefit of Section 428 Cr.P.C. has also been given to the appellant.

2. It is this judgment, which is under challenge in this Appeal.

3. Prosecution case as unfolded is that Smt. Sheetal (PW1) along with her daughter (hereinafter referred to as "Prosecutrix") aged about six years and son aged about three years had come to Delhi from Pune, about fifteen days prior to the incident, to see her ailing maternal grandmother, who was hospitalized in the Babu Jagjivan Ram Memorial Hospital, Jahangirpuri (hereinafter referred to as "BJRM"). She was staying at her aunt's (Mausi) house bearing No. D-179, Jahangir Puri, Delhi. Appellant is son of aunt of PW1. On 1st December, 2004, in the afternoon, PW1 was sitting outside the house alongwith her son; while prosecutrix was sleeping in the room where appellant was also present. At about 3:30 PM, on hearing cries of prosecutrix (PW2), PW1 went inside the room and found PW2 lying on the bed. She was weeping. Appellant was also present there. He had slide down his pant and underwear. On enquiry PW2 informed that appellant had inserted his penis in her vagina (words used by the witnesses are "urinating part" instead of penis and vagina). Blood was oozing per vagina of PW2. Underwear and pant of PW2 were blood stained. PW1 took the prosecutrix (PW2) to BJRMH, where she was medically examined vide MLC (Ex. PW7/A). Doctor Sujata Gautam had conducted the medical examination. She found the posterior vaginal wall torn which extended upto perineum, which appeared to be 1.5 inches externally. Vaginal swab was taken. Under

garment of the prosecutrix was also sealed by the doctor and handed over to the Investigating Officer.

4. Information regarding hospitalization of prosecutrix was sent to the police station Jahangirpuri by the Duty Officer/Head Constable Baljeet Singh, pursuant whereof DD No. 46-B was recorded and handed over to Sub Inspector Dharampal Tyagi who alongwith Constable Arun Kumar reached the hospital and recorded statement (Ex. PW1/A) of PW1 Sheetal, pursuant whereof FIR No. 882/2004 under Section 376 IPC was registered.

5. During the investigation, site plan (Ex. PW13/B) was prepared on the pointing of PW1 Sheetal. Appellant was arrested. He was medically examined in BJRMH. Doctor opined that there was nothing to suggest that the appellant was incapable of performing sexual intercourse. Blood stained undergarment of appellant was sealed by the doctor and handed over to the Investigating Officer. His blood sample on a piece of cotton was also taken. However, semen sample of appellant could not be taken due to his non-cooperation and noting to this effect has been made by the doctor in the MLC. On the pointing of appellant, blood stained mattress was also seized. Vaginal swab, underwear and pant of the prosecutrix, one towel having brown stains as also blood sample and underwear of the appellant were sent to Forensic Science Laboratory (FSL) and its report was obtained. As per this report, human blood of 'B' Group was found on the underwear of

the prosecutrix. It was also found on the towel and quilt. Semen was also detected on the underwear and pant of the prosecutrix.

6. After completion of investigation, appellant was sent up to face trial for having committed an offence under Section 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.

7. Charge under Section 376 IPC was framed against the appellant on 19th April, 2005 by the Trial Court to which he pleaded not guilty and claimed trial.

8. Prosecution examined thirteen witnesses to prove its story. Material witnesses are PW1 Sheetal, mother of the prosecutrix; prosecutrix herself, who has been examined as PW2, PW7 Dr. Sujata Gautam, Senior Resident (Gynae Department), BJRMH, who had examined the prosecutrix vide MLC Ex. PW7/A and has deposed in this regard. PW11 Shri Vinod Yadav, Administrative Sub-Judge, Delhi had recorded the statement of prosecutrix under Section 164 Cr.P.C. and has proved the same as Ex. PW 11/B. All other witnesses are formal in nature being police officials, who had been joined with investigation at one or the other stage.

9. After the prosecution closed its evidence, statement under Section 313 Cr.P.C. of the appellant was recorded, wherein entire

incriminating material, which had come on record in the prosecution evidence, was put to him. Appellant admitted that on 1st December, 2004 PW1 Sheetal along with her daughter (prosecutrix) aged about 5 years and son Aditya aged about 3 years were in his house bearing No. D-179, Jahangir Puri, Delhi and in fact she had been residing there. However, he denied that he had committed rape upon the prosecutrix on 1st December, 2004 between 3:00 PM to 4:00 PM. He claimed that he had been falsely implicated in this case. He also examined Gopal Sharma and Bimla Devi, who were residents of the same locality, as DW1 and DW2 respectively. Both these witnesses have deposed that on the date of incident at about 3/4 PM they saw Sheetal and appellant quarreling with each other. Number of persons had gathered there and they were saying that Sheetal was in love with the appellant; she had given warning to the appellant that he will have to face dire consequences.

10. Learned Trial Court meticulously examined the testimonies of PW1 Sheetal and PW2 prosecutrix and it found their versions to be trustworthy and reliable, sufficient enough to conclude that it is the appellant who had committed rape upon the prosecutrix on the fateful day. Trial Court was also of the view that their version was duly corroborated from the medical and scientific evidence available on record, inasmuch as FSL report indicated the presence of human semen on the clothes of the prosecutrix and

underwear of the appellant and doctor also found injuries on the vagina of the prosecutrix. On the basis of evidence adduced by the prosecution, Trial Court concluded that the prosecutrix was sexually assaulted by the appellant. Arguments of the appellant that he had been falsely implicated by the prosecutrix and her mother on account of strained relations between his parents and PW1 have been rejected. It was observed that had their relations been strained, PW1 Sheetal would not have been staying at the appellant's house for such a long period. That apart, Trial Court was also of the view that contradictory defenses taken by the appellant goes against him, inasmuch as DW1 and DW2 had deposed that Sheetal was in love with the appellant and on this point, a quarrel had taken place between them on the fateful day when she allegedly threatened the appellant that he shall face dire consequences, which defenses were, otherwise, not put to PW1 in her cross-examination. Trial Court was also of the view that there was no reason as to why Sheetal, who was cousin of appellant, would have implicated him in grave charges of rape of her daughter, more so when she had been staying in his house for the past 15 days.

11. I have carefully perused the statements of prosecutrix (PW2) and her mother (PW1) and I find their testimony trustworthy and reliable. They have fully corroborated the prosecution case. Their depositions in the Court are in line with their statements recorded

during the investigation. Both of them have fully supported the prosecution story. Prosecutrix PW2 has categorically deposed that on 1st December, 2004 she had come to Delhi alongwith her mother and brother. Appellant was her maternal uncle; he was living in Delhi; appellant had inserted his penis in her vagina. Thereafter, her mother removed her to the hospital where she was medically treated. She identified the appellant in the Court. PW1 Sheetal deposed that she had been living in Pune along with her family. Her maternal uncle, aunt and other relatives were living in Delhi. She along with her daughter (prosecutrix) and son Aditya had come to Delhi and was staying at her aunt's (Mausi) house in Jahangirpuri, Delhi. On 1st December, 2004 between 3:00 PM to 4:00 PM she was sitting outside the house, while her daughter (prosecutrix) was sleeping on the bed in a room inside the house. Appellant, son of her aunt, was also sleeping there. On hearing cries of her daughter she rushed inside the room and found her daughter lying on the bed without clothes. She noticed that the pant of her daughter as well as half pant of the appellant was lying on the floor. Appellant was trying to wear his nicker. Her daughter was bleeding per vagina. On enquiry, her daughter disclosed that the appellant had kept his penis over her private parts. She removed her daughter to BJRMH.

12. Above version given by PW1 and PW2 has remained unshattered in their cross-examination. Perusal of MLC shows

that the prosecutrix was admitted in the hospital with the history of “sexual assault”. Doctor found injuries on the private parts of the prosecutrix. This medical evidence corroborates the version of prosecutrix and her mother Sheetal. PW7 Dr. Sujata Gautam has categorically deposed that on 1st December, 2004 she had examined the prosecutrix aged about 5 years. She was bleeding from vagina with clots; posterior vaginal wall was torn which extended to perineum to the extent of 1.5 inches externally; upper limit was not reachable because of pain and uncooperative attitude of the patient. In her cross-examination, PW7 has clarified that the “posterior vaginal wall torn” meant that hymen was torn and was extended upto perineum. PW1 categorically denied a suggestion that the injuries, as mentioned in the MLC, had been caused due to fall from the bed and not due to any sexual intercourse. This medical evidence clearly indicates and supports the version of PW2 and PW1 that the prosecutrix was sexually assaulted on the fateful day. As per PW2 prosecutrix, it is the appellant who had sexually assaulted her and this fact was narrated by her to her mother PW1 Sheetal immediately after the incident, inasmuch as PW1 Sheetal had herself seen the appellant in the room naked below the waist and trying to wear his nicker. Even the scientific evidence duly supports the versions of PW1 and PW2, as human blood as well as semen stains were found on the underwear and pant of the prosecutrix which were of “B’ group.

Blood sample of the appellant taken on cotton was also identified as that of 'B' group. I am of the opinion that in view of the overwhelming evidence indicating culpability of appellant, Trial Court has rightly concluded that it is the appellant who had committed raped upon the prosecutrix on the fateful day, thus, was guilty of committing offence punishable under Section 376 IPC.

13. Learned Amicus Curiae has vehemently contended that PW2 was a child witness vulnerable to the tutoring of her near and dear ones, more particularly by her mother, inasmuch as, in her cross-examination the prosecutrix, in answer to a suggestion put by the defense counsel, had admitted that her mother had told her to say that the appellant had inserted his penis in her vagina. In nutshell, contention of the appellant is that PW2 was a tutored witness and no reliance could have been placed on her testimony. I do not find any force in this contention of the learned Amicus Curiae. When the whole testimony of the prosecutrix PW2 is read, it shows that she is a natural witness and had spoken truthfully in the court in all respects including the incident. A suggestion was put to her by the defense counsel that it was at the instance of her mother that she had deposed that the appellant had inserted his penis in her vagina to which she replied that her mother had told her about this fact. Immediately thereafter the Trial Court got this fact clarified by putting a court question as to whether this fact

was spoken by her on the basis of tutoring by her mother or in fact the appellant had inserted his penis in her vagina. In answer to this court question, the prosecutrix categorically stated that appellant had inserted his penis in her vagina. This clearly shows that she had not narrated this fact on the basis of any tutoring by her mother, but in fact the incident had occurred in the manner as described by the PW2. There is nothing to suggest that whatever was deposed by the prosecutrix, was based on tutoring by her mother, more particularly when in answer to the court question prosecutrix had categorically re-asserted and reaffirmed the aforementioned fact

14. It is well settled that a child witness, if found competent to depose the facts and reliable one, such evidence could be the basis of conviction. In case such witness is able to understand the questions and able to give rational answers thereof, the evidence of such a child witness can be considered. However, credibility of a child witness would depend upon the circumstances of each case. Once a court, after careful scrutiny of a child witness, 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 a child witness. Merely because, the witness is a child his/her evidence cannot be treated as unreliable. I have perused the testimony of PW2 prosecutrix, keeping in mind the above settled principles, I find her to be trustworthy and reliable. Her statement in examination-in-

chief has remained unshaken in her cross-examination. Prosecutrix has clearly described the incident and identified the appellant. Not only this, her testimony is duly corroborated by the evidence of her mother. Besides this, the medical evidence also lends support to the evidence of the prosecutrix, inasmuch as injuries were noticed on the private parts of the prosecutrix.

15. Learned Amicus Curiae has next contended that PW1 is not a trustworthy and reliable witness as her testimony is not in line with the prosecution case. In her cross-examination PW1 has deposed that after the incident prosecutrix changed her underwear before she was brought to the hospital. However, as per the prosecution, prosecutrix was wearing the same underwear which she was wearing at the time of incident. The underwear was seized in the hospital. Thus, it is contended that PW1 is not a reliable witness. Other discrepancy as pointed out by the learned Amicus Curiae is that while deposing in the court PW1 has stated that half pant of the appellant was lying on the floor of the room and he was trying to wear the nicker/half pant; while this fact was not mentioned by her in the FIR, wherein she had stated that appellant had slide down his underwear and pant. In my view, these discrepancies are minor in nature and are not sufficient enough to discredit the whole testimony of PW1. Statement of PW1 was recorded in the Court after about eight months of the incident. Due to lapse of the time, there are chances of fading of memory of

a person and in such eventuality some minor discrepancies are bound to occur. In fact, such minor variations indicate that such witness is a natural witness.

16. That apart, I do not find any reason as to why PW1 Sheetal would have falsely implicated the appellant, who was her cousin. No evidence has been led to show that there was any past enmity between PW1 Sheetal and the appellant as well as with the appellant's mother. In fact PW1 had come to Delhi and had been staying at her aunt's house which itself indicates that they had cordial relations. Defense set up by the appellant also does not inspire any confidence. DW1 and DW2 had deposed that on the date of incident at about 3:00 PM/4:00 PM they noticed appellant and PW1 Sheetal quarreling with each other and the crowd, which had gathered there, was saying that PW1 Sheetal was in love with the appellant and she was threatening the appellant that he will have to face dire consequences. No such suggestion was given to PW1 in her cross-examination and this defense appears to have been taken as an afterthought. That apart, statements of DW1 and DW2 clearly show that they were not having personal knowledge about this fact as they had allegedly heard about it from the crowd which had gathered outside the house of the appellant on the fateful day. In fact, the statements of DW1 and DW2 goes to show that this incident had taken place on the fateful day between 3:00/4:00 PM. May be after finding that appellant had

raped her daughter, PW1 had raised alarm as a result whereof, crowd gathered there. This plea, in fact, goes against the appellant and supports the prosecution.

17. For the foregoing reasons, I am of the view that Trial Court has rightly convicted the appellant under Section 376 IPC.

18. Section 376(2)(f) of the IPC provides that whoever commits rape on a woman who is under twelve years of age shall be punished with minimum sentence of not less than ten years. However, proviso to Section 376(2) empowers a court to reduce the sentence less than the minimum prescribed for adequate and special reasons.

19. In this case, I do not find any adequate and special reasons in favour of the appellant to reduce the sentence less than the minimum prescribed. Keeping in mind the age of prosecutrix, the sentence awarded by the Trial Court needs no interference.

20. For the foregoing reasons, Appeal is dismissed. A copy of this order be sent to Superintendent Jail for serving it on the appellant.

A.K. PATHAK, J.

NOVEMBER 9th, 2010

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