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

+ CRL.A. 601/2009

MOHSIN

..... Appellant

Through: Ms. Sandhya Goswami and
Mr. Jabar Singh, Advs.

versus

STATE OF DELHI

..... Respondent

Through: Mr. Arvind Kr. Gupta, APP.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

JUDGMENT

30.09.2010

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1 Mohsin, the appellant, has been convicted under Section 376 of the Indian Penal Code, 1860 (hereinafter referred to as IPC) and sentenced to undergo rigorous imprisonment for 10 years with fine of Rs.10,000/-, and in default of payment of fine undergo rigorous imprisonment for a period of six months.

2 Relying on the site plan Ex.PW-16/B it is submitted by the amicus curiae appearing for the appellant that there were three families residing in the property consisting of two big rooms and the bathroom in question was visible from outside. It is accordingly urged that the appellant could not have committed rape of the prosecutrix in the bathroom without being noticed by anyone. Evidence of DW-1 Sohaib Anjum, brother of the appellant is relied upon. It is also submitted that the allegation of rape is motivated and has been deliberately foisted on the appellant and his family members because the complainant's family

wanted the appellant to vacate the property in their joint possession. Another contention raised is that the rape was not actually committed and it is at best a case of attempt to rape.

3 The prosecutrix in the present case was only five years old at the time of offence and was about six years old when she was examined in Court as PW-6 on 4th March, 2008. She was studying in second standard in M.C. Primary School near her house. She narrated complete Urdu alphabets on being asked by the Court. She stated that her father was a motor mechanic. She has stated that she had come to the '*adalat*' (Court) and knew that she should speak the truth and stated that she would speak the truth before the Court. Learned trial court has recorded that the child witness is intelligent and understood the questions that were put to her. It is well settled law that a child witness is not an incompetent witness and evidence can be relied upon if the child is capable of giving rational account of what he or she had seen. However the Court has to cautiously scrutinize the evidence to ensure that there is no tutoring. If there are no flaws or infirmity then the evidence of the child witness can be accepted. In the present case, the prosecutrix has stated that the appellant had called her to the bathroom on the pretext of giving her keys and as she went to the bathroom the appellant took off her underwear and undid the chain of his trousers. She has narrated what happened thereafter and has specifically stated that he had touched her in her urinary portion with his male organ. She has further stated that the appellant had done this act several times. The appellant had told her not to tell this to anyone. The prosecutrix has stated that she felt pain in her urinary parts, had headaches and developed fever. In the cross-examination the prosecutrix has stated that her mother had brought her to Court and had told her to make statement against the appellant. This statement in the cross-examination does not show infirmity, flaw or create doubt about the

earlier statement made by the prosecutrix on examination made by the State. Per contra it shows that the prosecutrix had not tried to conceal any fact and had stated the truth without coming under any pressure or influence.

4 PW-4 Ms. Noor Fatima has stated that she was residing in D.D.A. Flats, Inderlok, Delhi with her three children including the prosecutrix. Sohaib Anjum was also residing in the same house along with his family. The appellant is a younger brother of Sohaib Anjum and had started living with them about eight months prior to the incident. She identified the appellant in Court. She has stated that on 31st March, 2007 at about 7.45 PM, the prosecutrix told her that the appellant had called her in the bathroom on the pretext of giving her keys and when the prosecutrix went inside the bathroom, the appellant put his hand on her mouth. She has stated that the prosecutrix told her that thereafter the appellant undid the chain of his trousers and took off the underwear of the prosecutrix. She has further stated that thereafter the appellant had urinated at the urinary portion of the prosecutrix and she felt pain. PW-4 Noor Fatima has stated that on the next day, she called her brother and informed the matter to the police. She has stated that the prosecutrix had told her that earlier also the appellant had done the same act with her several times. On the basis of her statement Ex.PW-4/A, police registered an FIR. The prosecutrix was taken to Bara Hindu Rao Hospital where she was examined. In the cross-examination PW-4 has admitted that the bathroom was visible from outside the house and 14 persons including the prosecutrix were residing there. She has admitted that on the date of offence her husband was not present in the house and he comes back from work at about 8.30

PM. She has stated that after the incident, none of the family members of Sohaib Anjum were residing with them.

5 PW-8 Phakrool Hassan has stated that the prosecutrix had informed her wife that rape was committed by the appellant. He told the said fact to his relatives and known persons and thereafter filed a complaint against the appellant.

6 PW-4 Ms. Noor Fatima was not cross-examined or questioned whether any other family members were present in the house at the time of incident. However, a specific question was put to PW-8 Mr. Phakrool Hassan in his cross-examination in this regard. He has stated that nobody was present in the house except the accused on the date of incident.

7 Learned counsel for the appellant had submitted that the prosecutrix in her cross-examination has stated that many persons were present in the house on the date of the incident. She has also stated that in the courtyard of the house, many people keep sitting all the times. Learned counsel for the appellant has drawn my attention to the following portions of the cross-examination of the prosecutrix:-

“There were many persons in the house at the day of incident. It is correct that in the courtyard of the house, many people keep on sitting at all the times.”

The question put to the prosecutrix was whether many persons were present on the day of the incident and not at the time of the incident. The second question is a general question whether people sit in the courtyard. As noticed above, the prosecutrix and the appellant were residing in the same house and were obviously well acquainted and known to each other. She was just five years old at that time and was not aware what was happening. In this regard, it may be relevant to reproduce here the

following observations in *Mohd. Alam Vs. State (NCT of Delhi)*, 2007

Crl. L.J. 803 :-

“42. From a perusal of these decisions rendered by the Supreme Court, the following parameters and factors that need to be kept in mind, clearly emerge in cases of a rape of a girl child. Such cases need to be dealt with sensitively and not like cases involving other penal offences. In other words, the whole approach of the Courts must be quite different. The traditional non-permissive bounds of Indian society must be kept in mind while examining the evidence in cases involving sexual offences. Social factors play an important role in the nature and quality of available evidence. The sole testimony of a prosecutrix is enough to convict a person accused of rape, if the testimony is free from blemish and implicitly reliable. Such testimony does not need corroboration; but if there is some doubt about the implicit reliability of the testimony, then the court may look for assurance to the acceptability of the testimony, short of its corroboration. If the testimony of the prosecutrix is reliable and trustworthy, then minor contradictions are not enough to throw out the evidence and other issues such as non-examination of an available witness, even the non-examination of a doctor or the non-production of the doctor's report would not be fatal to the case of the prosecution.”

8 The allegation of rape gets corroborated and full support from the evidence of PW-7 Dr. Preeti Verma, Senior Resident, Hindu Rao Hospital. She had examined the prosecutrix on 2nd April, 2007 and has proved on record MLC No.3077/07 Ex.PW-7/A. She has stated that the hymen of the prosecutrix was found to be torn (old) and labia was inflamed and reddened. There is a cutting on the said MLC Ex.PW-7/A but this does not in any way effect the evidentiary value of the said MLC.

The MLC also records that the hymen was found (old) torn and labia was inflamed and reddened. PW-7 Dr. Preeti Verma had made a long note on the back page of the MLC. It is apparent that the same pen was used and the entire note is written on the same day. Learned trial court in this regard has referred Wikipedia and has quoted the following lines:-

“Labia majora (singular ; labium majus) are two prominent longitudinal cutaneous folds which extend downward and backward from the mons pubis to the perineum. The vulva (from Latin, vulva, plural vulvae or vulvas) refers to the external genital organs of the female. In human anatomy or in mammals in general, the mons pubis (Latin for “public mound”), also known as the mons veneris (Latin, mound of Venus) or simply the mons, is the fatty tissue lying above the pubic bone of adult women, anterior to the symphysis pubis. The mons pubis forms the anterior portion of the vulva. In human anatomy, the perineum is generally defined as the surface region in both males and females between the pubic symphysis and the coccyx. The perineum is the region of the body inferior to the pelvic diaphragm and between the legs.”

9 In Modi’s Medical Jurisprudence and Toxicology Twenty Second Edition, at page 503 it has been observed as under :-

“4. In nubile virgins the hymen, as a result of complete sexual intercourse, is usually lacerated, having one or more radiate tears (more so in posterior half) the edges of which are red, swollen and painful, and bleed on touching, if examined within a day or two after the act. These tears heal within five or six days, and after eight to ten days become shrunken and look like small tags of issue. Frequent sexual intercourse and parturition completely destroy the hymen, which is represented by several small tags of issue, which are called carunculae hymenealis or myrtiformes.”

10 The medical evidence that the hymen of the prosecutrix aged between five to six years, was torn (old) supports and corroborates the

case of the prosecution and shows that the prosecutrix had been repeatedly subjected to the said act. In Modi's Jurisprudence and Toxicology Twenty Second Edition at page 504 it has been also observed that in small children the hymen is not usually ruptured.

11 On the question of redness of the labia, it may be relevant to refer following portions from the Taylor's Principles and Practice of Medical Jurisprudence Thirteenth Edition at page 84:-

“At the commencement of penetration, the penis tends to compress the labia both anteriorly and laterally, producing bruising of both the labia minora and the labia majora for in the infant there is only poor separation between the labia. The amount of bruising will depend upon the force used in attempting penetration.

Further attempts at penetration force the penis backwards, for anterior movement is prevented by the symphysis pubis, and the hymen is torn. The resultant tear is directed at the area of maximum roominess (i.e., backwards) and the penis then advances into the vagina, putting additional pressure on to the anterior and lateral structures and extending the hymenal tear into or through the perineal body and often involving the anterior wall of the ano-rectal canal.

The smaller and younger the infant, the more widespread the injuries that will result from attempted or complete penile penetration. Bruising of the labia with extensive haematoma production affecting particularly the anterior half is very common. Circumferential tears of the mucosa of the vestibule, and posterior linear tears of the hymen extending up the posterior vaginal wall and downwards to involve the skin of the perineum and the perineal body are frequent. The circumferential mucosal tears are indicative of attempted penetration by an object the size of an erect adult penis.

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The pattern of injury will tend to become less marked as the age and size of the infant increases, but the characteristic circumferential tears of the vestibular mucosa are constant findings, in the author's experience, up to the age of six years, and are frequent findings beyond that age.

Digital penetration of the infant vagina produces less compression of the soft tissues, and the pattern of injury is different. There is frequently some scratching or bruising of the labia and vestibule, but because the compression of the soft tissues is largely absent there is little shearing force applied to the mucosa and the characteristic circumferential tears are absent.

The commonest pattern of injury is a linear tear of the hymen, usually situated in the posterior or posterolateral quadrant. The tear may extend for a short distance upwards into the posterior vaginal wall and downwards on to the skin of the perineum where it may involve the perineal body. Involvement of the ano-rectal canal is rare. There is frequently bruising in the margins of the tear, and vaginal wall bruising on the anterior wall but vaginal vault injury is rare.

If the size of the penetrating object approximates to the dimensions of a penis, the resultant pattern of injury will approach that found on penile penetration or attempted penetration.

Effects of genital injury

Both the nerve and blood supply to the area of the genitals is very good, and it follows that injury to that area will almost invariably produce a marked response by the infant victim."

12 Learned trial court has rightly rejected the contention of the appellant that there were no external injury marks on the body of the appellant, therefore he had not committed rape. Further, the appellant was medically examined after two days and by that time, injury, if any, might have healed.

13 On the question of penetration, the injury in the private parts of the prosecutrix, the statements of PW-7 Dr. Preeti Verma and the MLC shows that there was penetration. In this regard it may be relevant to reproduce the following observations of the Supreme Court in ***Aman Kumar and Another Vs. State of Haryana***, 2004 (4) SCC 379 :-

“6. The offence of rape occurs in Chapter XVI IPC. It is an offence affecting the human body. In that chapter, there is a separate heading for “sexual offences”, which encompass Sections 375, 376, 376-A, 376-B, 376-C and 376-D. “Rape” is defined in Section 375. Sections 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act i.e. Sections 376-A, 376-B, 376-C and 376-D. The fast sweeping changes introduced reflect the legislative intent to curb with an iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is “the ravishment of a woman, without her consent, by force, fear or fraud”, or as “the carnal knowledge of a woman by force against her will”. “Rape or raptus” is when a man hath carnal knowledge of a woman by force and against her will (Co Litt 123 b); or, as expressed more fully, “rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will”. (Hale PC 628) The essential words in an indictment for rape are *rapuit* and *carnaliter cognovit*; but *carnaliter cognovit*, nor any other circumlocution without the word *rapuit*, are not sufficient in a legal sense to express rape. [1 Hen. 6, 1a, 9 Edw. 4, 26 a (Hale PC 628)] In the crime of rape, “carnal knowledge” means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation. (*Stephen’s Criminal Law*, 9th Edn., p. 262) In *Encyclopaedia of Crime and Justice* (Vol. 4, p. 1356), it is stated “... even slight penetration is sufficient and emission is unnecessary”. In *Halsbury’s Statutes of England and Wales* (4th Edn.), Vol. 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation, with violence, of the private person of a woman, an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order.

7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see *Joseph Lines*, IC&K 893). It is well known in the medical world that the examination of

smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. [See *S.P. Kohli (Dr) v. High Court of Punjab and Haryana*.] In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.”

14 The contention of the appellant is that the appellant and her parents have falsely implicated the appellant and they wanted that the

appellant and his family members to leave their house. This contention has no merit. There is no allegation that there were interse disputes and differences prior to the incident between the appellant and his family members and the parents of the prosecutrix. On the other hand, the examination of PW-4 Ms.Noor Fatima shows that there were good and cordial relations between her family and the family of DW-1 Sohaib Anjum, who was residing with them along with his family for last two years before the incident. DW-1 Sohaib Anjum no doubt in his statement had stated that there was dispute between them but he could not produce any earlier complaint between them. He had also stated that his mother was unwell and was residing in the same house. He has stated that on 31st March, 2007 he was present at his house for the whole day as their relatives came to meet their mother. However papers with regard to illness of his mother were not placed on record or relied upon. Further DW-1 Sohaib Anjum is brother of the appellant and he obviously had an interest in saving and protecting his brother, the appellant. In his cross-examination he has stated that he was working as a tailor in a shop at Rani Bagh and continues to work there. His presence at the time of the incident, therefore, is doubtful.

15 In view of the aforesaid findings, I do not find any merit in the contentions raised on behalf of the appellant. The finding given by the learned trial court that the appellant had committed rape of the prosecutrix and is guilty of offence under Section 376 IPC is confirmed.

16 Learned trial court has awarded rigorous imprisonment for a period of ten years and also imposed fine of Rs.10,000/-, failing which the appellant shall undergo rigorous imprisonment for a further period of six months. The same is in accord with the provisions of Section 376 IPC as the age of the prosecutrix is less than 12 years. Looking at the

nature of the offence, manner and method in which it was committed, there is no ground or reason to reduce or modify the sentence awarded. Appeal is accordingly dismissed.

SANJIV KHANNA, J.

SEPTEMBER 30, 2010

J