

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

+ CrI.A.No.605/2007

% Reserved on: 14th January, 2010
Date of Decision: 25th January, 2010

HARI OM Appellant
! Through: Ms. Saahila Lamba, Adv.

versus

\$ STATE (N.C.T) Respondent
^ Through: Mr. Jaideep Malik, APP

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

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

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

1. This is an appeal against the Judgment dated 25th July, 2007 and the Order on Sentence dated 1st August, 2007, whereby the appellant was convicted under Sections 363/376 IPC and was sentenced to undergo RI for five years and to pay fine of Rs. 5,000/- or to undergo SI for six months in default under Section 363 of IPC. He was further sentenced to

undergo RI for 12 years and to pay a fine of Rs.20,000/- or to undergo SI for two years in default, under Section 376(2)(f) of IPC. Out of fine, Rs.15,000/- was directed to be paid to the prosecutrix, as compensation.

2. The case of the prosecution, as set out in the FIR lodged by Smt. Bimla, mother of the prosecutrix on 3rd July, 2004, is that on 2nd July, 2004, at about 10.30 pm, when the complainant was present in her house and her husband was taking bath on the hand pump in front of her jhuggi, her daughter, aged about 8 years, came weeping. On being asked as to why she was weeping, she informed her mother that the appellant had taken her to a school on the pretext of giving toffee and had done bad act with her. On checking the prosecutrix, the complainant found blood on her vagina. Since telephone booths had closed at that time, they could not inform the police at night. In the morning, her husband went to the house of the appellant and brought him from there with him. They then brought the prosecutrix as well as the appellant to the Police Station and presented them to the police.

3. The prosecutrix came in the witness box as PW-1 and

was examined after certain preliminary question had been put to her and the learned Trial Judge was satisfied that the child was able to understand the proceedings and could be examined as a child witness. The prosecutrix stated that when she was playing outside her house, her mother was sleeping and her father was taking meals inside, the appellant came there and took her to the school with tin-shed on the pretext of giving her toffees. He removed his underwear as well as her underwear and had sexual intercourse with her, as a result of which blood came out of her private part. On reaching home, she told her parents about the incident. Thereupon, her parents called the appellant from his house. The police also came to the spot. She was taken to hospital where she was medically examined and her undergarments were seized. She was also produced before the Magistrate where she gave statement, as Ex.PW-1/A. She identified her underwear, which was shown to her in the Court.

4. PW-2, Smt. Bimla, is the mother of the prosecutrix. She stated that on 2nd July, 2004, when her husband was taking bath on the hand pump and she was busy in household

work, her daughter, aged about 8 years at that time, came weeping and on being asked, informed that she was taken to school with tin-shed, by the appellant, on the pretext of giving toffee to her. On checking her daughter, she noticed blood oozing out from her private part. Her husband, on being informed by her, went to the house of the appellant and brought him to their jhuggi. They tried to search the mobile to inform the police, but due to odd hours, her husband decided to take the prosecutrix to the Police Station in the morning. She further stated that they had taken prosecutrix to the Police Station, from where she was taken to hospital and was medically examined there.

5. PW-3, Hukum Chand, is the father of the prosecutrix. He has stated that on 2nd July, 2004, when his daughter was standing near him and was insisting on taking bath, the appellant came there and asked her to accompany him to take something, but, he refused and told the appellant that his daughter used to sleep early in the night. When he again came back to the hand pump, he found his daughter missing. The wife and brother-in-law of the appellant also reached there and they tried to trace her in the locality. In the

meantime, his daughter returned. She was perplexed at that time. On being asked two-three times, she told him that the appellant had taken her to the school with tin-shed where he had committed rape on her. On checking his daughter, he found that she was having bloodstains. The appellant, who had accompanied his daughter up to in front of his house and had gone upstairs, was chased by him and was brought down stairs. The police, which were on patrol, also reached there and took him to Police Station alongwith his daughter. In the morning, his daughter was taken to hospital where she was got medically examined.

6. PW-10 is an official of M.C. Model School, Rohini Extension and he has stated that as per the record of the school, the date of birth of the prosecutrix was 10th October, 1995. The copy of the relevant extract from the school registration is Ex.P-10/A, whereas photocopy of Admission Form is Ex.P-10/B.

7. PW-15 WSI Sujata has stated that on 3rd July, 2004, the complainant, Bimla alongwith her husband, the prosecutrix and the appellant Hari Om came to Police Station Sultan Puri. Bimla told her that the appellant had raped her

daughter in the night of 2nd July, 2005. She thereupon got the prosecutrix medically examined and conducted investigation.

8. In his statement under Section 313 Cr.P.C., the appellant denied the allegations of rape against him and stated that false allegations have been made against him, on account of enmity which he had with the mother of the prosecutrix, on vegetable cart. He further stated that in fact the complainant had come to him in the morning and informed that her daughter had been raped by someone and requested him to accompany him to Police Station. According to him, he only accompanied her to the Police Station on the request of the mother of the prosecutrix. He further stated that he had a quarrel with the parents of the prosecutrix on account of vegetable cart and that matter was got compromised by the neighbours. He further stated that the parents of the prosecutrix had thrown his vegetable cart, but he did not report the matter to the police on account of intervention of neighbours, though the parents of the prosecutrix had threatened to teach him a lesson.

9. DW-1 Smt. Dropdi is the wife of the appellant. She has

stated that the mother of the prosecutrix also used to place the cart on which she was selling vegetables next to the cart on which her husband used to sell vegetables. She further stated that one month prior to this occurrence, there was a quarrel between her husband and mother of the prosecutrix. The mother of the prosecutrix threw away their vegetables and gave a beating to her husband. No report was however, made to the police, as the neighbours had worked out a settlement, though the mother of the prosecutrix had threatened that in case her husband again places his cart at that place, he would be implicated in a false case. She further stated that on the date of this incident, her husband was sleeping with her and her children. The mother of the prosecutrix came to her house at about 7.30 am, informed them that her daughter had been raped by someone, touched the feet to her husband and requested him to accompany her to Police Station. DW-2 Ram Singh has stated that he was living in a house opposite to that of Bimla and the appellant Hari Om. He further stated that Bimla and Hari Om had quarreled with each other and at that time Bimla had toppled the cart of Hari Om and had given beating to him. Since then,

they were not in speaking terms with each other and Bimla had threatened the appellant to implicate him in a big case.

10. The learned counsel for the appellant has pointed out certain discrepancies in the the testimony of the prosecutrix, who has been examined as PW-1, her mother, who has been examined as PW-2, and her father, who has been examined as PW-3. It was pointed out that according to the prosecutrix the police had come to the spot and she had narrated the entire incident to the police. Her father also stated that the police which was on patrol, had reached and the appellant was taken to police station. On the other hand, the mother of the prosecutrix, Smt.Bimla has stated that they could not inform the police on the same day as they did not have a mobile. In the FIR lodged by her, also Smt.Bimla had stated that she could not inform the police in the night as telephone booths had closed by that time.

11. It was also pointed out by the learned counsel that according to PW-3, Hukam Chand the appellant had come in his presence when he was taking water for the cooler and asked his daughter to accompany him but he(the witness) had refused saying that his daughter used to sleep earlier in

night and when he came back again to the handpump after filling water in the cooler, he had found his daughter missing. On the other hand, the prosecutrix has stated that her mother was sleeping and her father was inside the house and taking meal when the complainant came there and took her to the school on the pretext of giving toffee to her.

12. It is difficult to accept that the parents of the prosecutrix neither informed the police, nor took her to the police station in the night of 2nd July, 2004, when this incident took place. The prosecutrix as well as her father have corroborated the testimony of each other in saying that the appellant had come to the spot on the very same day on which this incident took place. The truth of the matter appears to be that the police did not register the FIR in the night of 2nd July, 2004, presumably in order to avoid the inconvenience of taking the prosecutrix to the hospital, at odd hours of night, when only few police men are present in the police station and that is why they were able to persuade the mother of the prosecutrix to say in the FIR that since the telephone booths had closed, they took the appellant and the prosecutrix to the police station next day in the morning. It

also appears that when she was examined in the court during trial PW-2, Smt.Bimla chose to stick to the version given by her in the FIR, so as to avoid criticism of having contradicted the version given by her in the FIR. Considering the way parents of a young girl would react, on happening of such an incident, the parents of the prosecutrix were not likely to postpone the complaining of the matter to the police and even if no telephone was available to them, they would have immediately gone to the police station, which in a place like Delhi cannot be far off from the place where they were residing. In fact in her cross-examination, PW-2, Smt.Bimla, also stated that her husband had brought the appellant from his house on the same night. This part of her deposition, in cross-examination, also corroborates the testimony of prosecutrix and her father and shows that the sequence of events disclosed by them is correct.

13. It has come in the deposition of the prosecutrix that when she narrated the incident to her parents, they called the appellant from his house. PW-3, Hukam Chand, father of the prosecutrix, has also stated that he had followed the appellant who had gone upstairs and had slapped him after

bringing him downstairs. In the natural course of event and considering the way a father would react when the rapist is not only a known person but is also a neighbour, it is unlikely that the father of the prosecutrix would have waited till next day morning, to summon the appellant from his residence. The natural course for a father, in such a situation, would be to immediately go to the culprit, thrash him and take him to the police. This precisely is the version given by the father of the prosecutrix and stands corroborated from her own deposition in the court. Taking into consideration the facts and circumstances of the case and considering that PW-1, the prosecutrix, and PW-3, the father of the prosecutrix, have corroborated the testimony of each other, as regards the time when the appellant was called to their place and the police was informed, it appears to me that the appellant was brought from his residence on the same night and the police was also informed, though the prosecutrix was taken to the hospital only on the next day. Therefore, this minor variance in the testimony of prosecutrix and her father on the one hand, and the mother of the prosecutrix on the other hand, cannot be said to be so

material as to persuade the court to altogether discard the testimony of the prosecutrix, which has otherwise very well stood the test of cross-examination.

14. As regards the discrepancies as to whether the father of the prosecutrix was taking meal inside the house, as stated by the prosecutrix, or was filling water in the cooler, I do not see this as a contradiction. According to both of them, the prsecutrix was outside the house and her father was not present at the time the appellant took her with him. It is quite possible that the prosecutrix thought that her father was taking meal inside the house, whereas, in fact, he was filling water in the cooler, which was not noticed by the prosecutrix and that is why she presumed that her father was taking food at that time. It was pointed out by the learned counsel for the appellant that according to PW-2, Smt.Bimla, her husband was taking bath on the handpump and she was busy in doing household work, at the time the appellant is alleged to have taken the prosecutrix with him. In my view, the submission is not correct based as it is on a misreading of the testimony of PW-2 in this regard. What she has stated is that at the time the prosecutrix came weeping, her

husband was taking bath on the handpump whereas she was busy in doing household work. She did not say that her husband was taking bath on the handpump at the time when the appellant took the prosecutrix with him.

15. It was also submitted by the learned counsel for the appellant that according to the prosecutrix, she narrated this incident to her mother in the morning whereas according to PW-2, Smt.Bimla, the prosecutrix has disclosed the incident to her in that very night when she returned home. A careful examination of the deposition of the prosecutrix would show that in the examination-in-chief itself she specifically stated that she had told her parents about the incident after some time of her reaching back home on the same day. She also stated that thereafter her parents called the appellant from his house. Therefore, the prosecutrix does not say that she had disclosed the incident to her parents only next day in the morning. It is quite possible that the prosecutrix repeated the incident to her mother next day in the morning whe she noticed blood still coming out of her private part.

16. The contradiction, if any, on the question as to what the father of the prosecutrix was doing in the house, cannot

at all be said to be material considering the fact that reply to such questions related to peripheral aspects of the case are given only by whatever one is able to recollect at the time when he is examined in court. Everyone cannot recollect minor details of a past incident with complete accuracy and he, while replying to such questions, gives an answer based upon his recollection of the event at that point of time. Therefore, minor contractions on such peripheral issues which do not constitute the core of the matter, cannot be said to be material and not much importance can be attached to these minor discrepancies which are otherwise bound to come in the case of truthful witnesses. Since everyone does not have equal power of observation, retention and reproduction, which varies from individual to individual, there is bound to be some difference while giving details unrelated to the main incident. The approach of the court while evaluating the testimony of a witness should be to see whether his/her evidence, when examined as a whole, appears to be true, or not. If the impression formed by the court is that the witness appears to be truthful and trustworthy, his/her evidence needs to be scrutinized taking

into consideration the discrepancies and infirmities pointed out in his /her evidence and the court should then evaluate the testimony of the witness, to decide whether the evidence given by him/his in the court stands impeached or shaken, rendering him/her unworthy of reliance, in the light of the discrepancies or infirmities pointed out in his/her testimony. This is more so, when the witness comes from a lower strata of the society and, therefore, does not have the temperament or the capacity to match the skills and training of an experienced lawyer who cross-examined him/her in the court. Minor discrepancies in the testimony of such witness, which are not related to the core issue involved in the case, need not be given much importance and the testimony of such witnesses should not be discarded on account of such minor discrepancies or infirmities.

17. The testimony of the prosecutrix could not be shaken during cross-examination. The prosecutrix being a young girl aged 8-9 years at the time of the incident, it is extremely unlikely that she would make false allegation of rape against the appellant, who was residing in the same locality and was otherwise well-known to her family.

According to the prosecutrix, she was taken to a school which had a tin shed on its roof. This is not the case of the appellant that no such school was there in the locality at that time. The prosecutrix stated in her cross-examination that the gate of the school is always open and there is no chowkidar. There is no material on record to show that this part of her deposition is incorrect. The prosecutrix also denied the suggestion that she had implicated the appellant on account of a dispute between him and her father for the place of work. Therefore, the testimony of the prosecutrix remains totally unimpeached during examination and that by itself is sufficient to prove the guilt attributed to the appellant.

18. The prosecutrix being a young girl aged at about 8-9 years at the time of this incident, it is not likely that her parents would have implicated the appellant in a false case of rape of their daughter, conscious as they would be that reporting of such a matter to the police, particularly when the parents of the prosecutrix as well as the appellant were living in the jhuggies situated in the same locality, was bound to expose their daughter to scrutiny and questions not only by

the police and courts but also by their neighbours and relatives. They could not have been ignorant of the fact that they may even have difficulty in finding a suitable match for their daughter once it is known that she had been subjected to rape in her childhood. Therefore, if they, despite realizing these consequences do report the matter to the police, it would be only if what they were reporting was absolutely true and correct. In fact, some of the parents even refrain from reporting such incident lest their child not face embarrassment on account of the incident becoming public and her marriage being jeopardised on account of the prospective in-laws becoming aware of the incident, at the time of her marriage. The parents of the prosecutrix knew that if they report the matter to the police, they will have to take their child first to the police station then to the hospital and, thereafter, in the court and the child will be made to repeat the horrible incident at every place, at the cost of considerable discomfort and embarrassment to her. Therefore, unless an incident of this nature has actually happened with their child, they would not take such a step.

19. The learned counsel for the appellant has referred to the

decision of the Hon'ble Supreme Court in "**Radhu Vs. State of Madhya Pradesh**", (2007) 12 SCC 57, where the Supreme Court, inter alia, observed:

"It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a "rape", if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrists, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare

instances where parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.”

20. The Hon’ble Supreme Court itself observed, in the above referred case, the cases of the parents persuading a daughter to make a false charge of rape either to take revenge or to extract money or to get rid of financial liability, are only rare and whether there was rape or not would depend ultimately on the facts and circumstances of each case. The court cannot lose sight of the fact that the prosecutrix in this case was not a grown-up girl but was a girl aged about 8-9 years at the time of this incident. It is unlikely that a child of this age can even be tutored to make allegations of rape by a person otherwise well-known to her and then repeat those allegations before police, magistrate and then doctor during trial.

21. According to the appellant, he has been implicated in this case because he had a quarrel with the mother of the prosecutrix over parking of carts at the place on which they

used to sell vegetables and that the mother of the prosecutrix at that time had toppled the carts in which they used to sell vegetables. Presuming that such an incident had taken place, though there is no credible evidence to prove it, it is inconceivable that a mother would implicate the person with whom she had a minor dispute on parking of vegetable cart, in a case of this nature and that too at the cost of staking the future and welfare of her own daughter. If the mother of the prosecutrix were to implicate the appellant in a false case of rape, she would have alleged rape with her and not with her daughter, who was an unmarried girl of 8/9 years at that time.

22. According to the appellant, the parents of the prosecutrix had toppled his vegetable cart and thrown away his vegetables on account of the quarrel which he had with them. If that be so, it was the appellant who would be aggrieved against the parents of the prosecutrix on account of their having toppled his vegetable cart and throwing his vegetables and it would not be other way round

23. According to DW-1, the wife of the appellant, the mother of the prosecutrix has threatened to implicate her husband in

a false case, in case he against placed his cart at that very place. No one gives a threat of the nature attributed by DW-1. In a quarrel, one may give threat of beating or even killing but no one ordinarily gives threat of implicating other person in a false case. This is not the way human beings behave in quarrels. In any case, there is no convincing proof of the alleged quarrel. No report was lodged with the police complaining against the mother of the prosecutrix throwing away the vegetables of the appellant or threatening to implicate him in a false case. Therefore, the plea taken by the appellant in this regard is not convincing at all.

24. According to the DW-1, one the next day of this incident, the mother of the prosecutrix came to her husband at about 2.30 a.m, said that her daughter had been raped by someone, touched the feet of her husband and requested him to accompany her to the police station. Similar statement has been made by the appellant, when he was examined under Section 313 of Cr.P.C. According to DW-2, Ram Singh, who is a witness produced by the appellant, the mother of the prosecutrix and the appellant were not on speaking terms with each other as she had threatened to implicate the

appellant in a big case. I fail to appreciate why the parents or mother of the prosecutrix would go to the appellant and touch his feet in order to accompany them to the police station, when they were not even on speaking terms with each other. The appellant was not a police officer or an influential person. There is no way he could have helped the parents of the prosecutrix in the police station. Therefore, it is most unlikely that they would have gone to his house and touched his feet in order to persuade him to accompany them to the police station.

25. When the prosecutrix was examined in hospital on 3rd July, 2004, her hymen was found torn and mucosal tear seen on post vaginal wall. The prosecutrix being a girl aged about 8-9 years at that time, her hymen having been found torn when she was examined in hospital is drawing expression of the fact that she had been subjected to rape. The defence taken by the appellant is that the parents of the prosecutrix had got her raped by some other person, in order to implicate him in a false case. The defence taken by the appellant to say the least is preposterous. No parents would go to the extent of getting their own daughter aged

about 8-9 years raped by some one only with a view to implicate a neighbour in a false case of rape and that too merely because they had a tiff with him on parking of the carts at a place on which they used to sell vegetables. In fact, the defence taken by the appellant does not even deserve a serious consideration by this court, in the facts and circumstances of this case.

26. It is by now settled proposition of law by a catena of decisions of the Hon'ble Supreme Court, including "**Rafiq Vs. State of UP**", 1980 Cr1.L.J. 1344 and "**Bhoginbhai Hirjibhai Vs. State of Gujarat**" **AIR 1983 SC 753**, "**State Vs. Chandra Prakash**", **AIR 1990 SC 658**, and also the decision in the case of Radhu (supra) relied upon by the learned counsel for the appellant herself that conviction in a case of rape can be based solely upon the uncorroborated evidence of the prosecutrix, which should not be rejected on the basis of minor discrepancies and contradictions, unless there are such facts and circumstances present in a particular case which would persuade the court to look for corroboration for her testimony. In the present case, there are no such circumstances as would justify looking for the

corroboration of the testimony of the prosecutrix. The court cannot treat the testimony of the prosecutrix in a rape at par with that of an accomplice in a crime which requires corroboration and no infirmity is attached to the testimony of a victim of such a heinous crime. In fact, it would only be adding insult to the injury if the court insists on corroboration of her testimony, even in the absence of circumstances which would warrant adoption of such a course of action.

27. In any case, even if the court does look for corroboration of the testimony of the prosecutrix, the same is available in abundance in the present case. The testimony of the prosecutrix finds full corroboration not only from the injuries, including torn vagina found on her person when she was examined in the hospital but also from the statement made by her first to her parents and then to the doctor soon after this incident took place. The previous statements of the prosecutrix are admissible in evidence under Section 157 of the Evidence Act and this proposition of law was recognized by the Hon'ble Supreme Court in "Madan Lal Vs. State of J&K", 1988 SC 386, where the statement made by the

prosecutrix to her mother soon after the incident was accepted as a corroboration of her testimony in the court.

28. For the reasons given in the preceding paragraphs, I have no hesitation in holding that the appellant had raped the prosecutrix on 2nd July, 2004, taking advantage of her tender age and taking her to a secluded school which had no watchman and, therefore, he has rightly been convicted under Section 376(f) of Indian Penal Code the age of the prosecutrix at the time of commission of offence being less than 12 years. The trial court has awarded substantive sentence of 12 years to the appellant under Section 376(f) of the IPC. Considering the appellant has been in custody for last more than 5-1/2 years and that he belongs to a lower strata of the society who could not even afford a counsel of his choice and was provided a counsel by Delhi High Court Legal Services Committee to present his case, it is directed that the appellant will undergo RI for three years under Section 363 IPC and will pay a fine of Rs.5,000/- or undergo SI for three months in default. He will undergo RI for ten years and pay fine of Rs.15,000/- or undergo SI for six months in default under Section 376(f) of IPC. Out of the

fine, if recovered from the appellant, a sum of Rs.15,000/- shall be paid to the prosecutrix as compensation. In terms of the directions given by the trial court. The appellant will get the benefit of Section 428 of Cr.P.C. Both the sentence will run concurrently.

29. The appeal stands disposed of. One copy of this order be sent to the appellant through jail superintendent. Trial Court record be sent back with a copy of this judgment.

(V.K.JAIN)
JUDGE

JANUARY 25, 2010
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