

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

Judgment reserved on: July 30, 2010
Judgment delivered on: December 22, 2010

+ **CRIMINAL APPEAL NO.24/2008**

HARENDER

....APPELLANT

Through: Ms.Rakhi Dubey, Amicus Curiae

Versus

STATE (GOVT. OF NCT) DELHI

....RESPONDENT

Through: Mr.Pawan Bahl, APP.

CORAM:

HON'BLE MR. JUSTICE AJIT BHARIHOKE

1. Whether 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 Digest ?

AJIT BHARIHOKE, J.

1. This appeal is directed against the impugned judgment dated 14.9.2007 and the consequent order on sentence dated 21.9.2007 passed by the learned Additional Sessions Judge in Sessions Case No.94/2007 FIR No.472/2003 P.S. Model Town whereby the appellant Harender Singh has been convicted for the offence punishable under Section 376 IPC for raping a minor girl and sentenced to undergo RI for the period of 10 years and also to pay a fine of Rs.2000/-, in default of payment of which to undergo SI for the period of two months.

2. Briefly stated case of the prosecution is that on 28th August 2003 at about 2.21 p.m., lady Constable Praffulla of PCR conveyed information to police station Model Town that a 50 years old man has committed rape of a girl aged 5 years at House No.913/11, Lal Bagh, Model Town, Delhi. The information was recorded as DD No.14A (Ex.PW6/C) in the daily diary maintained at P.S. Model Town. Copy of the DD report was referred to ASI Virender Singh through Constable Balbir for necessary action and the SHO was also informed about call.

3. On the receipt of DD report, ASI Virender Singh reached at the spot of occurrence along with Constable Balbir Singh and apprehended the appellant. In the meanwhile, on the receipt of information regarding the DD report, S.I. Pushplata also reached at the spot of occurrence. There she met complainant Krishna (PW-2), mother of the prosecutrix 'P' (name withheld) and recorded her statement.

4. Complainant Krishna disclosed in her statement Ex.PW-2/A that she was resident of N-25, B-32, Lal Bagh, Azad Pur, Delhi and she was running a small provision shop from her home. On 28th August 2003, she left her daughter aged about 4 years at her shop and went upstairs for drying the clothes. 10/15 minutes later, she came back to her shop and found that her daughter was missing. She looked for her daughter here and there and suddenly she heard the sound of her daughter crying coming from House No.N-25, B-46, of her neighbour. On this, she went inside the said house and found that appellant Harender had

laid her daughter on the floor after removing her underwear he was indulging in wrong act (sexual act) with her daughter. She rescued her daughter from the appellant and raised alarm. On this, her brother-in-law(*devar*) Sanjay came at the spot and caught hold of Harender(appellant) and he was handed over to the police. S.I. Pushplata obtained thumb impression of the complainant on the said statement and sent the statement, after appending her endorsement as Ex.PW 18/A on the same, to the police station for the registration of the case. On the basis of said rukka, formal FIR (Ex.PW-6/A) was registered at P.S. Model Town.

5. Both the prosecutrix as well as the appellant were sent for medical examination to Hindu Rao Hospital. As per the MLC of the child victim, she reached Hindu Rao Hospital on 28th August 2003 at 3.30 p.m. with the alleged history of sexual intercourse by a male adult person. Child victim was conscious and oriented and on gynaecological examination, fresh torn hymen was seen. Vaginal smear was taken and handed over to Sub-Inspector Pushplata along with the under garments of the child victim.

6. As per the MLC Ex.PW-5/B of the appellant, nothing was found which may suggest that he was incapable of doing sexual intercourse. Under garments of the appellant were also seized. The samples were sent to CFSL for analysis and as per the report of CFSL Ex.PW-4/A, human semen was found on the underwear of the child victim. The

vaginal swab also tested positive for spermatozoa. Statements of the witnesses were also recorded. On completion of formalities of investigation, the appellant was charge sheeted and sent for trial.

7. Learned Additional Sessions Judge, on consideration of charge sheet and the submissions made by the parties, charged the appellant for the offence of rape punishable under Section 376 IPC. Appellant pleaded not guilty to the charge and claimed trial.

8. In order to bring home the guilt of the appellant, the prosecution has examined 18 witnesses. Material witnesses, however, are the prosecutrix (PW1), complainant (PW2), Sanjay (PW3) and Naresh (PW9) besides medical evidence given by PW5 Dr.Dhananjay Kumar and PW6 Dr.Shalini Jain.

9. PW-2 Smt. Krishna (complainant) is the mother of the child victim. She, in her testimony, has reiterated the allegations made in the complaint by stating that about a year prior to the recording of her evidence, she had gone to the roof of her house for drying the clothes after leaving her 4 years old daughter at the shop. On returning, she found that the prosecutrix was not in the shop so she looked around in search of her and suddenly she heard cries coming from jhuggi No.N-8, B-46 belonging to the appellant Harender. She went there and saw that her daughter was lying on the floor and the appellant was indulging in "*galat kaam*" i.e sexual intercourse with her. He had removed his underwear as well as under wear of the prosecutrix and

was committing rape by inserting his penis in the vagina of her daughter. She rescued her daughter from under the appellant and raised alarm. On this, her brother-in-law(*devar*) Sanjay came there. Police was also informed and she made statement Ex.PW-2/A to the police.

10. PW-3 Sanjay Kumar, brother-in-law of the complainant testified that on the fateful day, on hearing the alarm raised by the complainant, he reached at the jhuggi of the appellant and found that his niece i.e the prosecutrix aged 4 years was crying. He was informed that the appellant had raped her. He then caught the appellant and called the police. Police came and took the appellant as well as his niece to Hindu Rao Hospital for medical examination.

11. PW-9 Suresh is a chance witness who happened to reach at the spot on hearing the noise. He stated that on 28th August 2003, while passing through the place of occurrence, he saw the appellant Harender being caught by PW-3 Sanjay Kumar. Daughter of Roshan Lal aged 5 years was brought out of the jhuggi of Harender and people had collected outside the jhuggi. On his enquiry, he was informed by the complainant i.e. the mother of the child victim that the appellant had committed rape on the child inside his jhuggi. He also claimed that victim child was crying and the complainant had shown that her child was bleeding from her private parts. He further stated that the police arrived at the spot and recorded his statement.

12. Statement of the appellant under Section 313 Cr.P.C. was recorded with a view to afford him an opportunity to explain the incriminating evidence appearing against him. He denied the prosecution case and claimed that he has been falsely implicated by the complainant because of enmity and business rivalry.

13. The appellant examined 3 witnesses in defence. DW1 Smt. Sheela Devi is the wife of the appellant. She has stated that the appellant earlier had a quarrel with the complainant Krishna who threatened to implicate him in a false case to ensure that he remains in jail. She further stated that Krishna was holding a grudge against her as she had opened a provision shop in competition with PW Krishna. According to her, on 28.8.2003, a quarrel took place between Krishna and her husband Harender (appellant) at about 2.00 p.m. At that time prosecutrix was playing on the road side. Krishna gave a telephone call to the police at No.100. Police came there and took away the appellant. She stated that she and her husband were beaten by Krishna in that quarrel but they were not medically examined.

14. DW2 Batohi Shah is a neighbour of the appellant. He has submitted that on the relevant day, prosecutrix was playing on the road side. Complainant raised an alarm, as a result of which several persons collected there. Police also came there. He further stated that on an earlier occasion, there had been a quarrel between the appellant and the complainant and the complainant had threatened to falsely

implicate him. According to him, no quarrel took place between the appellant and the complainant on 28.8.2003 and he reached at the spot 5/7 minutes after Krishna had raised alarm. He also stated that he heard a rumour there that Harender had raped the prosecutrix.

15. DW3 Ram Aadhar is also a neighbour. He has deposed that on 28.8.2003, when he reached his house, he noticed a quarrel taking place on the issue of parking of rehri between the appellant and some other person whose name he could not tell. He stated that somebody called the police and police falsely implicated the appellant in the rape case.

16. Learned Additional Sessions Judge, on consideration of the evidence, relying upon the testimony of the prosecutrix, her mother PW2 Krishna, her uncle PW3 Sanjay Kumar as well as the medical evidence and the report of CFSL found the appellant guilty of having committed rape on the prosecutrix and convicted him under Section 376 IPC.

17. Learned Ms. Rakhi Dubey, amicus curiae appearing for the appellant has submitted that the appellant is innocent and he has been falsely implicated in this case. She submitted that the instant case an example of gross falsity and fabrication of evidence. In this regard, she firstly submitted that as per the case of prosecution, the investigating agency was put into motion with recording of DD No.14A dated 28.08.2003 (Ex.PW6/C) at P.S. Model Town. She has drawn my

attention to the DD report and submitted that this DD report was entrusted to ASI Virender Singh who, as per case of prosecution, went to the spot of occurrence along with Constable Balbir Singh No.1247 NW. Learned amicus curiae drew my attention to the testimony of Constable Balbir Singh who testified that he along with ASI Virender Singh reached at the spot of occurrence at about 1:30/2:00 pm, which means that the police party had reached the place of occurrence prior to the receipt of information of the incident vide DD report Ex.PW6/C, which was recorded at 2:21 pm. Learned amicus curiae submitted that this clearly indicates that the prosecution case is the result of twisting and manipulating of facts.

18. I find no merit in this contention. The incident, as per the FIR, took place on 28.08.2003 and Constable Balbir Singh was examined as a witness on 13.10.2005 i.e. almost two years after the incident. Therefore, this minor lapse about timing in the testimony of PW13 Constable Balbir Singh can easily be attributed to the lapse of memory and it cannot be taken as a circumstance to suspect the testimony of the complainant and the other witnesses who reached at the spot immediately after the occurrence.

19. Learned amicus curiae took me through the facts recorded in the police control room form Ex.PW17/A and submitted that careful perusal of this form would show that in the aforesaid form, initially it is recorded that a quarrel had taken place near Chakki of Noor Mohd, Lal

Bagh, Shishu Vatika Park, Azad Pur and, thereafter below the aforesaid recording, with a different ink, it is recorded that a girl child aged five years was lured by one Harender to his house where he tried to commit rape on her and the said Harender has been caught and detained at the spot.

20. This argument also does not help the appellant for the reason that the first recording pertaining to the fight near Chakki of Noor Mohd is the information received at police control room on 28.08.2003 at 1414 hours, which was given by one Virender through telephone No.27457176, whereas the second recording was at 1420 hours, wherein the allegations against the appellant referred to above are recorded. Therefore, the difference of darkness of ink is of no consequence. Otherwise also, Ex.PW 17/A is a photocopy and from the photocopy, it cannot be concluded that the entry recorded at 1420 hours is an interpolation. It appears that learned amicus curiae is trying to take advantage of the fact that the information received at 1414 hours was sent by one Virender and this happens to be the name of the ASI who went to the spot of occurrence for verification of DD No.14A.

21. Learned amicus curiae further contended that if the case of the prosecution is to be believed, the appellant inserted his penis in the vagina of the child victim. In that eventuality, as per the medical jurisprudence, there ought to have been serious injury to the private

part of child victim. However, in the instant case, as per the MLC of the child Ex.PW5/A and the history recorded by Senior Resident, Gynae, i.e. Ex.PW7/A on the MLC, no injury was seen on the vagina of the child but for fresh tear of hymen. This circumstance, according to learned amicus curiae, rules out any possibility of rape because penetration into vagina is the essential ingredient to constitute the offence of rape.

22. I am not convinced with the above argument. Section 375 of the Indian Penal Code defines rape and Explanation to Section 375 states that penetration itself is sufficient to constitute sexual intercourse necessary for the offence of rape and it is not necessary that the accused must go through the entire exercise of sexual intercourse. As per the MLC of the child victim, there was a fresh hymen tear found, which itself is sufficient to establish that there was some penetration in the vagina, otherwise the hymen would not have got torn. Not only this, as per the CFSL report Ex.PW4/A, the underwear of the prosecutrix on chemical analysis, gave positive test for semen and her vaginal swab also gave positive test for human spermatozoa. PW4 P. Kumar, Senior Scientific Assistant, CFSL has categorically stated that the underwear of the prosecutrix and her vaginal swab tested positive for human semen. This circumstance clearly indicates that there was some penetration in the vagina, as such the offence of rape of girl child stands established.

23. Learned amicus curiae further argued that the trial court has failed to take note of the fact that evidence of the prosecution suffers from material contradictions. In this regard, she has stated that as per testimony of PW9 Naresh, complainant Krishna had shown him the private part of the child victim which was bleeding, whereas as per the MLC of the child victim, no evidence of bleeding from vagina was seen and even the clothes of the child were not stained with blood. From this, learned amicus curiae has urged the court to infer that PW9 is a planted witness and this circumstance casts doubt against the fairness of the investigation.

24. I am not convinced with the above submission. It is well known that there is a tendency on the part of the witnesses to exaggerate while testifying in the court. If PW9 has succumbed to that tendency, it may not be taken as a circumstance to suspect the testimony of the complainant Krishna (PW2) and Sanjay (PW3).

25. Lastly, learned amicus curiae has contended that admittedly wife of the accused was present in the shop located in the house in question. Therefore, it is highly improbable that the appellant would have indulged in such a heinous act of rape in the presence of his wife.

26. I find no merit in this contention. According to PW2 Krishna, at the time of incident, wife of the accused was present at the shop located in the house, but the incident had taken place within a room.

Therefore, it cannot be inferred that wife of the appellant was present at the spot at the time of occurrence.

27. As regards the defence of the appellant that he has been falsely implicated due to business rivalry and enmity, I do not find any merit in the contention. It is inconceivable that in our society, a mother would try to settle score with some business rival by putting the honour of the family and the girl child at stake by making a false allegation of rape. PW2 Krishna has fully corroborated the case of prosecution by reiterating the allegation made in the complaint which was registered without any delay. Her version stands corroborated by the testimony of PW3 Sanjay, who stated that when he reached at the spot on hearing alarm of the complainant, he found his niece crying and he was informed by the complainant that appellant has raped his niece. The aforesaid information given by the complainant to her brother-in-law Sanjay is the evidence of her conduct immediately after the occurrence, which is admissible in evidence under Section 8 of the Indian Evidence Act. Not only this, PW9 Naresh, who is an independent witness, has also supported the above version. Even the defence witness DW2 Batohi Shah in his cross-examination by learned APP has stated that when he reached at the spot, complainant was claiming that her daughter has been raped by the accused. From the aforesaid evidence, it is established on the record that the appellant had committed rape of the child victim.

28. In view of the discussion above, I find no infirmity in the impugned judgment of conviction and order on sentence which may call for interference in appeal. The appeal, being devoid of merit, is dismissed.

(AJIT BHARIHOKE)
JUDGE

DECEMBER 22, 2010

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