

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

Judgment reserved on: January 04, 2011
Judgment delivered on: January 14, 2011

+ **CRIMINAL APPEAL No.700/2008**

DAYA SHANKAR

....APPELLANT

Through: Mr. S.D. Singh, Advocate with Mr. Rahul Kumar Singh, Advocate & Ms. Bharti D. Tyagi, Advocate

Versus

STATE OF DELHI

.....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.

1. This appeal is directed against the impugned judgment dated 01.08.2008 and consequent order on sentence dated 02.08.2008 in Sessions Case No.31/06 FIR no.903/05 under Section 376(2)(f) IPC P.S. Nand Nagri whereby the appellant has been convicted by the learned Additional Sessions Judge for the offence of rape of minor child under Section 376(2)(f) of IPC and sentenced to undergo RI for the period of

12 years and also to pay a fine of ₹10,000/-, in default to undergo SI for a further period of five months.

2. Briefly stated, allegations against the appellant are that on 04.12.2005 at around 6:30 pm in the park, Kachchi Pur, Nand Nagri, Delhi, he committed rape of the prosecutrix "P" (name withheld) aged three years. On 04.12.2005 at about 7:45 pm, an information about apprehending of a thief at B-2/239, Nand Nagri, Delhi was received at P.S. Nand Nagri which was recorded as DD No.25A in the daily diary maintained at the Police Station and copy of DD report was entrusted to ASI Rakesh Kumar Tyagi, who immediately left for the spot along with Constable Naim Chand. There, he found that the prosecutrix "P", daughter of the complainant Manbhavti had been raped by a neighbour, namely, the appellant Daya Shankar and he had already been taken to GTB Hospital. Since it was a case of rape, information was conveyed to the Police Station and the SHO directed SI Banita Tyagi to investigate the matter.

3. SI Banita Tyagi thus reached GTB Hospital. She obtained the MLC of the prosecutrix, who was unable to speak clearly. Mother of the prosecutrix Smt. Manbhavti was also present in the Hospital, so SI Banita Tyagi recorded her statement.

4. Smt. Manbhavti, in her statement to the Investigating Officer, inter alia, stated that in the evening of 04.12.2005, prosecutrix was playing outside the house and at around 6:00 pm, she noticed that the

prosecutrix was missing. So, she and her family members started searching for the prosecutrix. At about 7:00 pm, appellant Daya Shankar came with the prosecutrix in his lap. Prosecutrix was bleeding from her private parts and there were blood-stains on the pant and clothes of Daya Shankar. When she enquired from the appellant as to what had happened, he did not reply and tried to go away. Then, she enquired from the prosecutrix, who told that the appellant Daya Shankar, whom the prosecutrix used to address as "*bhaiya*", had laid her on the ground and indulged in wrong act with her after gagging her mouth. In the meanwhile, several public persons had collected at the spot and they gave beating to the appellant. SI Banita Tyagi obtained signatures of the complainant Manbhavti on the said statement Ex.PW4/A and sent it to the Police Station through Constable Naim Chand along with her endorsement Ex.PW11/A for the registration of formal FIR. After the registration of the case, investigation was entrusted to SI Banita Tyagi.

5. On 05.12.2005, Investigating Officer SI Banita Tyagi was handed over one sealed bottle purportedly containing the blood of the appellant and a sealed parcel purportedly containing underwear of the appellant which he was wearing at the time of his medical examination, which were taken into possession by the Investigating Officer vide memo Ex.PW6/A. The Investigating Officer also seized a sealed packet purportedly containing the clothes which prosecutrix was wearing at the time of incident, a sealed parcel containing anal swab, a sealed

parcel containing vaginal swab and one sample seal vide memo Ex.PW10/A, which were handed over to her by Dr. Rajni. She visited the spot of occurrence and prepared rough site plan Ex.PW11/B. The exhibits seized at the Hospital were sent to CFSL for examination and the result was collected. Statements of witnesses were recorded and on conclusion of formalities of investigation, the appellant Daya Shankar was charge sheeted and sent for trial.

6. The appellant was charged by the learned Additional Sessions Judge for the offence punishable 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 11 witnesses in all. Prosecutrix "P" was not examined as a witness, though she was produced in the court for that purpose on hearings dated 02.05.2006 and 23.08.2006. The learned Additional Sessions Judge on preliminary examination of the prosecutrix came to the conclusion that she was not mature enough to testify in the court, as such she was not examined. Thus, the case of the prosecution rests mainly on the medical evidence as well as the statements of the parents of the prosecutrix, namely, PW3 Sheshmani, PW4 Manbhavti and PW7 Hari Lal, who claims to be the neighbour of the complainant.

8. PW4 Manbhavti has stated that on 04.12.2005 at around 6:00 pm, she noticed that her daughter "P" who was playing outside the house was missing. She informed her husband and they started

searching for her. While they were searching for the prosecutrix, at about 7:00 pm, she noticed the appellant Daya Shankar coming along with the prosecutrix from the park. Daya Shankar left the prosecutrix and tried to escape from there. When she picked up her daughter, she noticed blood oozing from her vagina. Her husband caught hold of the appellant. When she enquired about the cause of injury from the prosecutrix, she told that *"Papa of Ravi had taken her in the park where he did a wrong act with her"*. She further claimed that when she asked the appellant as to what had happened, the appellant confessed by saying that *"Galti Ho Gai Hai, Ab Nahi Hogi"*. Besides those words, no further explanation was given by the appellant. She also stated that PCR was informed and pursuant to the information, a PCR van came and took her, her husband and the prosecutrix to the Hospital.

9. PW3 Sheshmani is the father of the prosecutrix and he also deposed to the similar effect. He, however, has not stated anything about the extra judicial confession made by the appellant.

10. PW7 Hari Lal claimed that he reached at the spot on hearing noise from the side of the house of the complainant. There, he noticed that the prosecutrix was in the lap of her mother and she was bleeding. He took the prosecutrix from her mother and thereafter a PCR van came and he along with the prosecutrix and the parents of the prosecutrix went to GTB Hospital in the PCR van. He also stated that when he enquired from the appellant Daya Shankar as to what had

happened, the appellant stated that *“Mujhse Galti Ho Gai, Aainda Nahi Karuga”*.

11. PW2 Dr. Rajni medically examined the prosecutrix at GTB Hospital and prepared her MLC Ex.PW2/A. She stated that on medical examination of the prosecutrix, she found: “Hymen torn – cervix intact and normal. Vaginal tear extending from posterior vaginal fornix upto the forehette through which rectal mucosa was bulging. PR exam – Anal sphincter torn. Rectal mucosa was intact. Vaginal tear and anal sphincter stichea in vayas complete hemostasis achieved”.

12. PW1 Dr. Banarasi proved the MLC of the appellant Daya Shankar prepared by Dr. Jitendra Pratap Singh by way of secondary evidence as Ex.PW1/A.

13. Statement of the appellant under Section 313 Cr.P.C. was recorded. In the said statement, he denied the prosecution evidence. He denied having made extra judicial confession by saying that *“Galti Ho Gai, Aab Nahi Karuga”*. No witness in defence has been examined.

14. In the instant case, prosecutrix “P” could not be examined as a witness due to her tender age, as in the opinion of the trial Judge, she was not capable of understanding the nature of the questions and giving clear and coherent answers. The learned trial Judge, relying upon the testimony of PW3 Sheshmani and PW4 Manbhavti, parents of the victim (prosecutrix) as also the testimony of PW7 Hari Lal and the medical evidence found the appellant guilty of rape of the prosecutrix

and convicted and sentenced him for the offence under Section 376(2)(f) IPC.

15. Learned Shri S.D. Singh, advocate appearing for the appellant submitted that the appellant is innocent and he has been implicated merely on suspicion. Learned counsel contended that the impugned judgment of conviction is the result of wrong appreciation of the facts and the judgment suffers from several infirmities.

16. Expanding on the argument, learned counsel for the appellant firstly contended that the learned trial judge has fallen in error in relying upon the testimony of PW3 Sheshmani, PW4 Manbhavti and PW7 Hari Lal, ignoring the fact that they are not the eye witnesses to the occurrence and their version is based upon the so-called information given by the prosecutrix, who when produced in the court as a witness, was not found capable of understanding the nature of questions and giving coherent answers by the trial Judge.

17. Learned APP has refuted the argument by contending that in a case of child rape, when the child is incapable of giving coherent answers as a witness in the court, non-examination of the prosecutrix cannot be a ground for acquittal and in such cases, the court has ample power to revert to circumstantial evidence in order to find out whether or not the accused on trial is guilty. In support of this contention, learned APP has referred to the judgment in the matter of **State of Karnataka Vs. Mahabaleshwar Gourya Naik**, 1992 Supp.

(3) SCC 179, relied upon by the learned trial Judge. In the aforesaid case, the prosecution could not produce the prosecutrix as she had unfortunately died before she could be examined and considering that fact, the Supreme Court held that non-examination of the prosecutrix due to her non-availability cannot be a ground for acquittal of the accused and the court can record a conviction for an offence made out from the available evidence.

18. There can be no dispute with the aforesaid proposition of law. The question, however, is if there is sufficient evidence available to prove the guilt of the appellant beyond doubt? PW4 Manbhavti, mother of the prosecutrix has testified that the appellant brought the prosecutrix to their house in his lap and the prosecutrix was bleeding from her vagina and when she asked the appellant as to what had happened, the appellant did not respond and tried to go away. Thereafter, on her asking, prosecutrix told her that the appellant had laid her on the ground in the park, gagged her mouth with his palm and indulged in wrong act (rape) with her. PW3 Sheshmani and PW7 Hari Lal have also testified to a similar effect. The question is whether aforesaid evidence is worthy of credence? In this regard, it is pertinent to note that the prosecution did produce the prosecutrix for recording of her statement during trial on hearings dated 02.05.2006 and 23.08.2007. On both the occasions, the trial court, on examination of the prosecutrix came to the conclusion that the prosecutrix was not intelligent enough to give coherent answers regarding the occurrence

and on both the occasions, due to the inability of the prosecutrix to testify, she was sent back unexamined, as is apparent from the record of the proceedings of the trial dated 02.05.2006 and 23.08.2007. From the aforesaid circumstances, it is evident that the prosecutrix, even till 23.08.2007 was too young to depose properly in the court. That being the case, can it be safely inferred that the prosecutrix was capable of telling PW4 Manbhavti as to what had happened on the date of occurrence? In my considered view, it is not safe to draw said inference, though there is a possibility that the prosecutrix might have told PW3, PW4 and PW7 that she was raped by the appellant. Since above noted evidence leaves scope for doubt, medical/forensic evidence assumes importance.

19. It is the case of the prosecution that the appellant was apprehended and taken to the Hospital for medical examination on the same day. MLC of the appellant prepared at GTB Hospital, Shahdara is Ex.PW1/A. As per this MLC, the appellant was medically examined on the date of occurrence i.e. 04.12.2005 at 8:30 pm. It is recorded on the MLC that no injury was seen on the genitals of the appellant and also that blood sample and the underwear of the appellant which he was wearing at the time of medical examination were handed over to duty Constable Jai Karan. Admittedly, the underwear of the appellant was sent to CFSL for forensic examination and as per the result of the examination, the underwear tested negative for the presence of blood or semen. This circumstance negates the theory of the rape having

been committed by the appellant and casts doubt on the correctness of the prosecution story. Further, as per the testimony of PW3 Sheshmani, PW4 Manbhavti and PW7 Hari Lal, when the appellant brought the prosecutrix to her house, she was bleeding from her vagina. If this version is to be believed, then it is obvious that because of penetration of the penis in vagina, the prosecutrix sustained injury and started bleeding. In that eventuality, under the natural course of circumstances, there ought to have been some traces of blood on the penis of the appellant and the aforesaid blood ought to have stained the underwear of the appellant. However, on perusal of the CFSL report, it is seen that no traces of blood or semen were found on the underwear of the appellant. Even the MLC of the appellant Ex.PW1/A does not mention about the presence of blood on the male organ of the appellant nor are there any witnesses to this effect. Thus, the forensic evidence also points towards the innocence of the appellant.

20. Learned Additional Sessions Judge declined to attach any importance to absence of blood or semen on the underwear of the appellant on the ground that accused, in his statement under Section 313 Cr.P.C. stated that after dropping the prosecutrix, he had gone to his home and there, he might have changed his underwear. Aforesaid observation of trial Judge is in the nature of surmises and conjectures. Otherwise also, as per the testimony of the witnesses, appellant was

apprehended at the spot and none of the witnesses have stated that he had gone inside his home. Therefore, the reasoning given by the learned trial Judge to reject the argument is unacceptable.

21. Learned counsel for the appellant further submitted that even the medical evidence rules out any possibility of the rape having been committed by the appellant. Dilating on the argument, learned counsel for the appellant referred to the MLC Ex.PW2/A of the prosecutrix, which records following injuries found on the person of the prosecutrix:

“Hymen torn – cervix intact and normal. Vaginal tear extending from posterior vaginal fornix upto the forehette through which rectal mucosa was bulging. PR exam – Anal sphincter torn. Rectal mucosa was intact. Vaginal tear and anal sphincter stichea in vayas complete hemostasis achieved”.

Learned counsel contended that from the aforesaid injuries, one can safely infer that it is not a case of marginal penetration but a case of forced entry of the male organ into the vagina of the prosecutrix. Learned counsel contended that as per MLC Ex.PW1/A of the appellant, he was medically examined on the date of occurrence at about 8:30 pm and on examination, no injury on his genitals was found. Learned counsel argued that if the appellant had actually committed rape on the prosecutrix resulting in tear of the hymen as well as vaginal tear, there ought to have been some injury on his male organ. Absence of such injuries on the penis of the appellant, according to learned

counsel, is also a circumstance pointing towards his innocence. In support of this contention, he has referred to the judgment in the matter of **Rahim Beg Vs. State of U.P.**, AIR 1973 SC 343 wherein the Supreme Court, in a case of rape of a girl of 10 to 12 years, observed that absence of injury on the male organ of the accused would point to their innocence.

22. Learned APP, on the other hand, referred to the judgment of Supreme Court in the matter of **State of H.P. Vs. Gian Chand**, (2001) 6 SCC 71 and submitted that absence of injury marks on the genitals of the accused cannot be taken as a circumstance of his innocence.

23. No doubt that absence of the injury on the genitals of an accused in a rape case by itself cannot always be a reason to presume the innocence of the accused, provided other reliable evidence leading towards the guilt of the accused is available. In the instant case, in view of the circumstances noted above, the version of the prosecution witnesses appears to be doubtful. Therefore, the absence of the injury on the male organ of the appellant is a factor which further compounds the doubt.

24. Learned APP took me through the testimony of PW4 Manbhavti, mother of the prosecutrix and PW7 Hari Lal wherein they have stated that when they asked the appellant as to what had happened, he stated "*Galti Ho Gai Hai, Ab Nahi Hogi*". Learned APP states that the aforesaid statement of the appellant amounts to extra judicial

confession of his guilt by the appellant and, therefore, the trial court was right in convicting the appellant.

25. I do not find any merit in the submission of learned APP, firstly for the reason that the so-called extra judicial confession is vague. Secondly, perusal of the statement of PW4 Manbhavti Ex.PW4/A, which is the basis of registration of the case reveals that in the aforesaid statement, Manbhavti did not say anything about the extra judicial confession made by the appellant and instead she stated that when she enquired from the appellant as to what had happened, the appellant tried to go away without giving any answer. From this, it is evident that that the story of extra judicial confession made by the appellant in presence of PW4 Manbhavti and PW7 Hari Lal is an improvement over the earlier version, as such it is not reliable. The aforesaid version is also not reliable for the reason that admittedly, father of the prosecutrix Sheshmani (PW3) was also present all through and he, in his testimony, is silent about the confession made by the appellant. Thus, no significance can be attached to the evidence of the prosecution regarding the extra judicial confession purportedly made by the appellant, being unreliable.

26. In view of the circumstances discussed above, I do not find it safe to rely upon the testimony of PW3 Sheshmani, PW4 Manbhavti and PW7 Hari Lal, who are related to each other. Otherwise also, the prosecution story is unnatural. If the appellant had actually raped the

prosecutrix, under the natural course of circumstances, he was expected to leave the child in the park instead of bringing the injured child to her residence. Conduct of the appellant in bringing the prosecutrix to her house also points towards the innocence of the appellant and a possibility cannot be ruled out that he has been falsely implicated on the basis of suspicion.

27. In view of the discussion above, case of prosecution appears to be doubtful. Thus, I find it difficult to sustain the conviction of the appellant on the charge under Section 376(2)(f) IPC. The impugned judgment and consequent order on sentence are, therefore, set aside and the appellant is acquitted of the charge, giving him benefit of doubt.

28. Appellant is in jail. He be released forthwith, if not required in any other case.

29. Appeal is disposed of accordingly.

(AJIT BHARIHOKE)
JUDGE

JANUARY 14, 2011
pst