

IN THE HIGH COURT OF DELHI AT NEW DELHI

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CrI.A. 774 OF 2006

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Date of Decision: 10th December, 2010

AVTAR SINGH

....Appellant

!

Through: Ms. Neelam Grover, Advocate

Versus

\$ **STATE**

...Respondent

!

Through: Mr. Pawan Bahl, APP

CORAM:

* **HON'BLE MR. JUSTICE P.K.BHASIN**

1. Whether Reporters of local papers may be allowed to see the Judgment?(No)
2. To be referred to the Reporter or not?(No)
3. Whether the judgment should be reported in the digest?(No)

JUDGMENT

P.K.BHASIN, J:

The appellant challenges his conviction for the offences punishable under Sections 376 and 342 of the Indian Penal Code ('IPC' in short) by the Additional Sessions Judge vide judgment dated 19th August, 2006 and the sentence of 10 years imprisonment and fine of ₹ 1 lac under Section 376 IPC and sentence of imprisonment for one year and fine of ₹ 1,000 under Section 342 IPC awarded vide order dated 28th August, 2006.

2. The prosecution case was that on 7th January, 1997 at about 4 p.m. the prosecutrix, a child of about 7 years of age, was playing on the roof of

her house and her father was also sitting on the roof and he gave her the keys of the house and asked her to go downstairs. At that time her mother was not present in the house. While the prosecutrix was opening the door of her house the accused-appellant, who was her neighbour, came there and closed her mouth forcibly and took her to his quarter and bolted the door from inside. He then started playing his tape-recorder at high pitch and thereafter stripped her naked and then raped her. When she was still inside the accused's house his brother knocked at the door and the accused made her hide behind the curtain but when the door was opened the brother of the accused came inside and saw her and then the accused sent her outside and she came back to her home. She informed her parents about the said incident and also to their neighbour (PW-9). On 8th January, 1997 the said incident was narrated to the police by the prosecutrix herself when her mother and based on that statement FIR No. 44/1997 under Sections 376/342 IPC was registered. The prosecutrix was then got medically examined. No external injuries were noticed on her body by the doctor. Her hymen was found intact. The skirt which she was wearing at that time was sealed and sent to Forensic Science Laboratory where on examination human semen was detected on that skirt(Ex.P-1). Since the prosecutrix had named the accused - appellant in her first information statement to the police as the person

who had committed rape on her, he was arrested on 10th January, 1997 and he was also got medically examined by the police. During investigation, the statement of the prosecutrix under Section 164 of the Code of Criminal Procedure was also got recorded on 9th January, 1997 in which also she had categorically claimed that the accused-appellant Bittoo had committed rape on her. In due course, the police submitted a charge-sheet against the accused-appellant in Court and after committal of the case to the Sessions Court he was charged and tried for the offences punishable under Sections 376/342 IPC. The learned Additional Sessions Judge relying upon the testimony of the prosecutrix(PW-1) and her parents(PW-8 and PW-11) found the accused – appellant guilty for the commission of the afore-said offences. Aggrieved thereby, the accused filed the present appeal.

3. Learned counsel for the appellant had contended that the conviction of the appellant is not sustainable at all since the prosecution could not establish its case beyond reasonable doubt. Elaborating the challenge, learned counsel submitted that the prosecution case was highly doubtful since there were no external injuries of any kind found on the person of the prosecutrix at the time of her medical examination and even the hymen was found intact and, therefore, the statement of the prosecutrix made in the Court was falsified. In support, one judgment of

Allahabad High Court in ***“Zahoor Ali vs. State of UP”, 1989 Crl.L.J. 1177*** was cited. Learned counsel further contended that this was in any case not a case where the accused could be convicted on the totally uncorroborated testimony of the prosecutrix as has been done by the learned trial Judge. The prosecution case was also challenged by the learned counsel on the ground that the incident was reported to the police on 9th January, 1997 even though the incident was of 7th January, 1997 and the parents of the prosecutrix were told about the incident same day by the prosecutrix and there was no explanation given by the prosecution for that delay in getting the crime registered. Finally, it was contended by the learned counsel that all the aforesaid infirmities in the prosecution case when considered alongwith the fact that admittedly there was prior enmity not only between the family of the accused and the father of the prosecutrix but between the accused and other neighbours also, including PW-9 Baljeet Kaur, as deposed by the prosecutrix herself in cross-examination, the benefit of doubt should have been extended to the accused. In any case, it can at least be a case of attempted rape, counsel argued. Learned counsel also contended that if at all this Court is not inclined to reverse the judgment of conviction the accused is at least entitled to get some reduction in the sentence of imprisonment awarded to him by the trial Court for the offence of rape

considering the fact that he was 19 years old at the time of commission of the offence and subsequently he got married and has now two young daughters, one of whom was born in April, 2010 and the other one is also three years old only and for the sin of their father why those innocent girls should be made to suffer and his mother is also suffering from cancer.

4. On the other hand, learned additional public prosecutor supported the judgment of the trial Court and contended that there was no infirmity whatsoever in the trial Court's findings. It was submitted that the prosecutrix had categorically narrated the incident of rape as she had narrated before the police in her first information statement as well as in her statement under Section 164 Cr. P.C. and she withstood the cross-examination on behalf of the accused and nothing could be elicited from her which could discredit her. It was further contended that even though the testimony of the prosecutrix alone was sufficient to hold the accused-appellant guilty and no corroborative evidence was required to be considered but in any case her statement stood duly corroborated by the evidence of her parents as well as her neighbour PW-9 Baljeet Kaur was also told about the incident on the day of the incident itself and further corroboration is lent to her statement by her statement under Section 164 Cr.P.C. also. It was also contended that absence of any injuries on the

body of the prosecutrix is not a ground to reject her testimony which was wholly reliable and trustworthy and without any blemish. Regarding the delay in the lodging of the complaint to the police the learned prosecutor submitted that the mother of the prosecutrix had stated in her evidence that after she had come to know about the incident she had taken her daughter to Irwin Hospital but there she was not examined and they were told that since it was a rape case the matter should be first reported to the police and since on that night her husband, her daughter and she herself were very nervous the matter was reported to the police next day. In reply to the argument of the counsel for the appellant that since admittedly the relations between the family of the prosecutrix and the accused were not cordial the learned prosecutor submitted that despite the fact that the prosecutrix had admitted this fact in her cross-examination that was no ground to reject her testimony and also that of her parents since it cannot be accepted that they would have levelled such kind of false allegations against the accused putting the honour of their own family and their daughter specially at stake to take revenge from the accused.

5. I have examined and analysed the evidence of the prosecutrix independently with caution in order to appreciate the respective contentions of the learned counsel for the appellant and the State

keeping in mind the fact that she had admitted that the relations between her family and that of the accused – appellant were strained for some years. The prosecutrix in this case was examined as PW-1 and she being the star prosecution witness her testimony is being reproduced before considering the grounds of challenge to the reliability of her evidence put forth by the learned counsel for the accused-appellant. This is what the prosecutrix (PW-1) deposed in her examination in chief after the trial Court had satisfied itself about her competence to depose since she was below the age of 12 years by generally questioning her:-

“..... In January 1997 I was residing along with my parents at Gurdawara Shish Ganj in quarters. Accused Avtar Singh @ Bittoo was also residing in one of the quarters in front of my house. As he is residing in room No. 3 and I am residing in room No. 9

On 7.1.97 I was present with my father on terrace. My mother had gone to the market. My father had given me key of the room at about 4 p.m. and told me to open the door of the room. I came down and in the process of opening door of my quarter, accused came there. He forcibly picked me and took me in his room and he started taperecorder. Accused removed his clothes and also removed my underwear and skirt which I was wearing at that time. Thereafter accused applied coconut oil on his private part. He made me lie on the bed and inserted his male organ in my urinal place and started pushing me. Brother of accused came there who used to be called as sonu. He knocked the door. Accused made me hide behind the curtain and opened the door for his brother. His brother and accused sent me outside the room. Then accused took me inside his room I had cried but accused put his hand on my mouth. I narrated entire incident to my father. My father told the facts to my mother when she came back from market. She enquired everything from me in separate room and I told my mother the entire facts. Next day, in the morning my parents took me to police station where my statement was recorded. I identify my signature at point A on Ex. PW1/A. I was taken to hospital for medical examination and my skirt was taken by the police. I was also produced before MM for my statement u/s 164 Cr.P.C. sealed with seal of SK is allowed to

open containing statement. Statement is Ex. PW1/B which bears my signature at point B. I narrated entire incident to MM.....”

6. In her cross-examination on behalf of the accused she categorically claimed that nobody had tutored her before recording of her statement at the police station but her mother had made her understand before she made the statement to the police. She admitted that her parents and the parents of the accused were not having cordial relations and further that the accused was also not having good relations with Surinder Kaur (PW-5) and Baljeet (PW-9). She also stated that she had tried to raise alarm when the accused had lifted her but the accused had gagged her mouth by putting his hand. She further deposed that when the accused had removed his clothes she had raised alarm but none had come. She further stated that when she had come out of the house of the accused she was not crying and she had also not raised any alarm or hue and cry at that time as she was confused. She also stated that when the accused raped her she had severe pain and at that time she had raised hue and cry and had also slapped the accused. She denied the suggestion that she was deposing at the instance of her parents and she had been tutored by them.

7. Having carefully gone through the evidence of the prosecutrix, I find no plausible and justifiable reasons to disbelieve and discard her

testimony. She is a wholly trustworthy witness and her evidence cannot be brushed aside for the reasons urged by the learned counsel for the appellant. The prosecutrix has given graphic narration of the incident as was given by her before the police as well as in her statement(Ex. PW-7/D) before the Magistrate(PW-7) under Section 164 Cr.P.C. No inconsistencies or contradictions could be brought on record during her cross-examination on behalf of the accused. The evidence of the prosecutrix being cogent, wholly reliable and trustworthy alone is sufficient to sustain the conviction of the accused – appellant, despite the fact that neither any external injuries were found on her body nor her hymen was found to be ruptured. Presence of injuries on the body of a rape victim is not the *sine qua non* for the offence of rape particularly in the case of rape of a girl of tender age by a fully grown up boy. Medical evidence in any case is corroborative piece of evidence. Its absence is of no effect if the testimony of the victim of rape is found to be trustworthy. For this view I find full support from the judgments of the Hon'ble Supreme Court reported as **(2007) 12 SCC 122, "B.C. Deva vs. State of Karnatka; (2007) 12 SCC 57, "Radhu vs. State of Madhya Pradesh; 2006)8) SCC 560, "Tarkeshwar Saha vs. State of Bihar and (1998) 8 SCC 635, "Ranjit Hazarika vs. State of Assam"**. In Radhu's case(supra) the Supreme Court had also observed that even when the opinion of the

doctor was that there was no evidence of any sexual intercourse or rape that opinion may not be sufficient to disbelieve the accusation of rape by the victim. In all these judgments the offence was found to be of rape and not of attempted rape even though no injuries were found on the body of the victim. These judgments were noticed by a Division Bench of the High Court of Bombay also while deciding an appeal against acquittal of the accused for the offence of rape (being CrI. A. No. 192/1990) decided on 7-5-09 – ***“The State of Maharashtra vs. Suresh Shankar Jadhav” (MANU/MH/0356/2009)***. In that case also there were no injuries found on the body of the victim and her hymen was also found intact at the time of her medical examination after the incident. The victim girl was found to be between 8 to 11 years of age and because of that medical evidence the Sessions Court had convicted the accused only for the offence of attempted rape but the High Court in appeal convicted the accused under Section 376 IPC. Since I have found the testimony of the prosecutrix in the present case to be wholly trustworthy and there are no compelling reasons necessitating the search for corroborative evidence to back the evidence of prosecutrix, absence of injuries on her body will not be sufficient to reject her testimony.

8. And, just because the relations between the families of the accused and the complainant were not cordial, as was admitted by PW-1 though

her parents have denied the suggestions to that effect, it cannot be accepted that the child of tender age would have been tutored by her parents to speak from her mouth such obnoxious words which she used in her testimony. PW-1 claimed that the parents of the accused used to abuse her mother. That even otherwise is not such a serious matter so as to put the small girl in the forefront by her parents to say that she had been raped. The accused – appellant himself during his statement under Section 313 Cr.P.C. had not given the nature of disputes between his father and the father of the prosecutrix who was a Raagi in a gurudwara where the accused – appellant was employed as a driver.

9. Learned counsel for the appellant had also sought to discredit the testimony of the prosecutrix by referring to some parts of the statements of the parents of the prosecutrix(PWs 8 and 11), who had also been examined by the prosecution to corroborate the statement of the prosecutrix that immediately after the incident she had informed them about what had been done to her by the accused – appellant. I have already observed that this Court need not look for any kind of corroboration for the testimony of the prosecutrix but in any case since learned counsel for the appellant as well as the learned prosecutor for the State had referred to the evidence of the parents of the prosecutrix and one of their neighbours(PW-9 Baljeet Kaur), who had also been

examined to lend strength to the prosecution case that she had also been told about the incident of rape on the day of incident itself, I will examine this submission also of the learned counsel for the accused – appellant. The father of the prosecutrix was examined by the prosecution as PW-11 and her mother was examined as PW-8. PW-11 had in his examination-in-chief supported the version of his daughter that on returning back from the house of the accused she had informed her father about the incident of rape since at that time her mother was not present in the house. He also stated that when his wife came back to house she was also told about the incident. In fact, he had also deposed that the accused was brought to his house by his father and some neighbours and the accused had sought pardon at the instance of his father and the neighbours. That statement of PW-11 was not challenged in his cross-examination and the same, therefore, also lends full support to the prosecution case. He denied the suggestion that he had falsely implicated the accused because of prior inimical relations with the parents of the accused. Learned counsel for the appellant had submitted that PW-11 had claimed that he and his daughter had narrated the incident to his wife(PW-8) while the prosecutrix herself had deposed that it was her father who had told the facts to her mother when she had come back from the market and thereafter her mother had enquired everything from her in a separate

room and she had told the entire facts to her mother. I, however, do not find these statements of the prosecutrix and her father to be in any way harmful for the prosecution and the statement of the prosecutrix cannot be viewed with suspicion on this ground. PW-8 Paramjeet Kaur, mother of the prosecutrix, had also claimed that when she had come back to her house at about 6 p.m. her husband had told her that the accused had raped their daughter. She also claimed that the parents of the accused had also come to their house to apologize for the act of the accused. Thus, both PWs 8 and 11 have corroborated each other's version also besides the testimony of the prosecutrix to the effect that she had narrated about the incident to her parents.

10. Learned counsel for the appellant had also submitted that if actually the prosecutrix had informed her father about the incident immediately thereafter, as was deposed by her, her father would not have waited for his wife to come back home and would have immediately rushed to the police station to lodge a complaint which he did not do and that circumstance also renders the entire prosecution case highly doubtful. However, I am not persuaded to accept this submission also for rejecting the wholly reliable testimony of the prosecutrix. There was nothing abnormal in the conduct of the father of the prosecutrix in not rushing to the police station immediately without waiting for his wife to

come back home. The mother of the prosecutrix had deposed that they had taken their daughter to the hospital same night where they were not entertained by the hospital staff since it was a case of rape and then they had come back around midnight when all of them were very nervous and so the matter was reported to the police next day. In my view, this statement of the mother of the prosecutrix is a sufficient explanation for the delay in lodging of the complaint with the police and the prosecution case cannot be rejected on the ground of delay in the registration of the FIR.

11. PW9 Baljeet Kaur is the neighbor of the family of the prosecutrix. She had deposed that on 7-1-97 she had gone to the market along with PW-8 Paramjeet Kaur and when they had come back at about 6 p.m. the husband of Paramjeet Kaur had met them and told them that the accused had raped his daughter and thereafter she and Paramjeet Kaur had enquired from PW-1 regarding the incident and she repeated the same facts which had been told to them by her father. In cross-examination, this witness stated that she was informed about the incident by the prosecutrix herself for the first time which was after 15 minutes of their returning from the market. However, this discrepancy in her statement in the examination-in-chief and in cross-examination, pointed out by the learned counsel for the appellant, is not sufficient to reject the testimony

of the prosecutrix. These type of discrepancies and inconsistencies are bound to occur when the witnesses are examined after a long period from the date of some incident. In the present case the incident was of 7th January, 1997 while examination-in-chief of PW-9 in Court was recorded on 24th August, 2000 and cross-examination was recorded about five years thereafter. Therefore, the accused – appellant cannot derive any benefit from this kind of discrepancy and inconsistency in the examination-in-chief of PW-9 and her cross-examination.

12. The learned prosecutor had also argued that presence of human semen on the skirt of the prosecutrix also lends support to the testimony of the prosecutrix. In this regard he drew my attention to the FSL report Ex. PX. I am in full agreement with this submission also of the learned prosecutor regarding which no submissions were made from the side of the appellant.

13. I am, therefore, of the view that there is no infirmity whatsoever in the impugned judgment of the learned Additional Sessions Judge holding the accused – appellant guilty for the offences under Sections 376 and 342 IPC and no interference is called for by this Court in this appeal. It certainly is not a case of attempted rape.

14. Coming now to the last submission made on behalf of the accused – appellant by his counsel that a lenient view should be taken in respect

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of the sentence of imprisonment to be awarded to him taking into consideration the mitigating circumstances, which have been noticed already. The circumstances highlighted by the learned counsel for the appellant have definitely made an impact in my mind and the same persuade me to take a lenient view in the matter. However, the leniency which can be shown to the appellant is that no notice of enhancement in sentence is being given to him which I was inclined to issue considering the fact that he had committed such a heinous crime of raping a girl of a tender age. I do not find any reason to award sentence of imprisonment to the appellant less than the minimum prescribed in the Indian Penal Code for the offence of rape of a girl of less than 12 years of age which the trial Court has awarded.

15. This appeal is consequently dismissed.

December 10, 2010/sh

P.K. BHASIN,J