

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

Judgment reserved on: January 25, 2011
Judgment delivered on: January 31, 2011

+ **CRIMINAL APPEAL NO.235/2008**

LUV KUSH

....APPELLANT

Through: Mr. Sumeet Verma, Advocate

Versus

STATE (NCT) OF DELHI

.....RESPONDENT

Through: Ms. Fizani Husain, 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 20th September, 2007 in Sessions Case No. 155/2006, FIR No. 214/2006, under Section 376 IPC P.S. Anand Vihar and the consequent order on sentence dated 12th October, 2007 whereby the learned Additional Sessions Judge has convicted the appellant on the charge under Section 376 IPC and sentenced him to undergo RI for the period of 10 years and also to pay fine of ₹ 500/- and in the

event of default of payment of fine, to undergo RI for further period of 02 months.

2. Briefly stated, case of the prosecution is that the prosecutrix "P" (name withheld) aged 09 years was sleeping on the roof of her house on the night intervening 10th/11th April, 2006. Her brother, who was unwell, was also sleeping on the roof. At around 9.30 p.m., the appellant Luv Kush is stated to have approached the prosecutrix. He removed her clothes and indulged in sex with her. When the prosecutrix started crying, he gagged her mouth with a piece of cloth so that she could not raise alarm. After raping the prosecutrix, the appellant is stated to have fled away and the prosecutrix went downstairs and narrated the incident to her mother.

3. Mother of the prosecutrix then approached Usha, the sister of the appellant and complained to her about the conduct of the appellant. Usha defended the appellant. Thereafter, mother of the prosecutrix complained to the brother of the appellant, who tried to pacify her and assured that he would bring the appellant before her. She waited till 11:00 am, but the appellant was not produced before her. Thus, she went to the Police Station with the prosecutrix, where the statement of prosecutrix Ex.PW3/A was recorded. The Investigating Officer obtained signatures of the prosecutrix on her complaint, appended his endorsement thereon and forwarded it to the duty officer for the

registration of the case. The prosecutrix was thereafter sent to SDN Hospital for medical examination. She was medically examined by PW5 Dr. Sakshi Arora, who did not find any external injury on the person of the prosecutrix. She also did not find any sign of bleeding, but the hymen of the prosecutrix was found ruptured. Dr. Sakshi Arora prepared vaginal smear slides of the prosecutrix. She took blood sample of the prosecutrix. Pyjama and shirt of the prosecutrix were also seized and converted into a sealed packet and handed over to the Investigating Officer, ASI Veera Sharma along with the packets of vaginal smears slides and the blood sample. The appellant was arrested during investigation and he was also sent for medical examination. Ossification test was done to ascertain bone age of the prosecutrix and as per the Radiologist, her age was between eight to nine years. The record pertaining to the date of birth was collected from the school. On completion of investigation, appellant was challaned and sent for trial.

4. The learned Additional Sessions Judge charged the appellant for committing rape of the prosecutrix punishable under Section 376 IPC. Appellant pleaded not guilty to the charge and claimed to be tried.

5. In order to bring home the guilt of the appellant, prosecution has examined nine witnesses. There is no eye witness to the occurrence, except the prosecutrix. Before adverting to the submissions made by

rival parties, it would be useful to have a look upon the testimony of the prosecutrix and some other important witnesses.

6. Prosecutrix in her testimony stated that on the fateful day, she was sleeping on the roof of her house. Her brother Sanjay, who was indisposed, was also sleeping on the roof. The appellant Luv Kush was also sleeping there. Prosecutrix testified that during the night, appellant came to her, he applied his saliva on his penis and started indulging in the act with her. Before that, the appellant removed her underwear and also gagged her mouth. She stated that in the process, she felt pain in her private part and cried. Thereafter, the appellant ran away. She further stated that her mother came there and she insisted on production of the appellant Luv Kush, who did not return. Thus, she was taken to Police Station where she gave her statement Ex.PW3/A to the police and signed the same. She also stated that she was taken to some place where medicines are given to the patient. Her suit was seized, but she had left her underwear at her house.

7. PW2 Meena is the mother of the prosecutrix and she is witness to the conduct of the prosecutrix after the incident. She testified that on the relevant night, she was sleeping in the room and prosecutrix and her son Sanjay had gone to sleep on the roof. She claimed that at around 2:30 am, prosecutrix came down stairs and knocked on her door. The prosecutrix complained to her that the appellant had removed her underwear and when she said that she would complain

against him to her mother, the appellant gagged her mouth and fled away after jumping from the roof. She also stated that prosecutrix told her that the appellant had tried to rape her and in the process applied his saliva over her private part and started having coitus with her. Prosecutrix also told that when she went to urinate, she felt pain.

8. PW5 Dr. Sakshi Arora is another important witness, who medically examined the prosecutrix. She stated that on 11.04.2006 at about 6:10 pm, prosecutrix was brought to the hospital for medical examination with alleged history of rape and on medical examination, no external injury was seen and there was no bleeding present. Hymen was ruptured. Public hairs were absent. She took vaginal smears slides and collected the blood sample of the prosecutrix. She further claimed that prosecutrix was not wearing undergarment and she seized the shirt and pyjama of the prosecutrix, converted it into a sealed packet and handed it over to ASI Veera Sharma along with vaginal smears slides. She has proved the MLC prepared by her as Ex.PW5/A. In the cross-examination, Dr. Arora stated that sometimes, because of physical exercise like cycling, jumping etc., hymen of a girl may get ruptured.

9. The appellant, when examined under Section 313 Cr.P.C. denied the prosecution version and he stated that he has been falsely implicated by the mother of the prosecutrix because he had some altercation with her in respect of some dispute.

10. In defence, the appellant examined his sisters Tulsa and Chander Kali to prove that there had been an altercation between the appellant and mother of the prosecutrix and the mother of the prosecutrix had threatened the appellant with false implication in some case and thereafter, she had lodged a false report.

11. The learned Additional Sessions Judge, relying upon the testimony of the prosecutrix (PW3), which in his opinion was corroborated from the medical evidence provided by PW5 Dr. Sakshi Arora and the testimony of her mother PW2 Meena, found the appellant guilty of rape of the prosecutrix and convicted and sentenced him accordingly.

12. Learned Shri Sumeet Verma, Advocate appearing for the appellant submitted that the impugned judgment is the result of wrong appreciation of the evidence. Learned Additional Sessions Judge failed to appreciate that the case of the prosecution is based upon sole testimony of the prosecutrix, which does not inspire confidence for various reasons.

13. Dilating on the argument, learned counsel for the appellant contended, as per version of the prosecution at the time of occurrence her brother Sanjay was also sleeping on the roof. If this version is true, then in all probabilities, Sanjay would have woken up on hearing the noise of resistance given by and the alarm raised by the prosecutrix.

This, however, is not the case of the prosecution. Therefore, it is not safe to rely upon the testimony of the prosecutrix.

14. I do not find merit in the above contention for the reason that as per the testimony of the prosecutrix, Sanjay was suffering from fever and he had gone to sleep after taking medicine. It is possible that as a result of having taken medicine, he was sound asleep at the relevant time. Otherwise also, the prosecutrix has testified that when the appellant removed her underwear, she uttered that she would complain against him to her mother and on this the appellant forced a cloth in her mouth and gagged her. From this, it is evident that the appellant had gagged and disabled the prosecutrix to raise alarm, as such, there is nothing surprising in the brother of the prosecutrix not getting up and witnessing the occurrence.

15. It is further contended by learned counsel for the appellant that it is not safe to rely upon the uncorroborated testimony of the prosecutrix, particularly when it is not even supported by the medical evidence. Dilating on the argument, learned counsel for the appellant referred to the MLC of the prosecutrix Ex.PW5/A and the statement of Dr. Sakshi Arora(PW5), who medically examined her on 11.04.2006 and pointed out that the Doctor did not find any external injury on the person of the prosecutrix nor there was any bleeding present. Though hymen was ruptured, it could be the result of physical exercise like cycling, jumping or climbing bamboo stairs. Learned counsel also

referred to the CFSL report Ex.PW8/C and submitted that even as per the CFSL report, no blood or semen was found on the clothes of the prosecutrix, which evidence negates the theory of rape committed on the prosecutrix. Thus, he urged that under the circumstances, it is not safe to rely upon uncorroborated testimony of the prosecutrix.

16. I am not convinced with the argument. There is no rule of law that the testimony of a rape victim cannot be acted upon without corroborating any material particulars. Prosecutrix in a rape case is a victim and she is not comparable with an accomplice to the crime. Her status is that of a victim of crime and her testimony is to be appreciated on the principle of probabilities, just like the testimony of any other witnesses. Her testimony can be acted upon by the court without corroboration unless there are compelling reasons which necessitate looking for corroboration of version of the prosecutrix. The court should not find any difficulty in acting on the testimony of a victim of sexual assault to convict the accused when her testimony inspires confidence. Admittedly, the prosecutrix was a young girl aged about 09 years at the time of occurrence and the appellant, as per the case of the prosecution, was an adult. Therefore, it is natural that she could not have physically resisted him. As such, absence of physical injuries on her person cannot be taken as a circumstance to negate the theory of rape. As regards the FSL report Ex.PW8/C, the *salwar* and *Kamiz* of the prosecutrix were sent for analysis and no traces of blood and semen were found on the same. The absence of traces of blood

and semen on the clothes of the prosecutrix by itself is no reason to assume that no rape was committed. Section 375 of the Indian Penal Code defines rape and the Explanation to the said Section provides that even a slightest penetration constitutes the sexual intercourse necessary to the offence of rape. From this, it is apparent that to constitute an offence of rape, it is not necessary for the accused to have full-blown sexual intercourse resulting in substantial penetration in the vagina and ejaculation of semen. Therefore, absence of blood or semen on the clothes of the prosecutrix or the vaginal swab does not rule out the theory of rape. The prosecutrix has categorically stated in her examination-in-chief that at the time of occurrence, appellant Luv Kush came to her. He applied his saliva on his penis and started doing act with her. She also stated that the appellant had removed her underwear and she had felt pain in her private part. This version, if read as a whole, clearly indicates that the appellant had penetrated his penis in the vagina of the prosecutrix. Further, the version of the prosecutrix finds corroboration from the testimony of her mother PW2 Meena, who has stated that about 2:30 am, the prosecutrix came downstairs and knocked at her door and told her that the appellant had removed her underwear and tried to rape her after applying saliva on her private part and indulging in the act of coitus. Aforesaid evidence of PW2 Meena is relevant under Section 8 of the Evidence Act, being the evidence of the conduct of the prosecutrix immediately after the occurrence. Thus, it cannot be said that there is no corroboration to

the testimony of the prosecutrix. Under these circumstances, I find no reason to disbelieve the prosecutrix, who has withstood the test of cross-examination. Otherwise also, it is highly improbable that the prosecutrix or her mother would falsely implicate the appellant at the risk of stigma to the honour of the family and the girl.

17. It is further contended by the learned counsel for the appellant that the prosecutrix in her complaint Ex.PW3/A and in her statement under Section 164 Cr.P.C. Ex.PW3/B has stated that the appellant Luv Kush indulged in "*galat kam*" with her without elaborating what she meant by "*galat kam*." He further contended that even in her testimony in the court she has stated that the appellant, after removing her underwear, started doing "an act" with her without elaborating what she meant by "an act". He argued that she has nowhere stated in so many words that the appellant penetrated his penis in her vagina, which is an essential ingredient of rape. Therefore, it is doubtful whether or not the rape was committed. As such, learned Additional Sessions Judge ought to have given benefit of doubt to the appellant.

18. Above contention of learned counsel for the appellant is misconceived. While appreciating the evidence, court cannot be oblivious to the social context. In our society, which is not permissive, "sex" is a taboo and females generally do not talk freely about sex and sexual intercourse in presence of others. Therefore, the words "*galat*

kam” used by the prosecutrix with reference to the act committed by the appellant have been rightly recorded by the learned trial Judge as rape. Otherwise also, while analysing the version of the prosecutrix, it has to be read as a whole to infer as to what the prosecutrix meant to convey by the words that the appellant started doing “an act with her”. Prosecutrix, while narrating the sequence of occurrence, inter alia, testified as under:

“Lovekush came to me. He applied spit over his penis and started doing an act with me. Lovekush had removed my underwear before doing that act with me. I uttered that I narrate the facts before my mother. At that juncture, Lovekush put cloth in my mouth. Thereafter, Lovekush ran away from there. I felt pain in my private part.”

If aforesaid version is read as a whole, it is clear that the appellant, as per the prosecutrix, applied saliva on his penis for lubrication and then indulged in an act which caused pain in the private part of the prosecutrix. From this, it can be safely inferred that the appellant had actually indulged in penile penetration in the vagina of the prosecutrix, which is sufficient to constitute the offence of rape.

19. Lastly, it is contended that prosecution story is not reliable for the reason that the complaint in this case is motivated. In this regard, learned counsel for the appellant has referred to the statement of the appellant under Section 313 Cr.P.C. and the testimony of defence witnesses and contended that actually the mother of the prosecutrix had an altercation with the appellant in respect of some dispute and

she had threatened him with false implication. Learned counsel submitted that the FIR in this case is the result of aforesaid altercation and this inference finds support from the cross-examination of the prosecutrix wherein she admitted the suggestion that before going to the Police Station, her mother told her as to what was to be stated before the police.

20. I do not find merit in this contention. The appellant in his defence has not clarified the nature of dispute which resulted in aforesaid altercation. The defence set up by the appellant in his statement under Section 313 Cr.P.C. is that two days prior to the alleged occurrence, he had an altercation with the mother of the prosecutrix and she had threatened him with false implication in some case. As per the case of prosecution, the occurrence took place on the night intervening 10th and 11th April, 2006. Thus, if the defence of the appellant is true, the altercation took place on 8th April, 2006. This version is not corroborated by the defence witnesses Tulsa and Chander Kali, who are sisters of the appellant. Both of them are categorical that the altercation between the appellant and mother of the prosecutrix took place on 10th day of English Calender month, which is the night of the occurrence. PW2 Meena has categorically stated that when the prosecutrix complained to her about rape, she approached Usha, sister of the accused and complained against the appellant and on this, Usha tried to defend the accused. The version of DW1 and DW2 tends to corroborate aforesaid testimony of PW2 Meena because

there is a possibility that when PW2 Meena protested against the conduct of the appellant, some altercation might have taken place. Thus, I find no substance in the contention of learned counsel for the appellant. As regards the plea that the complaint is the result of the tutoring by the mother of the prosecutrix, it is suffice to say that the prosecutrix was a young girl of 09 years and if her mother had told her to narrate the incident to the police at the Police Station, it cannot be taken as a reason to disbelieve the otherwise reliable version of the prosecutrix.

21. In view of the discussion above, I find no infirmity in the impugned judgment and order on sentence which may call for interference by this Court.

22. The appeal is devoid of merit, accordingly dismissed.

(AJIT BHARIHOKE)
JUDGE

JANUARY 31, 2011
pst