

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

+ Crl.A.No.419/2008

% Reserved on: 27th January, 2010
Date of Decision: 29th January, 2010

JAIDEV Appellant
! Through: Ms.Rakhi Dubey, Adv.

versus

\$ STATE OF N.C.T OF DELHI Respondent
^ Through: Mr.Lovkesh Sawhney, APP
SI UmeshMalik, PS Mehruli

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the 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 the Digest?

: **V.K. JAIN, J.**

1. This is an appeal against the Judgment dated 24th September, 2007 and the Order on Sentence dated 17th October, 2007, whereby the appellant was convicted under Section 376 IPC and was sentenced to undergo RI for ten years and to pay a fine of Rs. 5,000/- or to undergo SI for

three months in default.

2. In the night intervening 15/16th September, 2004, the Investigating Officer, SI Rajesh Kumar, on receipt of copy of DD No.32 regarding commission of rape with a girl aged about 3 years, from Police Control Room, went to Village Saidullajab, where he came to know that the prosecutrix had been taken to AIIMS Hospital. When the investigating officer reached AIIMS, the complainant Achhelal, father of the prosecutrix, met him there and lodged a complaint. Achhelal informed that on 15th April, 2004 at about 8.00 p.m., he accompanied by his wife, went to make a telephone call to his native village, leaving their children behind. When they returned back to their Jhuggi, their daughter was found missing. On enquiry, they came to know that their daughter had also followed them when they were going to make a telephone call. They started searching their daughter. One person informed them that he had heard the shrieks of a girl from the jungle. He, accompanied by others, went to jungle, where he heard the shrieks of his daughter. When he reached the spot, he saw, in the light of the mobile phone of one of his companions, that the appellant had gagged the

mouth of his daughter and was forcibly raping her having removed her underwear. He rescued his daughter from that man, who was given beating by the public, and Police Control Room was informed.

3. The prosecutrix, though produced in the court on 15th October, 2005, was not examined as the learned Additional Sessions Judge felt that she was not fully capable of answering the questions put to her and, therefore, could not be examined as a witness. The father of the prosecutrix was partly examined on 15th of October, 2005 when he started weeping and his further examination was deferred on that day. Thereafter, he was not produced by the prosecution as his wife stated in the court that her husband was not traceable for about 2/3 months. It was, in these circumstances, that his further statement could not be recorded.

4. The mother of the prosecutrix, Smt. Ramwati came in the witness box as PW-9 and stated that at about 8.00 p.m. she and her husband had gone to an STD Booth, to make a telephone call to her village. At that time, their children were sleeping inside their jhuggi. When they came back at about

8.30 p.m., the prosecutrix was found missing. On enquiry in the neighbourhood, they were informed that her daughter had followed them when they were going to make a telephone call. She raised an alarm and went in search of her daughter. She, accompanied by her husband, heard some noise from the bushes. One Sikh gentleman also came there and switched on his mobile to throw some light. They went to the bushes from where the sound was coming. From there, her husband dragged the prosecutrix from beneath the appellant. The underwear of her daughter had been removed and her mouth had been pressed by the appellant with his hand. The appellant was found wearing underwear and his pant was half open and was on the knees. He was caught by the public and was given a beating. The police was also informed and took the prosecutrix as well as the appellant to the hospital. She also stated that the accused/appellant was caught raping her daughter.

5. PW-4, Shri Jai Bhagwan, has stated that on 15th September, 2004, he was present at his workshop where he used to be on duty from 9.00 a.m. to 6.00 p.m. During those days, he used to reside in the workshop itself. At about

10.00 p.m., he heard the noise of weeping of a man and a woman. Thereafter, he along with Gurbachan, Manoj and other labourers went towards the side from where the noise of crying was coming and found a man and a woman were sitting there along with other residents of jhuggies. They heard the noise of crying of a girl child. The accused present in the court was found there with the girl, who at that time was wearing only a frock and was stained with blood. At that time, the girl was not wearing underwear. The girl was brought to their garage and the accused was beaten by the public. The Police Control Room was informed and the accused was handed over to the police, whereas the prosecutrix was taken to hospital in an ambulance. In his cross-examination he also stated that on seeing mobile light, the accused started running, but was apprehended by them.

6. PW-5, Shri Manoj, has corroborated the statement of PW-4, Jai Bhagwan, and stated that when he along with others heard the noise of crying of a girl, they found the accused with the girl. The underwear of the girl had been removed. On seeing them, the accused started running but was apprehended and beaten by public. There was bleeding

from the private part of the girl. The police was informed and when the police came to spot, the accused was handed over to the police. In his cross-examination, he stated that the prosecutrix and the accused were lying on the ground and the mouth of the prosecutrix was gagged by the accused.

7. PW-1, Dr.Chitranjan Behra, examined the appellant in the hospital on 15th September, 2004 and found a number of injuries on his person. He also noticed smell of alcohol from his mouth. PW-2, Dr.Charu, examined the prosecutrix in the AIIMS Hospital on 15th of September, 2004 and found that her hymen had been ruptured and there was minimal bleeding from introitus.

8. In his statement under Section 313 Cr.P.C., the appellant denied the allegations against him and stated that he had been falsely implicated, since he was drunk.

9. According to PW-9, he had found the appellant raping her daughter when they reached the spot, on hearing the shrieks of her daughter. If this part of her deposition is excluded from consideration, the case of the prosecution against the appellant would rest solely on circumstantial evidence.

10. When a case rests purely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be proved, must be cogently and firmly established. Secondly, the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances taken cumulatively, must form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. That is to say, the circumstances should be incapable of explanation on any reasonable hypothesis save that of the guilt of the accused.

11. For determining whether circumstances established on the evidence raise but one inference consistent with the guilt of the accused, regard must be had to the totality of the circumstances. Individual circumstances considered in isolation and divorced from the context of the overall picture emerging from a consideration of the diverse circumstances and their conjoint effect may be themselves appear innocuous. It is only when various circumstances are considered together that it becomes possible to understand and appreciate their true effect.

12. **CIRCUMSTANCES**

(i) The first circumstance proved against the appellant is that he was found present in the jungle at the same place where the prosecutrix was found. This factual position proved by PW-4, Shri Jai Bhagwan, PW-5, Shri Manoj, and PW-9 Smt.Ramwati, has not been disputed by the appellant either in his statement under Section 313 Cr.P.C. or during arguments. No explanation has been given by the appellant, for his being found along with the prosecutrix, in night, at a dark and secluded place. His presence at that time and place, in the company of the prosecutrix without any explanation for his being found there, is definitely an incriminating circumstance against him.

(ii) The second circumstances proved by the prosecution against the appellant is that when the prosecutrix was found with him in jungle in the night of 15th September, 2004, she was wearing only a frock, her underwear having been removed. This fact, proved by PW-4, Shri Jai Bhagwan, PW-5, Shri Manoj, and PW-9 Smt.Ramwati, has not been disputed by the appellant, who has claimed, in cross-examination of

PW-9, Ramwati, that somebody else had raped the prosecutrix and since the appellant was lying there in drunken condition, he was apprehended and handed over to the police. In his statement under Section 313 of Cr.P.C., the appellant did not say that he had found the prosecutrix in the jungle and that she had told him that some one had raped her. The natural reaction of a person, who comes across a child who has been subjected to rape, would be to enquire, from her, as to what had happened with her and who had committed the crime with her. His next step would be to take the child to a police station or to her house so that she can be taken care of. The appellant, however, does not claim to have done anything like that and, therefore, this circumstance also incriminates him.

(iii) The third circumstances proved by the prosecution against the appellant is that the frock which the prosecutrix was wearing at the time she was found with the appellant was having blood on it and the prosecutrix was bleeding from her private part at that time. When the prosecutrix was examined in the

hospital vide MLC, PW-2/A, the blood, though minimal, was found even at that time. This factual position has also not been disputed by the appellant, who claims that the prosecutrix had been raped, though by some person other than him.

(iv) According to PW-9, Smt.Ramwati, when they reached the spot, the appellant was found wearing underwear and his pant was half open and was on his knees. No suggestion was given to the PW-9 that the pant of the appellant was not half open and was not on his knees when he was apprehended by PW-4, Shri Jai Bhagwan, PW-5, Shri Manoj, and PW-9 Smt.Ramwati, and others. Even in his statement under Section 313 Cr.P.C. no such claim was made by the appellant. This is a strong incriminating circumstance against the appellant and the inference is that he had raped the prosecutrix and that is why his pant was half open and was on his knees.

(v) According to PW-9, Ramwati, when they reached the spot, they found her daughter beneath the appellant. No suggestion was given to her that the

prosecutrix was not beneath the appellant or was lying at some distance from him. When a witness deposes a particular fact and no suggestion to the contrary is given to him in cross-examination, the person against whom the deposition is made, is deemed to have admitted that fact. Therefore, by not giving any suggestion to the contrary to the witness, the appellant is deemed to have admitted that he was lying on the prosecutrix when he was apprehended by the witnesses. This is one more and a very strong incriminating circumstance against the appellant.

(vi) According to PW-4, Shri Jai Bhagwan, and PW-5, Shri Manoj, the appellant, on seeing them, tried to run away but was caught and beaten by the public. The appellant has not given any explanation for his trying to run away on seeing the witnesses. If the prosecutrix had been raped by some other person, as claimed by him, he, instead of trying to run on seeing the witnesses, would have stayed there and explained the factual position to the parents of the prosecutrix as well as to others who accompanied them. The attempt

of the appellant to run away on being seen by them is a clear indicator of his being the person who raped the prosecutrix.

(vii) It has also been stated by PW-5, Manoj, that when they reached the spot, they found that the mouth of the prosecutrix had been gagged by the appellant. No suggestion was given to this witness that the appellant was not found having gagged the prosecutrix when he was caught by the witnesses. There could have been absolutely no reason for the appellant to gag the prosecutrix, in case he was not raping her at the time he was caught or he had not already raped her by the time he was caught.

(viii) According to PW-1, Dr.Chitranjan Behra, who examined the appellant in the hospital on 15th September, 2004, his underwear was sealed and handed over to the IO. According to PW-14, Const.Rohtash Singh, the underwear of the appellant was seized vide memo Ex.PW-14/A. PW-15, ASI Adesh Kumar, has also deposed the same fact. A perusal of the report of the FSL Ex.PW-15/H shows that the blood

was found on the underwear when it was examined in the laboratory. This is not the case of the appellant that the underwear examined in the laboratory was not the underwear which he was wearing at the time he was caught. There is no explanation from the appellant as to how blood came on the underwear which he was wearing. The inference, in these circumstances, would be that it was the blood of the prosecutrix which came on the underwear of the appellant when he raped her.

(ix) According to PW-4, Shri Jai Bhagwan, PW-5, Shri Manoj, and PW-9 Smt. Ramwati, they had reached the spot on hearing the shrieks of a girl. The appellant was caught immediately thereafter and at that time the prosecutrix was found with him. There is no explanation from the appellant as to why the prosecutrix had shrieked when he was with her. The inference to be drawn, in these circumstances, would be that the prosecutrix had shrieked when the appellant raped her.

13. The incriminating circumstances proved against the appellant thus are, (i) he was found along with the

prosecutrix at a secluded place, in the night of 15th September, 2004, soon after she got missing, (ii) the prosecutrix was wearing only a frock at the time she was found with the appellant and was not wearing her underwear at that time, (iii) the blood was found coming from the private part of the prosecutrix at the time she was found with the appellant, (iv) the frock which the prosecutrix was wearing at time when she was found with the appellant had blood on it, (v) the pant of the appellant was on the knees and he was wearing underwear at the time he was caught when found with the prosecutrix, (vi) blood was found on the underwear of the appellant, (vii) the prosecutrix was beneath the appellant when he was caught and, (viii) the appellant tried to run away on seeing PW-4, Shri Jai Bhagwan, PW-5, Shri Manoj, and PW-9 Smt.Ramwati, and other witnesses, the prosecutrix had shrieked when she was with the appellant, her shriek having been heard by PW-4, Shri Jai Bhagwan, just before the appellant was caught with her.

14. A perusal of the MLC of the prosecutrix shows that hymen was found torn and minimal bleeding also was found when she was examined by the doctor soon after the incident

had taken place. Though semen was not found either on the underwear of the appellant or on the frock of the prosecutrix, that by itself does not mean that the prosecutrix had not been raped. Had the prosecutrix not been raped, her hymen would not have been found torn and she would not have been found bleeding from her private part. The penetration alone is sufficient to constitute rape and it is not necessary that there has to be emission of semen, to constitute rape. It appears from the facts and circumstances that the appellant could not ejaculate, as he saw the witnesses, including PW-4, Shri Jai Bhagwan, PW-5, Shri Manoj, and PW-9 Smt. Ramwati, coming towards him on hearing the shrieks of the prosecutrix and, therefore, the appellant despite having penetrated, could not emit semen.

15. The circumstances proved against the appellant unerringly proved him being the person who raped the prosecutrix. These circumstances leave no reasonable doubt that in all probability the rape with the prosecutrix was committed by the appellant and by no other person. The circumstances proved against him are totally incompatible with his innocence and are wholly consistent with the guilt

attributed to him. In fact, according to PW-9, Smt. Ramwati, when they caught the appellant, he was raping her daughter. Thus, according to this witness, she was an eye-witness of rape by the appellant. If I accept the deposition of the mother of the prosecutrix, there is direct evidence of the appellant having raped the prosecutrix. If I exclude this part of the deposition of PW-9, Ramwati, from consideration, the circumstances proved against the appellant, leave no reasonable doubt that he had committed rape on the person of the prosecutrix.

16. It was contended by the learned counsel for the appellant that no injury was found on the male organ of the appellant when he was examined in hospital and since the prosecutrix was a child aged about four years at the time of commission of rape with her, such injuries would definitely have been found had the appellant been the person who raped the prosecutrix. In support of her contention, she relied upon the decision in the case of “**Rahim Beg Vs. State of UP**”, AIR 1973 SC 343.

17. This issue, including the decision in the case of Rahim Beg (supra), came up before the Hon’ble Supreme Court in

“State of Himachal Pradesh Vs. Raghubir Singh”, (1993) 2 SCC 622, in which the victim was a girl of about seven years of age. She was wearing a frock and having shawl with her. The accused was of sixteen years. According to the prosecutrix, she was made to lie down and accused committed rape on her. On medical examination, the respondent was found to be potent and capable of sexual intercourse. It was argued on behalf of the accused that absence of injuries on the penis of the accused should be treated as fatal to the case of the prosecution. Reliance was also placed on Rahim Beg(supra). Negativating the contention and distinguishing Rahim Beg, the Court observed:

18. “Inferences have to be drawn in every case from the given set of facts and circumstances. There is no inflexible axiom of law which lays down that the absence of injuries on the male organ of the accused would always be fatal to the prosecution case and would discredit the evidence of the prosecutrix, otherwise found to be reliable. The presence of injuries on the male organ may lend support to the prosecution case, but their absence is not always fatal. Rahim Beg case was based on its peculiar facts and the observations made therein were in a totally different context and cannot advance the case of the respondent. The observations in Rahim Beg case cannot be mechanically pressed into aid in every case regardless of

the specific circumstances of the crime and absence of the fact situation as existing in that case.” (Emphasis supplied)

19. As noted earlier, in the present case, there was no ejaculation by the appellant, presumably, because despite having penetrated, he had to abandon the act being committed by him when he saw the witnesses coming towards him and that was likely be the reason why injuries were not found on his male organ after he had been caught and taken to hospital for his medical examination. Therefore, presence of injuries on the male organ would not exclude commission of rape in the facts and circumstances of this case.

20. As provided in Section 376 of Indian Penal Code, the sentence for committing rape on a minor girl when she is under 12 years of age is punishable with rigorous imprisonment of a term which shall not be less than 10 years but which may be for life though for adequate and special reasons to be mentioned in the judgment, the court may impose a sentence of imprisonment for a term of less than 10 years. In the present case, there is absolutely no ground for giving less than the minimum prescribed sentence to the appellant, who had no compunction in ravishing a girl of four years. The act

committed by him, besides being heinous, is horrible and repulsive. No words are enough to condemn such an act of absolute perversity. Therefore, I see no ground for reducing the sentence awarded to the appellant or to reduce the fine imposed upon him. I find no merit in the appeal and the same is, hereby, dismissed.

(V.K.JAIN)
JUDGE

JANUARY 29, 2010
RS/