

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

RESERVED ON : 20th January, 2012
% DECIDED ON : 5th March, 2012

+ **Crl.A.156/2011**

STATE Appellant
Through : Mr.Saleem Ahmed, ASC (Crl.).

VERSUS

ANWAR HUSSAIN Respondent
Through : Ms.Savita Prabhakar and Mr.Amit
Bhanot, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The State has preferred the present appeal against the judgement dated 25.02.2010 of Ld.Addl.Sessions Judge in SC No.128/2007 by which the respondent was acquitted of the charge for committing the offence punishable under Section 376 IPC.

2. Criminal law was set into motion at around 2000 hours (8.00 P.M.) on 25.08.2007 when DD No.64-B (Ex.PW-7/A) was recorded by SI Rishi Pal to the effect that at B-119, Joshi Colony, a girl aged about five years has been raped. Investigation was assigned to SI Praveen Kumar

who along with Const.Kulwant Singh reached the spot. Soon thereafter, Insp.Alka Azad also reached there. Margub, father of the prosecutrix 'P' (assumed name) in his statement to IO disclosed that on 25.08.2007 when he returned to the house after performing his duties at 7.00 P.M., his wife, Reshma told him that at about 2.30 P.M. her daughter 'P' went to the accused's shop (whom she used to address as '*chachu*') to purchase "Itchguard cream". When she returned after some time, 'P' told her that the accused had done something offensive (ganda kaam) after putting off her Knickers, inside the shop. He further stated that he and his wife saw semen spots on her Knickers. On that, he took 'P' to the shop of the accused; she identified him as the person who had done ganda kaam with her and further stated that earlier too, the accused had committed similar acts. He rebuked the accused and informed the police on telephone.

3. Insp.Alka Azad made an endorsement on the statement and sent the rukka for registering the case under Section 376 IPC. 'P' and her parents were taken to LBS Hospital where the doctor conducted medical examination of the prosecutrix. On reaching the spot from the hospital, the IO prepared the site plan on the pointing out of the complainant.

4. Since the father of the prosecutrix had indicted the accused, the police set out to apprehend him. On getting secret information, the accused was arrested from the corner of the gali on the identification of the complainant and the prosecutrix during the night intervening 25/26.08.2007. He was interrogated, he made disclosure statement Ex.PW-13/B. The accused was taken to LBS Hospital for medical examination.

5. During the course of investigation, the statement of the prosecutrix was recorded under Section 164 Cr.P.C; IO collected her birth certificate and other documents from school; she sent the exhibits to FSL and collected the FSL report. The IO recorded statements of witnesses conversant with the facts of the case and after conclusion of investigation, charge-sheeted the accused for committing the offence under Section 376 IPC.

6. To bring home the charge, the prosecution examined fourteen witnesses. It mainly relied on testimonies of the prosecutrix and her parents who appeared as PW-2 and PW-3. Statement of the accused was recorded under Section 313 Cr.P.C. to afford him an opportunity to explain the incriminating circumstances appearing against him. He denied his hand in the crime and pleaded that he was falsely implicated in this case due to enmity. He alleged that on the date of incident, the complainant and his brothers assaulted him and caused injuries. When he went to inform the police, he was detained there. The accused examined DW-1 (Const.Dharmender Singh), DW-2 (Ali Sher) and DW-3 (Israr Hussain) in his defence.

7. After consideration of the evidence and after considering rival contentions of the parties, the Addl.Sessions Judge acquitted the accused.

8. Leave was granted to the State to file appeal against the impugned judgment by an order dated 02.02.2011.

9. The APP has assailed the findings of the trial court and urged that it did not appreciate the evidence in the proper perspective and fell into grave error in rejecting the testimony of PW-2 without cogent

reasons. 'P' aged about five years, categorically implicated the accused for committing rape and gave a consistent version in her statement recorded under Section 164 Cr.P.C. as well as in her deposition before the Court. She gave a true account of the incident and identified the accused as the person who committed rape. Her testimony was corroborated on material facts by her father PW-2 Margub. The Trial Court further failed to appreciate the FSL report in which semen was detected on the shirt and underwear of the accused and on the 'top' of the prosecutrix. 'P' had no ulterior motive to level false allegations against the accused. Parents of the prosecutrix cannot make humiliating statements against the honour of their daughter just to settle their own score. PW-10 proved the prosecution's MLC (Ex.PW-10/A) where some injuries were found on her person.

10. Counsel for the respondent supported the impugned judgment and urged that there are no compelling and strong circumstances to reverse the judgment of acquittal. There are inconsistencies, improvements and variations in the depositions of the witnesses which make their statements unreliable. Delay in lodging the report with the police was not explained. The medical evidence contradicted the ocular version in this case. No independent public witness was joined during the investigation. The prosecutrix's mother turned hostile. The accused was not named at the first instance. Prosecutrix's testimony does not find any corroboration from any quarter.

11. We have considered the submissions of the parties and have scrutinized the trial court record.

12. Undoubtedly, the entire case of the prosecution hinges on the testimony of prosecutrix who was aged about five years. The Court is conscious that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration and the Court may convict the accused on her sole testimony. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. The Court is also conscious that in cases involving sexual harassment, molestation etc. the Court is duty-bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. While evaluating evidence, the Court must remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour. At the same time, it is also settled position that if for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix, it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the Court of facts finds it difficult to accept the version of the prosecutrix at its face value, it

may search for evidence, direct or circumstantial, which would lend assurance to her testimony.

13. The incident occurred at about 2.30P.M. However, intimation was given to the police at 8.00 P.M. when DD No.64-B (Ex.PW-7/A) was recorded to that effect. It is alleged that PW-14 Insp.Alka Azad reached the spot soon thereafter, and recorded the statement of complainant. However, rukka was sent to the police station for registering the case only at 11.35 P.M. There is no explanation for inordinate delay in lodging the FIR when the place of occurrence was at a distance of about 1-1 ½ K.M. from the police station. PW-3 Reshma, mother of the prosecutrix, came to know about the incident at about 2.30 P.M. She also did not explain the delay in not informing the police or her husband and to wait for him till his return as usual at 7.00 P.M. Prosecutrix was not taken for medical examination soon after the occurrence though prosecution version is that she had pain in the lower abdomen and her condition was bad.

14. Inconsistent versions were presented by PW-2 Margub and PW-3 Reshma, regarding the incident which makes their statements doubtful. In fact PW-3 Reshma entirely demolished the case and was cross-examined by the Addl.PP after seeking permission from the Court. PW-3 stated that when the prosecutrix returned after about 30 minutes, she told her (PW-3) that somebody had done wrong act(galat kaam) with her in the street. The prosecutrix was looking afraid and she took her in the street to identify that person but she was not able to tell the name of the said person at that time and she (PW-3) brought her back to the house. When her husband came in the evening, she (PW-3) told him about the fact and the matter was reported to the police. When police asked them

whether there was any enmity with someone, she disclosed that a quarrel had taken place with the accused on earlier occasion and the police noted down the name of the accused Anwar Hussain. In her cross-examination by Addl.PP, she denied the suggestion that on return from the shop of the accused Anwar, her daughter complained her that she was having pain in the lower portion of her abdomen and told that '*chachu*' had done wrong act(galat kaam) with her after removing her nicker. She further denied the suggestion that in the evening, she along with her husband took 'P' to the shop of the accused and 'P' identified him as the person who had done wrong act(galat kaam) or that 'P' again told them that '*chachu*' had done wrong act(galat kaam) at earlier occasion also.

15. In her deposition PW-3, Reshma did not implicate the accused for committing the crime and said that she was not aware, if it was the accused who had committed rape till the matter was reported to the police. She introduced a new version that the prosecutrix had told her that 'someone' in the street had done a wrongful act with her. She did not claim that on coming to know about the incident at about 2.30 P.M. she and her daughter 'P' went at the accused's shop to confront him. She did not give any explanation for not informing her husband about this serious incident. In the cross-examination on behalf of the accused, she supported the accused and admitted that there was no place for concealment in the shop of the accused. She further stated that her daughter testified in the Court at the instance of the police and on the date of examination, police directed her to implicate the accused by naming him. She even admitted that the accused was innocent. The prosecution failed to assign any

ulterior motive to this witness for exonerating the accused. A mother is not expected to let such a criminal go scot free.

16. PW-2 Margub, father of the prosecutrix, is not a witness to the incident. He came to know about the occurrence only when he returned from his place of work at about 7.00 P.M. He did not claim that soon after the occurrence, he was contacted by his wife. Testimony of this witness is based upon the facts disclosed to him by PW-3 Reshma, who turned hostile and did not depose, if all these facts were narrated by her at all to PW-2 Margub. Even after coming to know about the incident at 7.00 P.M., PW-2 did not inform the police and rather took his daughter to the shop of the accused, where allegedly he was identified by the prosecutrix. In the cross-examination, he contradicted the police version and stated that neither he nor his wife or his daughter informed the police, the name of the person who committed wrong act with 'P' and police obtained his signatures on blank papers. He also came up with the plea that his daughter had given statement at the instance of the police. He clarified (during his cross-examination on 30.09.2008) that his wife had told him that her daughter was not able to give the name of the person who had done wrong act with her. Again this witness (father of the prosecutrix) in his cross-examination failed to support his earlier version that his daughter 'P' had identified the accused to be the person who had done wrong act with her.

17. PW-14 Insp.Alka Azad arrested the accused on the night intervening 25/26.08.2007 at about 12.30 night. The arrest memo Ex.PW-2/B and personal search memo Ex.PW-2/C show PW-2 Margub a witness to the arrest. In his examination-in-chief, PW-2 merely stated that the

accused was arrested on the identification of his daughter. In the cross-examination, he changed his version and stated that neither he nor his daughter were present at the time of arrest and had no knowledge when the accused was arrested by the police. PW-5 Const.Kulwant claimed that the accused was arrested in his presence. However, the memos Ex.PW-2/B and Ex.PW-2/C do not bear his signatures. The prosecution failed to explain the material discrepancy about the manner in which the accused was arrested in this case.

18. At the time of his arrest, the accused had a number of injuries on his person. He was medically examined and PW-9 Dr.Vinay Kumar Singh proved his MLC Ex.PW-9/A noting number of injuries. The prosecution failed to explain the injuries sustained by the accused before his arrest. PW-14 Insp.Alka Azad admitted in the cross-examination that during the investigation, she came to know that a quarrel had taken place between the accused and the complainant and the latter party had attacked him in his shop. The Complainant, in his statement Ex.PW-2/A did not reveal if at the time of his visit to the accused's shop, a quarrel had taken place and he had caused injuries to him.

19. In the MLC Ex.PW-8/A and Ex.PW-9/A, no physical injuries were found on the private part of the accused. The prosecutrix, as stated above, was of tender age, i.e. five years at the time of occurrence and the accused was aged about twenty-six years. If a person of stature of the accused happens to insert his private part into the vagina of a girl of five years, there is every probability of the injuries being sustained on it. PW-1 in her testimony testified that accused used to insert his male organ in her private part after removing his and her underwear. In view of the fact that

there was a complete sexual intercourse, absence of such injuries on the private parts throws doubts on the prosecution story.

20. The prosecutrix was medically examined by PW-10 Dr.Subodh and her MLC Ex.PW-10/A was prepared. In the alleged history recorded by her, name of the accused was not disclosed. Even it was not alleged that 'rape' was committed on the prosecutrix. The doctor recorded that some kind of 'sexual misbehaviour' was done with the prosecutrix and the child was very small to exactly tell the act. In the MLC, no bruises were seen locally on valva; the vagina was found red-inflamed. In the cross-examination, the doctor admitted that in case of impropportionate male and female organ, if force is applied, the laceration of hymen; abrasions, bruises or laceration on the private parts of the female would be there. In the present case, no injury was found in the vagina of the prosecutrix. There can be number of reasons for red-inflamed vagina. The doctor could not give definite medical opinion as to the act of intercourse. Contrary, it was mentioned that the hymen of the prosecutrix was found ruptured but healed(wide open). In the cross-examination, she admitted that healing of vagina takes normally five to six days. The prosecution failed to explain how and under what circumstances hymen of the child ruptured about five or six days before the incident. No complaint for that incident was lodged any time.

21. Counsel emphatically contended that semen was detected on the baby's top and shirt and underwear of the accused and trial court ignored this vital circumstance. We have examined FSL reports Ex.PW-14/E and Ex.PW-14/F, proved by Insp.Alka Azad. Both reports are contradictory in contents. In Ex.PW-14/E, 'human semen' is stated to

have been detected on Ex.1a(i) i.e. baby's top; Ex.2 i.e. shirt and Ex.3 i.e. underwear. However, Ex.PW-14/F does not depict if 'human semen' was detected on these exhibits. Again no 'ABO' group was detected on these exhibits. It cannot be said with certainty that 'human semen' (if any) detected on these exhibits pertained to the accused. In the case of *Chander Dev Rai Vs. State (NCT of Delhi)* 156(2009) DLT 229 (DB) this Court observed that merely because semen stains were present on the dirty underwear of the appellant, nothing adverse can be inferred against him. No semen was found in the vaginal swab of the prosecutrix to infer that sexual intercourse had taken place. Semen stain on the underwear of a young man can exist because of varieties of reasons and it would not necessarily connect him with the offence of rape *Rahim Beg and Anr. Vs. State of U.P.* AIR 1973 SC343. The FSL reports thus, completely exonerate the accused.

22. The prosecutrix was an innocent child witness; her testimony is to be perused with great care and caution. In the case of *State of Assam Vs. Mafizuddin Ahmed*, 1983 Cr.L.J. 426, the Supreme Court observed that "*the evidence of a child witness is always dangerous, unless it is available after the occurrence and before there were any possibility of coaching and tutoring.*" It is well settled that a child witness is prone to tutoring and hence the Court should look for corroboration by any independent evidence before placing implicit faith and reliance on it.

23. In the instant case, PW-14 Insp.Alka Azad admitted in her cross-examination that prosecutrix's statement under Section 161 Cr.P.C. was recorded by her after 3-4 days of the incident i.e. on 29.08.2007. She did not offer any plausible explanation for delay in recording the

statement. Her statement under Section 164 Cr.P.C. was recorded on 13.09.2007. The prosecutrix revealed that the accused had also committed similar dirty act with her younger sister 'T' (assumed name) studying in Nursery. Police did not investigate, if the accused had committed any such act earlier also with the prosecutrix and with her sister 'T'. Parents of the prosecutrix did not state, if their younger daughter 'T' had ever informed them about the said act of the accused. In her statement under Section 164 Cr.P.C. she disclosed that she had informed to her brother Yusuf. However, prosecution did not record his statement and he was not produced as a witness.

24. The police did not join any independent public witness at any stage of the investigation. There is no circumstantial evidence to infer that the prosecutrix had visited the shop of the accused at about 2.30 P.M. and if so, for what duration, she had stayed inside the shop. It is not the prosecution's case that rape was committed by the accused after closing the main shop door. It has come on record that there were number of shops adjoining to the accused's shop where public persons were present. The accused's family used to reside on the upper floor of the shop. Accused's sister used to sit at the STD/PCO in the corner inside the accused's shop. It is highly improbable that rape on the child aged about five years would be committed by the accused inside the shop without taking precaution to close the door of the shop. Possibility of the customers visiting the shop during this period cannot be ruled out.

25. A child victim of rape is not expected to travel smoothly from the shop to her residence. No one heard the cries of the child at the time of the alleged occurrence or on her way to the residence. In other

words, no cogent evidence came on record to prove that on the date, time and place alleged by the prosecution, sexual activity took with the prosecutrix. IO admitted that someone from NGO Pratidhi had reached the house of the prosecutrix at about midnight and shop of the accused was visited in her presence. However, no such person from the said NGO was examined by the prosecution. All these deficiencies, and inconsistencies in the prosecution's case, require the Court to look for corroboration, which is lacking.

26. The standards to be applied by the High Court while considering an appeal against acquittal is one where the prosecution establishes substantial and compelling reasons, which by and large are confined to serious or grave mis-appreciation of evidence, wrong application of law and an approach which would lead to complete miscarriage of justice. In the present case, the Trial Court listed various grounds on which it acquitted the respondent/accused. All of them, to our mind, are reasonable and none of them can be termed as misapplication of law or wrongful appreciation of the evidence placed before the Court by the prosecution.

27. The appeal against the acquittal is considered on slightly different parameters compared to an ordinary appeal preferred to this Court. When an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of the acquittal of the accused under criminal jurisprudence. The Courts have held that if two views are possible on the evidence

adduced in the case, then the one favourable to the accused, may be adopted by the Court.

28. Considering all the facts and the circumstances of the case, we find no infirmity in the impugned judgment. The appeal is unmerited and is consequently dismissed.

(S.P.GARG)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

MARCH 05, 2012
tr