

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL. APPEAL NO. 773/2006**

% Decided on: 8th March, 2010

Salim Appellant
Through: Mr. Rajesh Mahan and
Mr. Ajay Raghav, Advs.
Versus

State (Govt.of NCT of Delhi) Respondent
Through: Mr. Manoj Ohri, APP for the
State.

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

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 was convicted under Section 376 IPC by the learned Additional Sessions Judge, Delhi and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 2,000/-; in default of payment of fine, to undergo rigorous imprisonment for two months.

2. As per the prosecution, on 25th February, 2004 at about

07:15 am, prosecutrix, aged about seven years was sent to market by her father to buy tea leaves from a shop at Jagat Pur, Delhi. Prosecutrix returned home at about 8 am and at that time she was bleeding per vagina. On enquiry she confided in her mother that one man had pushed her and raped near a vehicle parked at Jagat Pur Mod near a water tap.

3. Father of the prosecutrix went to the Police Station Timarpur along with his daughter and contacted ASI Sushma Ikka, who took them to Aruna Asif Ali Hospital, where prosecutrix was clinically examined. Statement of the father of prosecutrix was recorded, as victim was not in a position to make a statement, and pursuant thereof, FIR No. 79/2004 under Section 376 IPC was registered. Later, prosecutrix was treated at L.N.J.P. Hospital. As per the MLC, hymen of the prosecutrix was found ruptured with fresh bleeding. No external injury was found over the perineum or inner thigh. Blood stained underwear of the prosecutrix was sealed in the hospital by the doctor and handed over to the investigating officer.

4. Statement of prosecutrix was recorded on 1st March, 2004 by the Investigating Officer wherein she stated that while she was going to buy tea leaves, one man called her near the water tap where a vehicle was parked; he pushed her; removed her underwear; gagged her mouth and thereafter took out his penis and laid upon her and as a consequence of this act, bleeding started. Said man was not known to her. Thereafter, she went to shop and purchased tea leaves and returned home.

5. During the investigation, Investigating Officer, came to know that two buses used to remain parked near the water tap. On the date of incident two buses were parked there out of which one belonged to Police Training Institute and other was owned by one Satish. Investigating Officer made enquiries from Satish and came to know that the cleaner of bus namely Salim was in the bus that day and was absconding. After about one month i.e. on 25th March, 2004 Investigating Officer along with prosecutrix and her parents reached near Jagat Pur in search of appellant, and found

him present in the market. On seeing the appellant, prosecutrix got frightened and hugged her mother. On her identification appellant was arrested. Later he was got medically examined in the hospital. Doctor opined that he was capable of performing sexual intercourse. Blood sample of appellant was taken and sealed.

6. Subsequently, blood sample, under wears of prosecutrix and appellant were sent to FSL and its report was obtained. Semen was not detected on the under wears.

7. Learned Additional Sessions Judge framed charge under Section 376 IPC against the appellant to which he pleaded not guilty and claimed trial.

8. Prosecution examined eighteen witnesses to support its story. Prosecutrix was examined as PW1, her parents Mamta Sarkar and Rattan Sarkar were examined as PW2 and PW3, respectively. All other witnesses are either doctors or Police officials. Investigating Officer was examined as PW18.

9. In his statement under Section 313 Cr.P.C. appellant denied having committed the offence and claimed himself to be innocent. He further stated that he was falsely implicated in this case. However, no evidence was lead by him in his defence.

10. Learned Additional Sessions Judge found the statement of PW1 trustworthy and reliable, duly supported by medical evidence, according to which, injuries were found on the private parts of the prosecutrix and came to the conclusion that it was the appellant, who had committed rape upon the prosecutrix. Consequently appellant was convicted under Section 376 IPC.

11. Learned Amicus Curiae for the appellant vehemently contended that no reliance can be placed on the testimony of prosecutrix as the same was based on tutoring. In her cross examination, prosecutrix categorically admitted that her father had taken her to Police Station in the morning before bringing her to the court, had instructed her about the statement to be made in the court. This clearly shows that statement of the prosecutrix in

the court was tutored one. He has further contended that prosecutrix, in her cross examination, categorically stated that she sustained injuries herself in her house. Her this answer also falsify the whole prosecution story that appellant had raped the prosecutrix. He has further contended that the mother of the prosecutrix admitted, in her cross-examination, that water tap was situated in a park which was near a busy road. Lot of people used to come to that park to bathe and fetch water; that several vehicles also used to remain parked there. In this scenario, it was improbable that appellant would have raped the prosecutrix near the water tap in the open and in full public view. His another contention is that the manner in which arrest of the appellant is made, is also suspicious. As per PW18, she came to know from Satish, immediately after the incident, that the appellant was absconding. Despite this, no efforts were made to arrest the appellant. It was highly improbable that appellant would have been roaming in the same area knowing fully well that police was

after him. In nutshell, his contention is that the whole prosecution case is shrouded with mystery and suspicion which makes the appellant entitled to benefit of doubt and consequent acquittal.

12. As against this, learned counsel for the respondent has vehemently contended that prosecutrix was a minor child. There is no reason to disbelieve her. Right from the beginning, prosecutrix had maintained her stand that one man had called her near the water tap, pushed her and raped her. Keeping in mind the tender age of the prosecutrix, minor variations in her cross examination have to be ignored. There is no reason as to why prosecutrix and her parents would implicate appellant in such a the serious offence of rape, more so, when there was no past enmity between them. He has further contended that appellant was arrested on the pointing of prosecutrix, therefore, identification of appellant was not in dispute. According to learned counsel, impugned order is in consonance with the evidence led before the learned trial court and requires no interference.

13. I have considered the rival contentions of both the parties and carefully perused the trial court record. In her examination-in-chief, PW1 stated that while she was going to buy tea leaves, appellant met her on the way and pushed her and thereafter inserted his organ in her private part as a consequence of which, blood started oozing out. She returned home and narrated the incident to her father. Thereafter, she was taken to Police Station. However, in her cross-examination, she deposed that she sustained injuries in her house. Her this version in cross-examination creates a serious doubt about her version that she was raped near the water tap that too by the appellant. Prosecutrix further deposed that before tendering her statement before the court, in the morning, she was taken to Police Station by her father and was briefed about the statement to be made before the court. This shows that on the date when her statement was to be recorded in the court, she was first taken to the Police Station and was tutored to narrate the story in the manner in

which she later on narrated in the court. Her answers in cross examination shattered her testimony completely and makes her an untrustworthy and unreliable witness.

14. It is well settled that conviction can be based upon sole testimony

of the prosecutrix if her statement inspires confidence and is believable. In such an eventuality court is not required to look upon the corroboration regarding version of prosecutrix through the medical, scientific or any other independent evidence. Though the evidence of a victim of alleged rape deserves due consideration and can be accepted without any corroboration, still such evidence has to be assessed as the evidence of any other witness and all that she says cannot be accepted on the face value. The same has to be tested on the touchstone of probabilities and her conduct. In this case, as described above, prosecutrix's statement suffers from infirmities and indicates tutoring making it unsafe to base conviction of the accused on such sole testimony.

15. In Prahlad Singh Vs. State of Madhya Pradesh reported in AIR 1997 SC 3442, in view of the statement of prosecutrix, in

her cross-examination, that the policewala uncle had tutored her statement outside the court, held that substantive evidence of the prosecutrix in court identifying the accused was of no relevance and no conviction could be based on the same.

16. That apart, version of the prosecution that prosecutrix was raped near the water tap appears to be improbable. PW2 in her cross-examination deposed that immediately after her girl arrived at home, she along with her husband and neighbours went to the place of incident but did not find any blood stains near the water tap. She also admitted that lot of persons were present near the water tap and she made enquiries from them but nothing could be discovered. She further admitted that in the morning several people take bath at the water tap. According to her, road adjoining to the park was also very busy and crowded and even vehicles used to remain parked there. Her this answer also creates doubts about the authenticity of the prosecution story. From the answers given by PW2, it is clear that place of

occurrence was not a secluded or isolated place. It was near a busy road. Water tap was in the park where several people used to take a stroll in the morning and also used to take bath. Incident took place at about 7:30/8:00 AM and at that time there must have been lot of people in the vicinity. As per the site plan also bus was parked in the open area and not adjoining to any wall. The area around the bus was open to public view. There was a school near the park. Therefore, it appears to be highly improbable that appellant could have committed rape of the prosecutrix in full public view. Place of occurrence is also doubtful keeping in mind the answers given by the prosecutrix in her cross-examination that she had sustained injuries herself in her house. Accordingly, benefit of doubt would obviously lean towards the appellant.

17. In the light of the above discussions, I am of the view that appellant is entitled to benefit of doubt resulting in his acquittal.

18. Accordingly, impugned order dated 9th May, 2006 is set aside and appellant is acquitted of the charges leveled against him. He

be released forthwith if not wanted in any other case.

19. Appeal is disposed of in the above terms.

20. Copy of the order be sent to Superintendent Jail for serving on the appellant and also for compliance.

A.K. PATHAK, J

March 08, 2010

ga