

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL 26/2009

% Judgment decided on: 17th February, 2011

SANTOSH

.....APPELLANT

Through: Mr. A.J. Bhambhani, Ms. Nisha
Bhambhani, Mr. Victor Bhambhani
and Ms. Lakshita Sethi, Advs.

Versus

THE STATE (N.C.T. of DELHI)

.....RESPONDENT

Through: Mr. Arvind Gupta, APP for the State

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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

A.K. PATHAK, J. (Oral)

1. Appellant has been convicted under Sections 376(2)(f)/323/506 of the Indian Penal Code by the Trial Court; sentenced to undergo rigorous imprisonment for 10 years with fine of ₹2,500/- and in default of payment of fine to undergo simple imprisonment for one month for the offence under Section 376(2)(f); sentenced to undergo rigorous imprisonment for one year for the offence under Section 506; rigorous imprisonment for three months for the offence under Section 323 IPC. All the sentences have been ordered to run concurrently. Appellant has been granted benefit of Section 428 Cr.P.C.

2. It is this judgment which is under challenge in this appeal.
3. Prosecutrix has been examined as PW3. Her father Bhanu Choudhary has been examined as PW7. Smt. Leela Devi, mother of the prosecutrix, has been examined as PW6. Dr. Nupur Gupta, who had clinically examined the prosecutrix, has been examined as PW2. Dr. Shiva Prasad, who had medically examined the appellant, has appeared in the witness box as PW10. These are the material witnesses, on the basis of whose testimonies Trial Court has returned a definite finding that appellant had committed rape upon the prosecutrix aged about 8 years, thus, committed offence under Section 376(2)(f) IPC.
4. I have perused the statements of PW3, PW6 and PW7 recorded in court as also by the Investigating Officer (IO) during the investigation. Besides this, I have also perused the statement of prosecutrix under Section 164 Cr.P.C. recorded by the Metropolitan Magistrate and that of PW2 Dr. Nupur Gupta together with MLC of the prosecutrix Ex. PW2/A. On scrutiny of above material I am of the view that Trial Court was not right in reaching a conclusion that appellant had committed rape upon the prosecutrix, inasmuch as, no evidence had come on record to suggest that appellant had penetrated his male organ into the private part of the victim/prosecutrix.
5. FIR in question was registered on the basis of statement of PW7 Bhanu Choudhary. In the FIR, PW7 Bhanu Choudhary had stated that on 25th March, 2006 at about 9:30 pm, when he reached home after work, he found his daughter missing. He made a search for his daughter, and while doing so he reached behind

his jhuggi where garbage used to be thrown. There he found one boy molesting his daughter. (Actual word used by PW7 is "*ched chaad*"). He asked the said boy as to what he was doing with his daughter at which appellant threatened him that in case he informed about the incident to anyone he would kill him. On his raising alarm, other persons of the locality arrived there and caught hold of the appellant. Public persons gave beatings to the appellant. He informed the police on telephone. Police officials arrived at the spot and apprehended the appellant. On inquiry, name of appellant was disclosed as "Santosh".

6. After FIR was registered, statement of prosecutrix was also recorded on 26th March, 2006 itself, wherein she did not level any allegation of rape. She had stated that the appellant, who was her neighbour, took her behind her house; it was dark there; when she tried to raise alarm appellant gagged her mouth. Thereafter, he started fondling her cheeks. He intimately touched her private parts and other parts of body. At that stage, she raised alarm. Her father arrived there and apprehended the appellant. Police also arrived at the spot. To the similar effect is the statement under Section 161 Cr.P.C. of PW6, Leela Devi.

7. After about one and a half month of the incident, statement of the prosecutrix under Section 164 Cr.P.C. was recorded by Metropolitan Magistrate wherein she has made improvements. For the first time she stated that appellant had removed her under wear. Thereafter, he opened zip of his pant and took out his male organ and struck the same on her vagina. To the similar effect is her deposition in the court. First of all there is material

improvement in her these statements vis-à-vis her statement under Section 161 Cr.P.C. recorded immediately after the incident. Secondly, even in her subsequent statements she has not said that the appellant had made any attempt to insert his male organ in her vagina or had inserted the same. The evidence with regard to penetration of male organ into the private parts of victim/prosecutrix is totally missing. No medical evidence with regard to penetration has also come on record. PW2 Dr. Nupur Gupta has not whispered a single word as to there was any possibility of rape or attempt of rape. No such mention is there even in the MLC Ex.PW2/A. PW2 Dr. Nupur Gupta has stated that on local examination of prosecutrix she did not notice any injury marks. Hymen was not torn. Vaginal swab and under garments of the prosecutrix were taken and sent to CFSL but no traces of semen were found on the vaginal swab or on the under garment of prosecutrix. In the MLC, it has been mentioned that vagina admits tip of little finger with great difficulty. This evidence also ruled out penetration.

8. Explanation to Section 375 IPC makes it clear that Penetration is necessary to constitute the sexual intercourse which is a requisite for the offence of rape. Penetration is the sine qua non for an offence of rape. Penetration of male organ into the private part of the prosecutrix is necessary to constitute the offence of rape. Even slightest penetration, with or without emission of semen, is sufficient to constitute the offence of rape and rupture of hymen is not necessary. In **Tarkeshwar Sahu Vs. State of Bihar (Now Jharkhand) 560 SCC (2006) 8 SCC**, Supreme Court has

held that no offence under Section 376 can be made out unless there was penetration to some extent. Absence of penetration, to any extent, would not bring the offence against the accused within the four corners of Section 375 of the Indian Penal Code. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC. In **Aman Kumar and Anr. Vs. State of Haryana AIR 2004 SC 1497**, Supreme Court held that penetration is 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 women, no matter how little. 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. In the said case since evidence of penetration was missing, Supreme Court converted the offence under Section 376(2)(g) into offence under Section 354 IPC.

9. Coming back to present case, there is no evidence to indicate that the appellant had penetrated his male organ in the vagina of the prosecutrix. Thus, in my view, appellant cannot be held guilty of offence under Section 376 IPC. No material has come on record

to show that accused was determined to have sexual intercourse in all events. In Aman Kumar's case (supra), Supreme Court has held that there is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid background, the offence cannot be said to be an attempt to commit rape to attract culpability under Section 376/511 IPC. In the present case, no offence of attempt to commit rape can be made out. As regards ingredients of offence under Section 354 IPC is concerned, the same are made out in this case. There is sufficient evidence on record that appellant had outraged the modesty of woman i.e. prosecutrix. The statements of PW3, PW6 and PW7 had been consistent that appellant had taken the prosecutrix with him behind her house and molested her. What constitutes an outrage to female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex. The act of pulling a woman, fondling with her, touching her cheeks, private parts and other parts of body would be an outrage to the modesty of such woman. Knowledge that modesty is likely to be outraged is sufficient to constitute the offence without any deliberate intention in this regard. In this case, even while deposing in the court, prosecutrix has stated that appellant had fondled her cheeks, private parts and other parts of the body. His this act

would certainly amount to outraging the modesty of a woman. Accordingly, appellant is convicted under Section 354 IPC.

10. So far as conviction of the appellant under Section 323 IPC is concerned, the same cannot be maintained as no injury was found on the person of the prosecutrix as per the MLC. In her initial statement, she had not stated that appellant had given beating to her. However, conviction of the appellant under Section 506 IPC is maintained as it is as PW7 has made a categorical statement that after he found appellant molesting his daughter, he asked the appellant as to what he was doing, at which he threatened him that in case he disclosed this fact to anyone he would kill him.

11. In view of above discussions, conviction of the appellant under Section 376(2)(f) IPC and the sentence awarded therein is set aside. Conviction of the appellant under Section 323 IPC and sentence awarded therein is also set aside. Appellant is convicted under Section 354 IPC and sentenced to rigorous imprisonment for two years with fine of Rs.2,500/- and in default of payment of fine to undergo simple imprisonment for one month. As regards conviction under Section 506 IPC is concerned, the same is maintained as it is. Both the sentences shall run concurrently.

12. Appeal is disposed of in the above terms.

13. Copy of this order be sent to Superintendent Jail for serving on the appellant as also for compliance.

A.K. PATHAK, J.

FEBRUARY 17, 2011

ga

Crl. Appeal No. 26/2009