

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

Judgment delivered on: November 8, 2010

+ **CRIMINAL APPEAL NO.1039/2008**

DHARMENDER @ BINDU **....APPELLANT**

Through: Mr.Bhupesh Narula, Advocate

Versus

STATE **.....RESPONDENT**

Through:Mr.R.N.Vats, APP.

WITH

CRIMINAL APPEAL NO.6/2009

KAILASH **....APPELLANT**

Through:Mr.S.B.Dandapani, Advocate

Versus

STATE **.....RESPONDENT**

Through: Mr.R.N.Vats, 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.(ORAL)

1. These appeals are directed against the impugned judgment dated 27.05.2008 and the consequent order on sentence dated

29.05.2008 whereby the appellants Dharmender @ Bindu and Kailash have been convicted and sentenced for the offences punishable under Section 363 IPC read with Section 34 IPC and Section 376 (2) (g) IPC. For the offence under Section 363/34 IPC, both the appellants have been sentenced to undergo RI for the period of five years and also to pay fine of ₹ 1000/- each, in default of payment of fine, to undergo SI for further period of 15 days each respectively. For the offence under Section 376 (2) (g), the appellants have been sentenced to undergo RI for the period of 10 years each and also to pay a fine of ₹ 2000/- each, in default of payment of fine, to undergo SI for the period of one month each.

2. Briefly put, case of the prosecution is that in the morning of 10.01.2005, the prosecutrix (real name withheld) was playing in the park. From there, she was enticed away by the appellant Dharmender @ Bindu, who offered to buy her new clothes. The appellants took her to a block of public toilet, which was dilapidated and under disuse. The appellant Dharmender took the prosecutrix into one of the latrines and subjected her to rape whereas the appellant Kailash stood guard outside that latrine. As a result of rape, the prosecutrix suffered bleeding from her vagina. She went home and narrated the incident to her mother (PW-1). Father of the prosecutrix was not present at the relevant time so they waited for him to come and thereafter in the night of 10.01.2005 at about 9.00 p.m. mother of the prosecutrix along with her went to the police station and reported the matter. Her

complaint was initially recorded as DD No.40A dated 10.01.2005 P.S. Sultan Puri (Mark `X') which was forwarded to S.I. Tej Bahadur(PW-11) through Constable Joginder (PW-8). S.I. Tej Bahadur at that time was not in the police station as he had gone for investigation of case FIR No.63/2005, P.S. Sultan Puri under Section 376 IPC. When S.I. Tej Bahadur returned back to the police station late in the night, Constable Joginder handed over copy of DD No.40A and produced the prosecutrix as well as her mother before him. S.I. Tej Bahadur took the prosecutrix along with her mother to Sanjay Gandhi Memorial Hospital for medical examination. He collected the MLC of the prosecutrix as also the sealed packets containing her under garments as well as the vaginal swab of the prosecutrix. He also recorded the statement of Babita(PW-1), mother of the prosecutrix Ex.PW-1/A and obtained her signature on the same. He appended his endorsement Ex.PW-11/A on the statement of the complainant Babita and sent it to the police station through Constable Joginder for the registration of the case. During investigation, the appellants were arrested. The under garments of the prosecutrix as well as the slide of vaginal swab were sent to FSL for chemical examination and the report of FSL was collected. The appellants were also medically examined to confirm whether or not they were physically capable of indulging in sexual intercourse. On completion of the investigation, both the appellants were challaned and sent for trial.

3. The learned Additional Sessions Judge charged the appellant Dharmender for the offences under Section 363/34 IPC and Section 376 IPC whereas the appellant Kailash was charged for the offences under Section 363 IPC and Section 211/376 IPC. Subsequently, on 30.11.2006 alternative charge for the offence of gang rape punishable under Section 376(2)(g) IPC was framed against both the appellants. The appellants pleaded not guilty to the charges framed against them and claimed to be tried.

4. In order to bring home the guilt of the appellants, prosecution has examined 16 witnesses in all. The case of the prosecution, however, is essentially based upon the testimony of the prosecutrix (PW-3) as there is no other eye witness to the occurrence. Prosecutrix has testified in court that on the fateful day i.e. 10.01.2005 at around 11.30 a.m. she was playing with other children in the park. Appellant Dharmender came there and called her aside. He told her that he was carrying money and he would get her new clothes and took her to the public toilets, which were in dilapidated state. There Dharmender sexually assaulted her after removing her clothes. She claimed that the appellant unzipped his pant and inserted his penis into her vagina. As a result, she started bleeding. Thereafter, the appellant zipped up his pant and threatened her not to tell anyone about the incident and ran away from the spot. She also stated that the appellant Kailash, who at that time was keeping guard outside the latrine, also ran away with the appellant Dharmender.

5. PW-1 Babita is the mother of the prosecutrix. She has deposed that on 10.01.2005 at around 12.30 – 1.00 p.m., the prosecutrix came home. She was crying and her clothes were stained with blood. When asked as to what happened, prosecutrix told her that one boy had lured her to public latrine promising to buy her clothes. There he removed her clothes and raped her. She also stated that two persons were involved in the rape. PW-1 Babita further stated that when she examined her daughter, she found that the prosecutrix was bleeding from her private part. She then rang up her husband who came at 8.00 p.m. The witness further claimed that she had asked the prosecutrix about the identity of the assailants but the prosecutrix could not tell their names. Prosecutrix, however, told that she could take her (mother) to them. When they were going towards main road, the prosecutrix pointed towards the appellant Bindu @ Dharmender and identified him as the person who had raped her.

6. PW-2 Bhanu Pratap is the father of the prosecutrix. He has stated that on the fateful day he returned home at about 8.30 p.m. and he was informed that his daughter has been sexually assaulted by someone. When he asked the prosecutrix about the identity of the rapist, she replied that she was not aware of the name of that person but he was a boy staying at the *sabjiwala* house. Thereafter, they went to the house of the appellant Dharmender @ Bindu and he spoke to the mother of the appellant, who refused to believe that her son could commit such an act. He also stated that his daughter was medically

examined at Sanjay Gandhi Memorial Hospital. According to PW-2, appellant Dharmender was not present at the house but later on they found him near the garbage dump of D-Block near the park in the company of two others people. On the pointing of the prosecutrix, he tried to catch the appellant. Appellant Dharmender @ Bindu managed to escape by climbing over a 6 feet high wall but he caught appellant Kailash and took him to the police station. The appellant Dharmender @ Bindu was arrested on the next day.

7. PW-4 Dr.Meenakshi examined the prosecutrix at Sanjay Gandhi Hospital on 11.01.2005 at about 1.05 p.m. and prepared her MLC Ex.PW4/A. She referred her to Senior Resident Gynaecologist for medical examination along with the MLC.

8. PW-10 Dr.Poppy Hazarika medically examined the prosecutrix and found that her hymen was ruptured. She took a vaginal swab of the prosecutrix and also sealed under garments of the prosecutrix and handed over the same to the I.O. Vaginal swab was also sealed before handing it over to the I.O.

9. PW-16 Dr.R.K.Misra, Radiologist examined the X-Ray plates of the prosecutrix for bone age assessment and opined that her age was between 12-14 years. His report is Ex.PW-16/A.

10. PW-5 Bimla Devi, Principal, MCD Primary School, Peera Garhi has deposed on the basis of school record and proved the School Leaving Certificate of the prosecutrix Ex.PW-5/A wherein the date of birth of the

prosecutrix is shown as 17th May 1992, which implies that at the time of incident, the age of the prosecutrix was 12 years and 8 months approximately.

11. PW-9 Dr.Satish Kumar Mittal has deposed that on 11.01.2005 at about 5.45 p.m., appellant Dharmender was produced in the hospital by Constable Joginder for medical examination to confirm his sexual capability. Dharmender was referred to Forensic Expert Dr.Baljeet Singh, who after medical examination, opined that there was nothing to suggest that Dharmender was incapable of performing sexual act. He has proved the MLC prepared by him Ex.PW-9/A.

12. Other witnesses examined by the prosecution are formal witnesses who participated in the investigation of the case at one stage or the other.

13. The learned Additional Sessions Judge, on consideration of evidence on record and the submissions made by the respective parties, found both the appellants guilty of charges under Section 363/34 IPC as well as Section 376(2)(g) IPC and convicted and sentenced them accordingly.

14. Learned Shri Bhupesh Narula, Advocate appearing for the appellant Dharmender @ Bindu has submitted that the learned Additional Sessions Judge has committed a grave error in relying upon the uncorroborated testimony of the prosecutrix to hold the appellant guilty for rape. He firstly contended that as per the case of the

prosecution, under garments of the prosecutrix as well as her vaginal swab were seized and sent to FSL for chemical examination along with the under garments of the prosecutrix. He has drawn my attention to the report of FSL Ex.`PX`, according to which no traces of semen were found either on the vaginal swab of the prosecutrix or her under garments. Learned counsel submitted that this rules out the possibility of rape because had the prosecutrix been raped, there would have been some traces of semen on the vaginal swab as well as the under garments of the prosecutrix.

15. I do not find any merit in this contention. Rape is defined under Section 375 IPC, which reads thus:-

“375. Rape.

A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: -

First: - Against her will.

Secondly: -without her consent.

Thirdly: - With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly: -With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly: - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly: - With or without her consent, when she is under sixteen years of age.

Explanation: - Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: -Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape”

16. On bare reading of explanation to the definition of rape, it is clear that even a slightest penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape and to hold an accused of guilty of rape. It is not necessary that after penetration he must have ejaculated. Therefore, absence of semen on the under garments of the prosecutrix or her vaginal swab by itself cannot be taken as circumstance to reject the otherwise credible version of the prosecutrix. Thus I find no reason to suspect the truthfulness of the version of the prosecutrix so far as the role of the appellant Dharmender @ Bindu is concerned.

17. Learned counsel for the appellant Dharmender further contended that the prosecution case is based upon the sole testimony of the prosecutrix which is not reliable for the reason that as per the case of prosecution, the prosecutrix was enticed away by the appellant Dharmender to public latrines while she was playing with the children in the park and she was raped in the public latrine during day time, somewhere around 11.30 a.m. Despite that there is no independent witness to corroborate the version of the prosecutrix at least to the extent that someone saw the appellant Dharmender @ Bindu taking away prosecutrix towards public latrines. This circumstance, according to learned counsel for the appellant, raises a grave doubt against the prosecution story and the aforesaid doubt gets compounded by the fact that as per the MLC Ex.PW4/A, no fresh injury was found on the person of the prosecutrix, which rules out the possibility of rape.

18. I am not convinced with the above argument. The law relating to appreciation of the evidence of a victim of rape is well settled. Her testimony has to be appreciated on the anvil of probabilities like the testimony of any other victim of crime. The prosecutrix undoubtedly is a competent witness under Section 118 of the Evidence Act and her evidence must receive the same weight as it attaches to a victim in a case of physical assault. There is no rule of law that the testimony of a rape victim cannot be acted upon without corroboration of material particulars. The Court can safely act upon the uncorroborated testimony of the victim of sexual assault, provided her testimony inspires confidence and is found to be reliable.

19. The Apex Court, in the case of ***State of Punjab vs. Gurmit Singh***, 1996 (2) SCC 384, while dealing with the testimony of rape victim, inter alia, observed thus:-

8. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for *corroboration* of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of

corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable. In *State of Maharashtra v. Chandraprakash Kewalchand Jain*, (1990) 1 SCC 550, Ahmadi, J. speaking for the Bench summarised the position in the following words:

"A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

20. The Supreme Court in the matter of ***Om Prakash vs. State of U.P.*** (2006) 9 SCC 787 observed thus:-

13. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian woman has a tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members have courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after scathing (*sic* scathing) her own prestige and honour.

14. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault—it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation. This position was highlighted in *State of Punjab v. Gurmit Singh*

21. In the instant case, the prosecutrix has given a vivid account of the entire episode which goes to show that the appellant Dharmender @ Bindu enticed her to the public latrine on the lure of getting her new clothes and raped her. Aforesaid version of the prosecutrix finds

corroboration from the testimony of her mother PW-1 Babita who has categorically stated that when the prosecutrix reached home on the fateful day at 12.30-1.00 p.m. she was crying and her clothes were stained with blood and on examination she found that the prosecutrix was bleeding from her private parts, which obviously is the evidence of the penetration into the vagina of the prosecutrix. Further, from the MLC Ex.PW4/A, it transpires that the hymen of the prosecutrix was ruptured, which apparently could be the result of the penetration. Not only this, the appellant Dharmender @ Bindu was also medically examined on 11.01.2005 at 5.45 p.m. and the concerned doctor found a small wound(tear) on the under surface of penis near the gland which could be the result of the sexual intercourse with the young girl. Therefore, I find no reason to suspect the testimony of the prosecutrix, particularly when there is nothing on record to suggest that there was any enmity or motive on the part of the prosecutrix or her family to falsely implicate the appellant in this case. Thus, I am of the view that learned Additional Sessions Judge has rightly found the appellant Dharmender guilty of the offence of kidnapping and rape of the prosecutrix.

22. Learned Shri S.B.Dandapani, Advocate appearing for the appellant Kailash has submitted that the appellant Kailash has nothing to do with the instant case and he has been implicated merely on suspicion. Expanding on the argument, learned counsel took me through the testimony of the prosecutrix who appeared as PW-3 and

pointed out that in her entire examination, prosecutrix has nowhere stated that the appellant Kailash was party to luring the prosecutrix to accompany the appellant Dharmender @ Bindu to the public latrines. Learned counsel submitted that only role ascribed to Kailash is that he stood guard outside the public latrine while the appellant Dharmender @ Bindu was raping the prosecutrix. Said version, according to learned counsel for the appellant Kailash, is not reliable for the reason that though as per the case of prosecution the incident took place in the morning of 10.01.2005 between 11.30 a.m. – 1.00 p.m. yet, FIR in this case has been registered much later on the next day at around 4.00 a.m. Learned counsel also submitted that before the registration of the FIR, as per the case of prosecution the mother of the prosecutrix had visited the police station in the night of 10.01.2005 at 9.00 p.m. and reported the matter vide DD No.40A, P.S. Sultan Puri (Mark `X') wherein there is no mention of Kailash having accompanied appellant Dharmender @ Bindu or having stood guard outside the latrine while the prosecutrix was being raped. Thus, according to learned counsel for the appellant Kailash, the version of prosecutrix pertaining to the role of Kailash in her testimony as PW-3 is a material improvement upon the first hand version of the incident given to the police by mother of the prosecutrix and this circumstance itself causes a grave doubt about the prosecution story of Kailash having shared common intention to rape the prosecutrix with Dharmender.

23. I find merit in the above contention of learned counsel for the appellant Kailash. Perusal of DD No.40A dated 10.01.2005(Mark `X') reveals that this DD report was recorded at P.S. Sultan Puri on the complaint of PW-1 Babita, mother of the prosecutrix at about 9.00 p.m. i.e. 8 hours after the incident. In this DD report, only allegation made was that one boy has raped the daughter of the informant. There is no mention of the presence of the second boy at the time of rape. This circumstance raises a grave doubt against the correctness of version of the prosecutrix to the effect that Kailash stood guard outside the latrine while she was being raped, more so because of the reason that the prosecutrix, apart from the aforesaid role ascribed to Kailash has nowhere stated about participation of Kailash in luring her to the public latrines. In view of the above discrepancy, I do not find it safe to rely upon the testimony of the prosecutrix regarding the role of the appellant Kailash in the incident. Thus, I find it difficult to sustain the conviction of the appellant Kailash on the charges under Section 363/34 IPC and Section 376(2)(g) IPC. He, in my view, is entitled to benefit of doubt.

24. Another question which arises for determination is whether the appellant Dharmender @ Bindu is guilty of the offence punishable under Section 376 IPC or the offence of gang rape under Section 376(2)(g) IPC. As per the case of prosecution, the appellants Dharmender @ Bindu and Kailash were party to the gang rape of the

prosecutrix punishable under Section 376(2)(g) IPC. Gang rape is defined in explanation (1) to Section 376 IPC which reads thus:-

“Punishment for rape.....

Explanation 1. - Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.”

25. On reading of the definition of gang rape, it is clear that in order to constitute an offence of gang rape, there have to be more than two accused who acted in furtherance of their common intention resulting in rape of a woman. In the instant case, in view of the discussion above, the prosecution has failed to establish that the appellant Kailash nurtured a common intention with the appellant Dharmender @ Bindu, in furtherance of which the prosecutrix was raped. Therefore, we are left with only one accused involved in the offence. As such, the necessary ingredient of gang rape punishable under Section 376(2)(g) IPC is lacking in this case. Thus, on consideration of the testimony of the prosecutrix and the other material on record, I find that the appellant Dharmender @ Bindu is guilty of the offence of rape punishable under Section 376 IPC and his conviction under Section 376(2)(g) is not sustainable.

26. In view of the discussion above, I accept the appeal of appellant Kailash. His conviction on charges under Section 363 IPC as well as

Section 376(2)(g) IPC and the consequent order on sentence is set aside and he is acquitted of the charges, giving him benefit of doubt.

27. So far as appeal of appellant Dharmender @ Bindu is concerned, it is partly accepted. While maintaining his conviction under Section 363 IPC, his conviction under Section 376(2)(g) IPC is converted into conviction under Section 376 IPC.

28. Learned counsel for the appellant Dharmender @ Bindu has pressed for reduction of sentence awarded to him for the offence of rape. He has submitted that since his conviction has been reduced to a lesser offence under Section 376 IPC, his sentence may be reduced to the period already undergone in custody. Appellant Dharmender @ Bindu was a young boy in his early 20s at the time of commission of offence. As per his nominal roll, he had undergone custody for a period of 3 years 9 months and 22 days as on 06.11.2008, his conduct in jail is satisfactory and his previous record is clean.

29. Taking into account the above referred facts and overall circumstances of the case, while maintaining the sentence awarded to the appellant Dharmender @ Bindu under Section 363 IPC and maintaining the fine imposed, I reduce the sentence awarded to the appellant Dharmender @ Bindu for the offence of rape of the prosecutrix from rigorous imprisonment for 10 years to rigorous imprisonment for 8 years.

30. The appeals are disposed of accordingly, in the aforesaid terms.

(AJIT BHARIHOKE)
JUDGE

NOVEMBER 8, 2010

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