

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

Judgment delivered on: October 03, 2011

+ **CRIMINAL APPEAL NO.523/2008 & CrI.M(B)1104/2009**

RAM DEV **....APPELLANT**

Through: Ms. Bansuri Swaraj, Advocate

Versus

THE STATE OF NCT OF DELHI **.....RESPONDENT**

Through: Ms. Jasbir Kaur, 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. This appeal is directed against the impugned judgment dated 11.9.2007 in Sessions Case No.308/2006 FIR No.226/2005 P.S. New Usman Pur whereby the appellant Ram Dev has been convicted for the offence punishable under Section 376 IPC and also against the consequent order on sentence dated 15.9.2007 whereby learned Additional Sessions Judge has sentenced the appellant to undergo R.I. for the period of 10 years and also to pay fine of ₹ 2,000/-, in default of payment of fine to undergo R.I. for the period of six months.

2. Briefly stated, case of the prosecution is that on the night of 13th July, 2005, PW4 Kamlesh gave telephonic information to the PCR that one tenant has raped his 6 years old daughter at Arvind Mohalla near Brahm Puri. This information was conveyed to police station New Usman Pur and was recorded as DD No.24A (Ex.PW6/A). Copy of the DD report was entrusted to ASI Kamal Singh for verification, who left for the spot of occurrence along with Constable Manbir. ASI Kamal Singh met the prosecutrix at the place of occurrence. He recorded her statement Ex.PW1/A and sent it to the police station for the registration of the case with his endorsement Ex.PW7/A. The prosecutrix, in her statement Ex.PW1/A claimed that on the fateful day, her parents had left for their work and she was alone in the house. At around 4.00 p.m., she went upstairs to collect the clothes which were left by her mother for drying. The appellant Ram Dev also followed her to the roof and started talking with her. He also caressed her on her abdomen and thigh. Thereafter, he made her lie down and removed her underwear. He also removed his shorts and inserted his penis in her vagina. Because of that, she felt pain and cried but the appellant did not leave her and raped her. Thereafter, the appellant left, saying that she should not tell anyone about the incident. The prosecutrix also stated that because of the rape, she suffered pain and started bleeding. She further stated that when her mother came, she narrated the incident to her mother as well as her sister.

3. The Investigating Officer arranged for the medical examination of the prosecutrix as well as the appellant. He collected their MLCs at the hospital. The examining doctor took the vaginal smear of the prosecutrix. Vaginal smear, as well as the underwear of the prosecutrix was sealed in separate packets with the seal "MLC GTB Hospital". Those packets along with the sample seal were handed over to the police which were seized vide memo Ex.PW5/A. Similarly, underwear of the appellant and his blood sample were sealed in separate packets. Those packets along with the sample seal of GTB Hospital were handed over to the I.O. and sealed as Ex.PW7/A.

4. During investigation, the appellant made a disclosure statement wherein he confessed his guilt and stated that after the rape he wiped his penis with his shorts which he had concealed under the clothes in his room. Pursuant to the said disclosure statement, the appellant got his shorts recovered, which were stained with blood. Aforesaid blood stained shorts of the appellant were seized vide memo Ex.PW7/D.

5. The seized exhibits were sent to CFSL for serological examination. The report of CFSL was collected and on completion of investigation, the appellant was charge sheeted for the offence punishable under Section 376 IPC.

6. Learned Additional Sessions Judge charged the appellant for the offence under Section 376 IPC. Appellant pleaded not guilty to the charge and claimed to be tried.

7. In order to bring home the guilt of the appellant, prosecution has examined as many as 12 witnesses. The star witness of the prosecution, however, is the prosecutrix as there is no other eye witness to the incident.

8. The statement of the appellant under Section 313 Cr.P.C. was recorded. The appellant denied the prosecution version and claimed that actually Kamlesh Kumar, father of the prosecutrix owed him some money and when he demanded his money back, some altercation took place. Because of that, the father of the prosecutrix was nursing a grudge against him and perhaps for that reason he has been falsely implicated. No witness in defence has been examined.

9. On consideration of the evidence, learned Additional Sessions Judge found the testimony of the prosecutrix worthy of credence. He observed that testimony of the prosecutrix stood corroborated by the medical evidence. Thus, he found the appellant guilty of the offence under Section 376 IPC and convicted and sentenced him accordingly.

10. Learned Ms. Bansuri Swaraj, Amicus curiae appearing for the appellant has submitted that the impugned judgment of conviction is not sustainable under law as it is based upon incorrect appreciation of evidence. It is submitted that the conviction of the appellant is based upon the sole testimony of the prosecutrix, which is not corroborated by the forensic as well as medical evidence. Learned counsel submitted that it is the case of the prosecution that the underwear of

the prosecutrix as also the underwear and shorts of the appellant were seized during investigation. Those articles admittedly were sent to CFSL for serological examination. However, neither the underwear of the appellant nor his shorts tested positive for the presence of semen and blood, which rules out the prosecution story that the appellant, after raping the prosecutrix, wiped the semen and blood off his penis with his shorts. Learned counsel further submitted that even the MLC of the prosecutrix does not support the theory of rape. Expanding on the argument, learned counsel for the appellant has taken me through the MLC and submitted that as per the MLC, but for a torn hymen, no tell-tale sign of any injury was found on the person of the prosecutrix which negatives the theory of rape. Learned counsel further submitted that it is not clear from the MLC or the testimony of the Doctor whether the hymen tear was current or old. Therefore, it is unsafe to conclude that hymen tear was the consequence of rape as claimed by the prosecutrix. Under these circumstances, learned counsel for the appellant submitted that it is not safe to rely upon the testimony of the prosecutrix, who is a child witness and was not intelligent enough to understand the nature of questions put to her during trial and to give proper response to the same. Learned counsel argued that the capacity of the prosecutrix to understand the nature of the questions put to her is also suspect for the reason that though as per her mother she was not her youngest child, the prosecutrix stated in her examination-in-chief that she was the youngest of her siblings.

Similarly, it is pointed out that the prosecutrix has faltered regarding the number of rooms in their home, as at one stage she stated that their premises comprised of three rooms, whereas at another stage, she stated that the premises comprised of one room only. In view of the aforesaid, learned counsel has urged that it is not safe to rely upon the testimony of the prosecutrix.

11. I am not satisfied with the submission made on behalf of the appellant. As regards the competence of the prosecutrix to testify, it is suffice to say that on overall reading of the testimony of the prosecutrix, one gets an impression that the prosecutrix is intelligent enough to understand the nature of the incident and answer the questions put to her effectively. Merely because the prosecutrix has faltered regarding her being the youngest of all her siblings or regarding the number of rooms in the premises, she cannot be dubbed as an incompetent, unintelligent witness not worthy of reliance. Prosecutrix, who appeared as PW1 has fully supported the case of the prosecution. She categorically testified that the appellant laid her on the ground after removing her underwear and forced his penis into her vagina. I find no reason to disbelieve said version. Otherwise also, the version of the prosecutrix finds corroboration from the CFSL report Ex.PA which confirms that the underwear of the prosecutrix tested positive for the presence of human semen. Merely because the vaginal swab tested negative for the semen test, one cannot discard the testimony of the prosecutrix who had no grudge to depose falsely

against the appellant. Section 375 IPC defines the offence of rape. Explanation to the definition provides that slightest penetration is sufficient to constitute sexual intercourse necessary to the offence of rape. It is a possibility that the appellant withdrew his penis from the vagina before ejaculation. This explains the vaginal swab testing negative for semen.

12. Further, absence of semen or blood on the underwear and the shorts of the appellant is also of no consequence for the reason that the appellant was not arrested at the spot and there is a possibility that he might have changed his underwear and he might have voluntarily misled the police in getting the shorts recovered.

13. Perusal of the MLC of the prosecutrix Ex.PW11/A would show that the prosecutrix was medically examined at GTB Hospital Shahdara on the night intervening 13th and 14th July, 2005 at 3:00 am and on her medical examination, her hymen was found torn. There was bruise found on labia minor and a tear of about 2 x 1 cm was found on the fouchette but not bleeding. This medical evidence leads to a conclusion of penile penetration in the vagina of the prosecutrix. Otherwise also, the Doctor concerned has recorded on the MLC that the prosecutrix herself gave history of being sexually assaulted i.e. penile penetration by the neighbour Ram Dev. In the background of the above corroborative medical evidence, I find no reason to doubt the correctness of the version of the prosecution.

14. Coming to the defence of the accused. He has taken a vague defence in his statement under Section 313 Cr.P.C. that he had some altercation regarding the loan given by him to the father of the prosecutrix and for that he was nursing a grudge against him (appellant). The explanation given by the appellant for his false implication is vague and unacceptable for the reason that the appellant has not even disclosed when the loan was given, what was the amount of loan and when he demanded the loan back and when the altercation took place. Otherwise also, the motive set up by the appellant in his defence is not such which would motivate the parents of the prosecutrix to put the honour of the family and the prosecutrix at stake to settle the score with the appellant.

15. The next contention of learned counsel for the appellant is that the evidence of the prosecution is not worthy of credence for the reason that the incident allegedly took place in a thickly populated area at the rooftop. Despite that, there is no independent witness to hear the cries of the prosecutrix. The absence of independent witness, in my opinion, is not a reason to discard the testimony of the prosecutrix which is corroborated by the medical evidence as well as forensic evidence, i.e., report of CFSL. Thus, under the circumstances, I am of the opinion that the learned Additional Sessions Judge has rightly relied upon the testimony of the prosecutrix and found the appellant guilty of the offence of rape, as such there is no reason to interfere with the judgment of conviction.

16. Learned counsel for the appellant has also raised the plea of juvenility of the appellant. In view of the aforesaid plea, the appellant was called for personal appearance on hearing dated 17.08.2011. On examination, the appellant told that he studied upto 7th standard in Madhya Vidhyalaya, Baltar, Bihar. In view of the aforesaid information, the respondent/State was asked to verify about the age of the appellant from the aforesaid school. As per the verification report dated 14.09.2011 submitted under the signatures of SHO, New Usmanpur, school record of Madhya Vidhyalaya Baltar, Azamnagar, Katihar, Bihar was got verified and as per the record, the appellant Ram Dev Vishwas S/o Raj Mohan Vishwas R/o Baltar, P.S. Azamnagar, Katihar, Bihar had studied in the aforesaid school upto 7th standard and as per the school leaving certificate, attested copy of which is annexed, his date of birth is 04.08.1982. Thus on 13.07.2005, i.e. the date of occurrence, the appellant was aged slightly less than 23 years, as such he was not a juvenile on the date of occurrence.

17. Lastly, in the alternative, learned counsel for the appellant has urged for reduction of sentence. It is submitted that the trial court had been too harsh in awarding of a sentence of 10 years RI besides fine to the appellant, ignoring the fact that it was his first offence and he was a young man aged 23 years at the time of occurrence. Learned counsel for the appellant submits that appellant is the only earning member of his family and he deserves a chance to reform himself and become a useful member of the society. Thus, she has pressed for a

lenient view. Learned APP, on the other hand, has argued in support of the order on sentence and submitted that the appellant has committed a heinous offence of raping a minor girl, as such, he is not entitled to lenient view.

18. The appellant is a young man and he is responsible for his family. He appears to have realised his mistake. He is in incarceration since his arrest in this case on 15th July, 2005. As per his nominal roll received from the concerned Jail Superintendent, his conduct in Jail has been satisfactory and there is no other instance of his involvement in crime. Taking into account the conduct of the appellant in jail and the fact that he is a first offender and also that he was a young man of 23 years at the time of occurrence, I feel that he deserves to be dealt with leniently and he is entitled to at least one chance to reform himself and become a useful member of the society. Therefore, while maintaining the sentence of fine, the sentence of imprisonment awarded to the appellant is reduced from 10 years RI to 07 years RI.

19. In view of the discussion above, the appeal is partly accepted. The conviction of the appellant under Section 376 IPC is maintained. However, while maintaining the fine imposed on the appellant, the sentence of imprisonment awarded is reduced from 10 years RI to 07 years RI.

20. Appeal is disposed of accordingly.

21. Copy of order be sent to Superintendent Jail concerned for information to the appellant as also necessary action.

(AJIT BHARIHOKE)
JUDGE

OCTOBER 03, 2011
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