

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

% *Judgment Reserved On: 19th January, 2010*
Judgment Delivered On: 22nd January, 2010

+ **CRL.APPEAL NO.58/2006**

RAJAB ALI Appellant

Through: Mr.S.Q.Kazim, Advocate with
Mr.Alim Mizaj, Advocate

Versus

STATE Respondent

Through: Mr.M.N.Dudeja, Advocate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J.

1. Since 'F' i.e. the prosecutrix who was aged 3½ years when she was admittedly raped in the evening of 21.1.2003, while deposing in Court on 29.10.2004 stated that the appellant enticed her with offer of peanuts and took her behind bushes and after putting a hand on her mouth committed an act causing pain to her and she started bleeding as a result her clothes got stained with mud and blood; the

learned Trial Judge has held that it would be safe to convict the appellant on said testimony of the prosecutrix, which found support from the testimony of Mst.Meena PW-10 who deposed that she saw the appellant going with a minor girl at 7:30 PM as also the testimony of Mohd.Kaushar PW-1 and Mst.Firoza PW-3 the parents of the prosecutrix who deposed that the prosecutrix left the house at around 6.00 PM to purchase peanuts and since she did not return within reasonable time they went searching for her and found her coming towards the house in the company of a boy aged 8 years who was holding her hand and at that time mud was stuck on the clothes of their daughter and when she was bathed blood was noticed oozing from her private parts. The learned Trial Judge has found that the young boy who was accompanying the prosecutrix to her house was Amir PW-13 who deposed in court that on 21.1.2003 he had gone to fetch milk at about 8:00 PM and on the way he saw a girl child crying near a *Nali*. He was taking the girl to the Police Station when her parents met them and he handed over the girl to them. The learned Trial Judge has found further incriminating evidence in the fact that the pair of chappals Ex.P-1 recovered from the bushes near a *Naala* as entered in the seizure memo Ex.PW-1/C was

recovered from the said spot pursuant to the confessional cum disclosure statement Ex.PW-8/B made by the appellant and after he was arrested and after the statement he led SI Aadesh Kumar PW-17 to the spot wherefrom the recovery was made. The said pair of chappals was identified by the father of the prosecutrix as that of his daughter. That the prosecutrix was raped has been held established through the testimony of Dr.Shabab Alam Qureshi PW-11 and Dr.Shikha Sharma PW-21 as also Dr.Anil Aggarwal PW-18. As per the parents of the prosecutrix when they noticed blood oozing from the vagina of the prosecutrix when she was being bathed, they took her to the clinic of Dr.Shabab Alam Qureshi PW-11 who found that the child was seriously injured and hence referred her to a government hospital. The prosecutrix was taken to LNJP Hospital where Dr.Ritu Gupta Senior Resident examined her and diagnosed a small tear over posterior vaginal wall; external anal had sphincter with stool oozing out evidencing complete perineal tear. She took the vaginal smear, which was analyzed by Dr.Anil Aggarwal PW-18 the Head of the Department of Forensic Medicine at Maulana Azad Medical College and as per the report Ex.PW-18/A noted that the microscopic field was full of red blood cells and spermatozoa

head. Lest there be any confusion we may note here itself that Dr.Shikha Sharma PW-21 proved the MLC Ex.PW-21/A prepared by Dr.Ritu Gupta for the reason Dr.Ritu Gupta had left LNJP Hospital and she had worked under Dr.Shikha Sharma who stated that she was conversant with the handwriting and the signatures of Dr.Ritu Gupta. That the appellant was capable of performing sex has been held to be established through the testimony of Dr.V.K.Yadav PW-20 who examined the appellant on 24.1.2003 and made a detailed report Ex.PW-20/A recording therein that the appellant refused to give his semen sample.

2. Since a brief resume of the evidence led has been intertwined by us while analyzing the impugned decision, we may straightaway note the arguments advanced by learned counsel for the appellant when the appeal was heard on 19.1.2010.

3. The first contention urged was that as per the report Ex.PW-18/A and the testimony of Dr.Anil Aggarwal PW-18 spermatozoa head was noted when the vaginal swab of the prosecutrix was examined under a microscope and by not conducting any DNA analysis with reference to the sperms of the appellant the prosecution has withheld the most reliable

evidence and hence the appellant is entitled to the benefit of doubt. The second contention urged is that after he was apprehended, the appellant was not subjected to any test identification by Mst.Meena PW-10. The third contention urged was that in the undergarment of the prosecutrix no sperm was detected and this rules out that the prosecutrix was raped. Fourthly, it was urged that as per the seizure memo Ex.PW-1/C the pair of chappals Ex.P-1 were recovered from within the bushes adjoining a *Naala* along the railway line but father of the prosecutrix Mohd.Kaushar PW-1 categorically deposed that his daughter returned with one chappal and the other was recovered from the *Naala*. Lastly, it was urged that PW-8 has categorically deposed that he signed blank papers at the asking of PW-1 and that the statement Ex.PW-8/B as also the recovery memo Ex.PW-1/C pertaining to the pair of chappals was drawn using the said blank papers.

4. We may note that the argument before the learned Trial Judge pertaining to Mst.Meena PW-10 being a false witness as the accused had seen her in a compromising position with Amjad PW-7 has not been urged before us for the obvious reason learned counsel for the appellant could not on the one hand urge that Mst.Meena and the appellant knew

each other and that she had a motive to falsely implicate him and at the same time urge that Meena not being made to identify the appellant after he was arrested during investigation, her dock identification lacked credibility.

5. Qua the first plea urged it may be noted that as per Dr.V.K.Yadav PW-20 who medically examined the appellant on 24.1.2003, the appellant refused to give his semen sample. Thus, where was the occasion for the investigating officer to have got done DNA analysis of the spermatozoa head detected in the vaginal swab of the prosecutrix when Dr.Anil Aggarwal PW-18 analyzed the same under a microscope.

6. On the issue of the appellant not being subjected to any TIP by Meena, from the testimony of Meena where she has said that when she saw the appellant with a young girl he asked her where was he taking the girl, it is apparent that Meena knew the appellant and thus it hardly matters whether Meena was not required to identify the appellant in a test identification parade.

7. We are surprised at the third submission made pertaining to no sperm being detected on the underwear of the prosecutrix and hence the requirement to draw a conclusion that the prosecutrix was not raped. Our surprise is due to the

fact that the very first submission urged was that the spermatozoa head found in the vaginal swab of the prosecutrix was not subjected to a DNA analysis. Obviously, the foundation of the first submission is the detection of spermatozoa in the vaginal swab of the prosecutrix. Be that as it may, not only the fact that spermatozoa was detected on the vaginal swab of the prosecutrix, the MLC Ex.PW-21/A and the testimony of PW-11 and PW-21 conclusively establish that the prosecutrix was brutally raped. There was a tear over posterior vaginal wall and the external anal had sphincter evidencing complete perineal tear. The testimony of the parents of the unfortunate young girl also proves that their daughter was raped. The absence of semen on the underwear of the victim is explainable on various counts, the foremost being, that the underwear was removed completely and not simply slid down to facilitate a complete penetration by the appellant. That the penetration was complete is proved by the prosecutrix suffering complete perineal tear. Her infant age of 3½ years would have required a probable wide parting of the legs. After the rape was complete, the prosecutrix was made to wear the underwear and may be the sperms in the vagina did not flow on to the underwear.

8. It is no doubt true that PW-1 has stated that his daughter returned with one chappal and the other was found at the spot wherefrom the recovery of both chappals has been shown in the memo Ex.PW-1/C. But, all other witnesses to the recovery have unanimously deposed that the pair of chappals Ex.P-1 i.e. both feet were recovered from the spot whereto the appellant led the investigating officer and as entered in the seizure memo Ex.PW-1/C. Thus, we take it as a blemish on the part of PW-1 to somewhat be confused and discount the blemish with reference to PW-1 being an illiterate vegetable vendor whose illiteracy is evidenced by the fact that he cannot even append his signatures and has affixed the left thumb impression on his deposition as recorded in Court in acknowledgment of the same having been read over and explained to him.

9. That Mohd.Tafsir PW-8 a witness to the recovery memo Ex.PW-1/C as also to the disclosure statement Ex.PW-8/B of the appellant has chosen not to support the case of the prosecution does not discredit the other witnesses of the prosecution who have stood the test of cross examination with respect to the recording of the disclosure statement and the

recovery effected pursuant thereto namely Mohd.Kaushar PW-1 and SI Adesh Kumar PW-17.

10. We may note that no suggestions have been put to the parents of the prosecutrix that they were falsely implicating the appellant on account of any enmity. We wonder why should the parents of the prosecutrix falsely implicate an innocent person.

11. Though no submissions were urged before us pertaining to the testimony of the prosecutrix, in all fairness to the appellant we have perused the testimony of the young girl who was aged only 4 years when she deposed in Court. She could only understand and speak in Bengali and hence the Court took the services of an interpreter namely Dr.Anita Basu a Reader in Modern Indian Languages in the University of Delhi. Her testimony shows that the prosecutrix was extremely petrified when she appeared in Court. What is worthy to be noted is that to the question: *Who had taken you away?* She replied by a gesture by pointing out towards the accused. To the next question whether she knew where the accused resides, the child replied 'No'. To the question: *What the accused did to you?* She gave no reply. She simply kept

mum. With the permission of the Court learned APP put leading questions to her. Her further testimony is as under:-

“It is correct that the accused had given me peanuts to eat. The accused had taken me behind the bushes. The accused had raped me behind the bushes. I felt pain and blood oozed out but the witness does not state from where blood had oozed out. Blood had oozed out from my private part. Accused had put his hand on my mouth. The witness does not answer whether she was wearing chappal. Again said, she was wearing chappal. The accused had pushed me in the nalla. One boy had brought me from there. I do not know the boy who had brought me from the spot. My clothes were blood stained and clay stained. I was taken to the hospital by my parents.”

12. It would not be out of place to note that the prosecutrix has substantially deposed what has otherwise been proved by the prosecution. That she was raped at a place where there was slush has been proved through the testimony of the parents of the prosecutrix who have stated that when they searched for their daughter and saw her, mud was stuck on her clothes and she had to be bathed. That the prosecutrix has said that one boy had brought her from the place where she was raped has been independently proved through the testimony of Amir PW-13 who has stated that when he went to fetch milk he saw a girl child crying near a naali and he was taking her to the police station when her parents met them and he handed over the girl to them.

13. Noting that no submissions were urged on the issue of the sentence imposed which is to undergo imprisonment for life, noting the brutal manner in which the crime was committed, we see no scope to reduce the sentence.

14. The appeal is dismissed.

15. Since the appellant is in jail, copy of this order be sent to the Superintendent Central Jail Tihar for being supplied to the appellant.

(PRADEEP NANDRAJOG)
JUDGE

(SURESH KAIT)
JUDGE

JANUARY 22, 2010
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