

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

Judgment delivered on: August 16, 2010

+ **CRIMINAL APPEAL NO.589/2005**

RAVI RAM MUSAHARI

....APPELLANT

Through: Mr. Rajesh Mahajan, Advocate/Amicus
Curiae with Ms. Satsheel Sheokand,
Advocate

Versus

THE STATE OF NCT OF DELHI

.....RESPONDENT

Through: Mr. Pawan K. Bahl, APP

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

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

AJIT BHARIHOKE, J.(ORAL)

1. This appeal is directed against the impugned judgment of Additional Sessions Judge dated 21st May, 2005 in terms of which the appellant was convicted on the charge under Section 376 IPC as also the consequent order on sentence of even date in terms of which the appellant was awarded rigorous imprisonment for a period of 10 years and was directed to pay a fine of Rs.5000/-, in default of payment of which to undergo RI for five months.

2. Briefly stated, case of the prosecution is that on 30th March, 2002 Veer Bahadur (PW3) visited police station Vikas Puri and lodged a complaint stating that on 29th March, 2002 at around 4:00 p.m., while he was present in his home along with his wife, his daughter aged 7 years came weeping. Her vagina was stained with blood and she told them that their neighbour Ravi Ram Musahari @ Bahadur had indulged in wrong act (rape) with her. PW3 further alleged that when he and his wife Poonam asked for details, his daughter i.e. the prosecutrix (name withheld) told them that the appellant had lured her to his room located in premises No.WZ-55, Village Budella, Vikas Puri and there he made her to lie on the ground and removed her underwear. Thereafter, he fingered her and inserted his penis in her vagina. As a consequence, she suffered pain and started bleeding. The Investigating Officer reduced the complaint into writing(Ex.PW3/A) and sent it to the Duty Officer for the registration of the formal FIR. Investigation of the case was entrusted to S.I. Mahender Singh, who inspected the spot, arrested the appellant, sent the prosecutrix as well as the appellant for medical examination and sent the exhibits including underwear of the prosecutrix to CFSL for chemical examination. He got the statement of the prosecutrix recorded under Section 164 Cr.P.C. and also recorded statement of the witness. On completion of investigation, the appellant was charge-sheeted and sent for trial.

3. The learned Additional Sessions Judge, on consideration of the material collected during investigation, charged the appellant for the offence of rape punishable under Section 376 IPC. The appellant pleaded not guilty to the charge and claimed trial.

4. In order to bring home the guilt of the appellant, prosecution has examined 13 witnesses in all. However, the material witnesses out of them are the prosecutrix, who has given first hand version of the occurrence and the parents of the prosecutrix, who were the witnesses of conduct of the prosecutrix immediately after the occurrence, besides the medical evidence.

5. Prosecutrix was examined as PW2. She has deposed that the appellant was her neighbour. It was a day of 'Holi' when the appellant, on the pretext of giving her a toffee took her to his room and bolted it from inside. Thereafter, the appellant removed her panty and inserted his penis in her mouth. After that the appellant inserted his penis in her vagina. Prosecutrix further stated that after the occurrence, she came back to her house and narrated the incident to her mother. She was taken to the hospital by her parents.

6. PW3 Veer Bahadur is the father of the prosecutrix. He has stated that on 29th March, 2002 i.e. on the day of 'Holi', the prosecutrix had gone out to play 'Holi'. At around 4:00 p.m., prosecutrix came home and she was not fully oriented. Next day, she told her mother that a boy who was residing in the neighbourhood had indulged in a wrong

act (*`ganda kaam'*) with her. On this, his wife took her to the house of the appellant but the appellant was not present there. Thereafter, he went to the police station and lodged a complaint. Police arrived at the spot and apprehended the appellant on the pointing of the prosecutrix. He has proved his complaint Ex.PW3/A and personal search memo of the appellant Ex.PW3/B. He also stated that the statement of prosecutrix was also recorded before the Magistrate at Tis Hazari Courts.

7. PW5 Smt.Poonam is the mother of the prosecutrix. She has stated that on the relevant day, she was present at the house with her husband who was unwell and her daughter was playing outside. When the prosecutrix returned home, she was bleeding profusely, was disoriented and was unable to speak. When the prosecutrix composed herself after some time, she told that she was lured by the appellant with the offer of a toffee to his room where he committed wrong act with her. Police was informed by her husband and the police took the prosecutrix to DDU Hospital for medical examination. She has also stated that the statement of the prosecutrix was recorded during investigation by the Magistrate.

8. PW1 Dr. Nishu Dhawan of DDU Hospital has deposed that she prepared the MLC of the prosecutrix (Ex.PW1/A) and referred her for gynaecological examination. She also stated that on the same day, she (PW1) physically examined the appellant Ravi Ram and prepared

his MLC Ex.PW1/B. According to her, there was nothing to suggest that the appellant was not capable of performing sexual act.

9. PW10 Dr.Seema, Senior Resident, DDU Hospital has proved the report of medical examination of the prosecutrix Ex.PW10/A prepared by Dr.Mamta, by way of secondary evidence. She stated that the prosecutrix herself gave the history of scratching her vulva by a neighbour and on examination, no injury mark was found anywhere on the body. However, there was a perineal tear present 1 cm from posterior fourchette to perineal skin and the injury mark appeared to be fresh. Hymen was intact but bruised and no active bleeding was seen. She further deposed that a vaginal smear was taken and a slide was made.

10. The appellant when examined under Section 313 Cr.P.C. denied the prosecution story and he claimed that he has been falsely implicated. No witness in defence has been examined.

11. Learned Shri Rajesh Mahajan, advocate, amicus curiae appearing for the appellant has submitted that the impugned judgment of conviction is based upon the wrong appreciation of the facts. Learned amicus curiae took this Court through the MLC of the prosecutrix Ex.PW1/A and the history of the incident Ex.PW10/A recorded thereon by Dr. Mamta, Gynaecologist who attended to the prosecutrix on 31.03.2002 at 2:15 am and submitted that as per the endorsement of Dr. Mamta Ex.PW10/A on the MLC of the prosecutrix, the prosecutrix

herself told Dr. Mamta that some boy in the neighbourhood had scratched her vulva with his finger nails and there is no mention of penetration of the penis by said boy in her vagina, which circumstance makes the prosecution story of the commission of rape of the prosecutrix by the appellant highly suspect. Expanding on the argument, learned amicus curiae submitted that as per the MLC, no injury marks were seen on the body of the prosecutrix and even her hymen was intact and no active bleeding from vagina was seen, which also negates the theory of rape. Thus, learned amicus curiae summed up that on the aforesaid count itself, the appellant is entitled to benefit of doubt.

12. I am not convinced with the submission made by the learned amicus curiae. Perusal of the MLC Ex.PW1/A would reveal that the prosecutrix was taken to DDU Hospital for medical examination on 30.03.2002 at 10:25 pm. There she was examined by Dr. Nishu Dhawan, who prepared the MLC Ex.PW1/A and recorded "H/O sexual act" as told by Smt. Manju. It appears from the MLC that the prosecutrix was examined on the same night intervening 30th and 31st March, 2002 at 2:15 am when she, inter alia, recorded the history as under:

"According to the neighbour lady accompanying the patient, she was raped on 29.03.2002 by a boy in the neighbourhood. According to the patient herself, some boy in the neighbourhood scratched her vulva with his finger nails."

Learned amicus curiae has urged this Court to infer from the history given by the prosecutrix to Dr. Mamta that she was not raped and only her vulva was scratched with the finger nail. In my considered view, this circumstance by itself cannot be taken as a reason to reject the prosecution case. While appreciating the evidence, one cannot lose sight of the fact that the prosecutrix was a child aged seven years and she had undergone the trauma of being sexually violated by the accused. Therefore, if she, while giving the history to the Gynaecologist did not mention about the rape, it cannot be given undue importance. On perusal of the testimony of prosecutrix who was examined as PW2, it is apparent that her version is consistent with the version recorded in the FIR Ex.PW4/A, which was registered on the basis of the statement of Shri Veer Bahadur, father of the prosecutrix. The version of the prosecutrix also finds corroboration from the testimony of complainant Veer Bahadur who has categorically stated that on the day of Holi festival at about 4:00 pm, when the prosecutrix came home, she was disoriented and she told her mother that someone in the neighbourhood has raped her. PW5 Smt. Poonam, mother of the prosecutrix has also deposed to the similar effect. There is nothing on the record to suggest that the parents of the prosecutrix had any reason or motive to falsely implicate the appellant. Therefore, I find no reason to suspect their version. Even if for the sake of argument, it is assumed that parents of the prosecutrix were nursing some grudge against the appellant, then also it is highly improbable

that they would make false allegations of rape of their child by the appellant to settle their score at the cost of honour and reputation of their family. Even the medical evidence supports the testimony of prosecutrix to a certain extent. As per the endorsement of Gynaecologist Ex.PW10/A on the MLC, the hymen of the prosecutrix was found bruised and the presence of bruises on the hymen of the prosecutrix almost two days after the incident is sufficient evidence to indicate that the appellant had actually forced his penis into the vagina of the prosecutrix. Section 375 of the Indian Penal Code defines the rape as follows:

“375. Rape.-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: -

First.-Against her will.

Secondly.-without her consent.

Thirdly. - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly. -With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. - With or without her consent, when she is under sixteen years of age.

Explanation: - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: -Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

13. On reading of first Explanation to Section 375 IPC, it is obvious that a slightest penetration of penile organ is sufficient to constitute the sexual intercourse necessary for the offence of rape. Thus, in view of the testimony of the prosecutrix as well as her parents PW3 Veer Bahadur and PW5 Poonam, there is no doubt left that the appellant did commit rape of the prosecutrix.

14. In view of the discussion above, I find no reason to interfere with the impugned judgment of conviction passed by the learned Additional Sessions Judge.

15. Appeal is dismissed accordingly.

(AJIT BHARIHOKE)
JUDGE

AUGUST 16, 2010
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