

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL NO. 873/2009

% Judgment decided on: 25th February, 2011

DHAN BAHADUR @ RAJU APPELLANT

Through: Mr. S.K. Sethi, Adv.

Versus

STATE OF NCT OF DELHI ...RESPONDENT

Through: Mr. Arvind Gupta, APP for
the State.

AND

CRL. APPEAL NO. 927/2009

DAAN BAHADUR APPELLANT

Through: Mr. S.K. Sethi, Adv.

Versus

STATE OF NCT OF DELHI ,...RESPONDENT

Through: Mr. Arvind Gupta, APP for
the State.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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| 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. By the judgment dated 29th August, 2009, appellants have been convicted under Section 376(2)(g) of the Indian Penal Code (IPC) by the Trial Court. They have been sentenced to undergo rigorous imprisonment for ten years with fine of ₹50,000/- and in

default of payment of fine to undergo simple imprisonment for two years. It has been ordered that fine amount, if realized, be paid to the parents of the girl for her rehabilitation. Benefit of Section 428 Cr.P.C. has also been given to the appellant.

2. It is this judgment which is under challenge in these appeals. Both the appeals are being disposed of together as the same arise out of the same incident and FIR.

3. FIR in this case was registered on the statement of mother of the prosecutrix (hereinafter referred to as “complainant”). In the FIR, complainant stated that Dhan Bahadur @ Raju was her jeth (elder brother of her husband). On 20th November, 2007 at about 12:30 pm, her jeth along with his friend Daan Bahadur came to her house. They told complainant’s husband that they wanted to have food. Her husband went to market to buy vegetables. Complainant went inside the kitchen for doing some work. Her children were playing in the adjoining room. After some time her son aged about 4 ½ years came out of the room. Her daughter (prosecutrix) aged about 6 years remained in the room. At about 2 pm, on hearing cries of her daughter, she opened the door of room and saw her daughter lying naked on the bed. Dhan Bahadur @ Raju was lying on her daughter and was doing “galat kaam”. Daan Bahadur had caught hold of her daughter’s hands. He had also gagged the mouth of her daughter. On seeing her, both the appellants ran away. Her daughter was bleeding per vagina and was not in a position to walk. In the meantime, her husband came there. She narrated the incident to

him. Thereafter, they took the prosecutrix to the All India Institute of Medical Sciences (AIIMS).

4. Prosecutrix was first taken to casualty department of AIIMS where her MLC was prepared. Then she was referred to Senior Resident Gynae, Dr. Bindya Gupta, who conducted her medical examination vide Ex. PW8/A. Complainant informed the doctor that the prosecutrix had been raped at about 2 pm by her 'Tao' (her husband's brother). Doctor found that prosecutrix had not attained menarche. On vaginal examination hymen was absent and it was blood stained. Vaginal smear as well as underwear of the prosecutrix was taken, sealed and handed over to the police official by the doctor. Since prosecutrix was not able to communicate properly, she was referred to Dr. Shyam Kumar, Senior Resident, Department of ENT, AIIMS for examination. Doctor found hearing of prosecutrix within the normal limits. He has noticed in his report that prior to the incident also prosecutrix was having history of decreased speech but was able to communicate her basic needs. Oral cavity was found in normal limits. He advised that due to lack of communication expert opinion for neurological and psychological condition should be sought. Accordingly, prosecutrix was referred to PW9 Ms. Anubha Dhal, who was PHD Scholar at AIIMS. Ms. Anubha Dhal assessed the social maturity of prosecutrix by using Vineland Social Maturity Scale (VSMS). On the basis of her examination she opined social age of the prosecutrix as three years and ten months with social quotient in the range of 62 to 67 which was indicative of "mild mental retardation".

5. During the investigation both the appellants were arrested from the Bus Stand Sarai Kale Khan on 20th November, 2007 at about 9:45 pm at the instance of complainant. Both the appellants were medically examined at AIIMS. Doctor opined that there was nothing to suggest that appellants were not competent to perform sexual intercourse. No injuries were found on the persons of appellants. Blood sample, under wear, pant and penial swab of the appellants were taken, sealed and handed over to Investigating Officer (IO). Case property was sent to Central Forensic Science Laboratory (CFSL) and its report was obtained.

6. Statement of the prosecutrix was not recorded since she was not in a position to communicate, inasmuch as, she was found suffering from “mild mental retardation”. Though, prosecutrix was six years of age but on her examination, Ms. Anubha Dhal found her social age equivalent to that of a child of three years and ten months.

7. Complainant has been examined as PW1. Her husband Raju has been examined as PW2. Dr. Shyam Kumar has been examined as PW6. Dr. Bindya Gupta has been examined as PW8. Ms. Anubha Dhal has been examined as PW9. All other witnesses are formal in nature being police officials having been joined with the investigation at one or the other stage.

8. After prosecution closed its evidence statements under Section 313 Cr.P.C. of the appellants were recorded separately wherein entire incriminating material which had come on record was put to them. The case of the appellants is that of simple denial. In their defence appellants examined their friends namely Lal Bahadur and Dhan Raj as DW1 and DW2 respectively.

9. Trial Court meticulously examined the evidence adduced by the parties and found the testimony of PW1 trustworthy, reliable, credible and sufficient enough to conclude that appellant Daan Bahadur had caught hold of prosecutrix while appellant Dhan Bahadur had committed rape upon her. Trial Court was also of the view that testimony of PW1 was duly corroborated from the medical evidence, inasmuch as, hymen of the prosecutrix was found torn with traces of blood. The discrepancies, as pointed by the counsel for the appellants, have been brushed aside being minor in nature. As regards absence of semen on vagina and under garment of prosecutrix is concerned, Trial Court has observed that it was not necessary that there should be ejaculation or emission of semen for completing the offence of rape. It was observed that simple penetration was sufficient to constitute the offence of rape.

10. Arguments heard. Record perused. PW1 has deposed that on 20th November, 2007 his jeth along with his friend came to her house at about 12:30 pm. They told her that they would take meal. Her husband went to market to buy vegetables. Her daughter (prosecutrix) and son were playing inside the room. She went in the kitchen for preparing food. After some time she heard cries of her daughter. She asked her son to go to room so as to find out what the matter was. Since her son did not listen to her, she herself went inside the room. On opening the door of the room, she found her daughter lying on the bed in naked condition. Her jeth was lying upon her daughter and committing rape. Friend of her jeth had caught hold of hands of her daughter. On seeing her, both the accused ran away from there.

Blood was oozing from the private parts of her daughter. In the meantime, her husband came there. She told him about the incident. Thereafter, they took their daughter to AIIMS where police also arrived and recorded their statements. She identified her signatures on her statement Ex. PW1/A. It is this statement which is the basis of FIR. She has correctly identified both the accused in court. Her deposition in court is in line with her earlier statement on the basis whereof, FIR had been registered. Her this version given in examination-in-chief has remained unshattered in spite of the fact that she had been cross examined by the counsel for appellants at length. Her statement on material points had remained unshaken. That apart, medical evidence lends credence to her version. PW8 Dr. Bindya Gupta has deposed that on 20th November, 2007 at about 5:20 pm she medically examined the prosecutrix in Paediatric Casualty Department. Mother of prosecutrix gave history that prosecutrix was raped at 2 pm on 20th November, 2007 by her Tao. On vaginal examination of prosecutrix, her hymen was absent and it was blood stained. PW8 Dr. Bindya Gupta in her cross-examination has rendered a positive opinion that prosecutrix was sexually assaulted. Statement of PW8 duly corroborates the version of PW1 that the prosecutrix was raped on the date of incident. As per PW1, it is the appellant Dhan Bahadur @ Raju who had raped her daughter while appellant Daan Bahadur had caught hold of her hands. It is evident that there was fresh tear of hymen which was blood stained when the doctor had examined the prosecutrix. This itself shows that penetration was there. In

my view, Trial Court has rightly accepted the statement of PW1 to

convict the appellants for committing gang rape upon the prosecutrix. PW1 has been categorical in making her statement that appellant Daan Bahadur had caught hold of hands of her daughter while Dhan Bahadur @ Raju had committed rape.

11. Learned counsel for the appellants has contended that prosecutrix was not examined in court, inasmuch as, her statement was not even recorded under Section 161 Cr.P.C. by the Investigation Officer. Efforts were not made to record the statement of prosecutrix under Section 164 Cr.P.C. by a Magistrate. Non-examination of prosecutrix is fatal. It is the prosecutrix alone who could have divulged as to how she sustained injuries in her vagina more so, when Dr. Bindya Gupta has admitted in her examination that such injury was possible by blunt forceful trauma. I do not find any force in this contention of learned counsel for the appellants. PW6 Dr. Shyam Kumar has deposed that prosecutrix was unable to speak, therefore, she was referred to him. On examination he found her hearing within the normal limits. He also found oral cavity of the prosecutrix within the normal limits. Since prosecutrix was not able to communicate he referred her for expert opinion with regard to her neurological and psychological condition. PW9 Ms. Anubha Dhal, who had been pursuing her doctorate at AIIMS had examined the prosecutrix to find her level of maturity. PW9 Ms. Anubha Dhal has deposed that she had assessed social maturity level of the prosecutrix by using VSMS. On examination of prosecutrix she found her social age to be three years and ten months as against her actual age of six years. Her social quotient ranged from 62 to 67 which indicated that prosecutrix had been suffering from 'mild

mental retardation'. From this evidence it is clear that prosecutrix was not a normal child and was suffering from 'mild mental retardation' and was not in a position to communicate properly. For this reason, non-examination of prosecutrix in court will not be fatal in this case. Besides this, PW1 is an eye-witness to the incident. She had herself seen accused Dhan Bahadur lying on the top of prosecutrix while Daan Bahadur had caught her hands. At that time prosecutrix was naked from below the waist. Testimony of PW1 itself is sufficient to prove the culpability of appellants even in absence of testimony of prosecutrix.

12. Learned counsel for the appellants has next contended that there are inherent discrepancies in the prosecution case. PW1 has given different timings with regards to the occurrence of incident at different stages. PW1, while in court has deposed that incident occurred at 2.00 PM, whereas as per her initial statement and FIR, it occurred sometime after 12.30 pm. Furthermore, as per MLC, prosecutrix was examined at 2.00 PM. I do not find merit in this contention. Minor discrepancies are bound to creep in the testimony of a witness and trivial variations make such witness a natural one. As per the mental capabilities of human being, it cannot be expected that witness will absorb all the details and reproduce it in the testimony. In ***State v. Saravanan and Anr.*** ***AIR 2009 SC 152***, Supreme Court has held that while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety.

13. Learned counsel for the appellants has next contended that PW2, who is father of prosecutrix and husband of PW1, has

deposed that PW1 had not informed him that appellant Dhan Bahadur had committed rape upon the prosecutrix. As against this PW1 has stated in the FIR as well as in court that she had narrated the incident to her husband and, thereafter, both of them had taken the prosecutrix to AIIMS. I do not find any force in this contention of learned counsel for the appellants. Appellant Dhan Bahadur is real brother of PW2. Accordingly, there is every probability of his resiling on this point in order to save his brother. PW1 is mother of the prosecutrix. She had no enmity with the appellants. There is no reason as to why she would depose falsely to implicate her jeth and his friend more so, when PW1 and PW2 had been residing together. It is not the case that they were not maintaining good relations or in order to take revenge or out of frustration PW1 had falsely implicated appellant Dhan Bahadur @ Raju.

14. Learned counsel has next contended that no traces of semen were found on the vaginal smear as well as on the under garment of prosecutrix. The allegations of PW1 that Dhan Bahadur had raped her had remained uncorroborated by scientific evidence; this itself makes the statement of PW1 that prosecutrix was raped, unreliable. I do not find any force in this contention of learned counsel either. Explanation to section 375 IPC envisages that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Even the slightest penetration of the vulva by penis with or without emission of semen is sufficient for the commission of offence under Section 376 IPC. In the present case penetration is evident

from the MLC of the prosecutrix as hymen was found absent with blood stains.

15. In ***State of U.P. v. Babul Nath (1994) 6 SCC 29***

Supreme Court has held as under:-

“To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest 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 would be quite enough for the purpose of Sections 375 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her.”

Thus, absence of semen on vaginal smear and undergarment would not wipe out the commission of offence.

16. For the foregoing reasons, I am of the view that Trial Court was right in convicting appellants under Section 376(2)(g) IPC. Accordingly, conviction of appellants is maintained.

17. Learned counsel for the appellants has prayed for leniency in sentence. He contends that appellant Daan Bahadur is about 37 years of age; his wife and four children are totally dependent upon him; he is a poor person. Appellant Dhan Bahadur is aged about 43 years; having two

children; his daughter is of marriageable age; and his old father is dependent upon him. Per contra Learned APP submits that the appellants have committed heinous crime of raping a 6 year old mentally retarded girl, thus, deserve no leniency. Keeping in mind the nature and gravity of offence, I am of the view that appellants are not entitled to any leniency in the sentence. They have committed the heinous crime of “gang rape” upon a helpless minor child suffering from ‘mild mental retardation’. Section 376(2)(g) IPC envisages minimum sentence of 10 years to an accused of gang rape. Proviso to this section, however, vests power in the court to reduce the sentence of imprisonment for a term of less than 10 years but only if adequate and special reasons could be made out. In this case, no special reasons could be made out. I do not find it to be a fit case to award sentence less than what has been mandated under Section 376(2)(g) IPC. Accordingly, sentences as awarded by the Trial Court are maintained except that in case of default of payment of fine, appellants shall undergo simple imprisonment for six months.

18. Both the appeals are disposed of in the above terms.

A.K. PATHAK, J.

FEBRUARY 25, 2011

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