

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

Reserved on : 4th July, 2012
% **Pronounced on : 11th July, 2012**

+ **CRL.A. 1017/2009**

SANJAY YADAV Appellant
Through: Mr.Ajay Verma, Advocate.

Versus

State Respondent
Through: Mr.Navin Sharma, APP for
State.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. The appellant Sanjay Yadav is the real father of the child victim Baby 'B' (name withheld to conceal her identity). He has impugned the judgment dated 21.05.2009 and order on sentence dated 25.05.2009 vide which he has been convicted for having committed the offence punishable under Section 376 IPC and sentenced to undergo RI for ten years with fine of Rs.5000/- and under Section 506-I IPC to undergo RI for two years.

2. The prosecution case as revealed from the complaint Ex.PW3/A by the child victim Baby 'B' aged 12 years is to the effect that she lost her mother at the age of two years and had no sibling. She was staying with her father i.e. the appellant. About five months prior to lodging of complaint Ex.PW3/A dated 27.11.2005, her father started doing 'galat kaam' with her under threat to kill her.

3. On the night of 26.11.2005 also when she was sleeping, her father woke her up and asked to bring a glass

of water. After she gave a glass of water, she was caught by her father who removed her clothes and like other days, made her lie on the cot and did 'galat kaam' with her. She wept and came out of the house and informed PW-1 Manju Aunty – her neighbour who made her to sleep in her house. Next day in the morning, she took bath and washed her clothes as usual. Her neighbours PW-1 and PW-4 accompanied her to a PCR. She informed the Police Control Room and when the police came, she narrated about the occurrence by making statement before ASI Rajwanti who got the FIR registered against her father.

4. During investigation, the child victim as well as her father were sent for medical examination and after completion of investigation, chargesheet for committing the offence under Sections 376/506-I IPC was filed against the present appellant.

5. Learned Trial Court after framing the charge, examined fifteen witnesses. After giving an opportunity to the appellant to explain the evidence appearing against him, believing the testimony of the child victim, convicted the appellant under Sections 376/506-I IPC for committing rape on his daughter after criminally intimidating her. He was sentenced in the manner stated above.

6. On behalf of appellant, Mr. Ajay Verma, Advocate has submitted that this is a case of false implication by the child victim of her own father for the reason he objected to her relationship with son of PW-1 Manju. It has been further submitted that even as per PW-3 - the child victim, the occurrence took place in the night but FIR has been got registered only on the next day and this delay of one day

remains unexplained which is fatal to the case of prosecution. Learned counsel for the appellant has submitted that the MLCs of the child victim as well as of the appellant also falsify the case of prosecution as no injury has been noticed by the doctor at the time of their examination. Not only that the vaginal swab taken by the doctor was sent to CFSL and it also does not support the case of prosecution. The CFSL report also does not connect the appellant with the offence. The defence of the appellant is that this case is the result of his objection to the relationship of his daughter with son of PW-1 Manju & PW-4 Om Prakash and he was opposed to the proposal of marrying his daughter with their son. This case has been got registered by his daughter on being instigated by PW-1 Manju and PW-4 Om Prakash. Learned counsel for the appellant has also submitted that it has already come in the statement of child victim that when she was weeping outside her house, she was taken by son of PW-1 Manju to his house which supports the defence version, hence appellant may be acquitted.

7. On behalf of State, it has been submitted by Mr. Navin Sharma, APP that there is hardly any delay in registration of the FIR. Regarding scientific evidence, it has been submitted that in the complaint itself it is mentioned that the child had taken bath and washed her clothes still doctor had taken the vaginal swab and the CFSL report reveals that sample was putrefied and due to that reason, the conclusive evidence to connect the appellant with the crime could not be adduced. It has been further submitted on behalf of State that the testimony of the child victim is inspiring confidence and she had been consistent throughout regarding the duration i.e.

five months for which she was sexually assaulted by her father and lastly on the night of 26.11.2005. Learned APP submitted that in the given circumstances, the order of the Trial Court may not be interfered with.

8. I have considered the rival contentions and carefully gone through the testimony of the child victim Baby 'B' who has been examined as PW-3.

9. The defence of the appellant is that he had seen his daughter with the son of PW-1 Manju and PW-4 Om Prakash in objectionable condition and PW-1 Manju and PW-4 Om Prakash also wanted to get their son married to his daughter which was rejected by him. First of all, had there been any grain of truth in this defence, the father would not have remained silent on seeing a neighbour boy sexually assaulting his minor daughter. He would have immediately informed the police and handed over that boy to the police by lodging the complaint and getting the child victim medically examined immediately which would have also led to collection of scientific evidence to connect the act with the offender. Statement of PW-1 Manju is to the effect that appellant had shifted in that room alongwith his daughter a few days prior to this occurrence. She stated that she has three children i.e. one son and two daughters and age of her son is 12 years. When the appellant had shifted in the neighbourhood of PW-1 Manju and PW-4 Om Prakash just a few days back and their own son is just 12 years of age, where was the question for them to ask for the hand of the daughter of the appellant for their son. Not only that, it seems to be a case of economic disparity because the appellant claimed that he was offered Rs.20,000/- by PW-1

Manju and PW-4 Om Prakash to enable him to start some business. In that circumstance, taking into consideration the age of the child victim to be only about 12 years having not even attained the age of menarche, there was no question of any marriage proposal of the son of PW-1 Manju and PW-4 Om Prakash with the child victim. Thus, the defence taken by the appellant is improbable and not inspiring any confidence.

10. The incident has taken place on the night of 26.11.2005 and matter was reported to the police on the next day i.e. on 27.11.2005 at 8.37 AM vide DD Ex.PW18/B. Delay in FIR has been duly explained by the prosecution because in the peculiar circumstances, for the neighbours the decision to report the matter to the police was not easy. Being a neighbour, first concern of PW-1 Manju could be to provide shelter to the child during the remaining part of the night and give time to her to think about the future course of action. The child victim was the daughter of the appellant and there was none else in the family who could take her under his care to make her muster enough courage to lodge a complaint against her own father for sexually assaulting her for about five months. During the night time, the neighbours could only provide shelter to her and give time to the child victim to think whether to report the matter to the police against her own father. She was just a child of about twelve years of age with no close or distant family member around her and solely dependent on her father who instead of protecting her, was sexually exploiting her.

11. Even otherwise delay is not fatal in such type of cases as held by Apex Court in the case ***State vs. Narayan*** AIR

1992 SC 2004 as under :-

'The accused may be related to the prosecutrix; that the prosecutrix may be a young girl and she might have been threatened; she might be worrying about her future; she might have been frightened and may be in traumatic state of mind. It is well settled the accused is not entitled to acquittal and the prosecution evidence cannot be discarded on the ground that the complaint was not filed immediately.'

12. In another case **State of Himachal Pradesh vs. Gian Chand** (2001) 6 SCC 71, the Apex Court has held that :-

*'It is common knowledge and also judicially noted fact that incidents like rape, more so when the perpetrator of the crime happens to be a member of the family or related therewith, involve the honour of the family and, therefore, there is a reluctance on the part of the family of the victim to report the matter to the police and carry the same to the Court. A cool thought may precede lodging of the FIR. In this case of rape of a minor girl aged five years by a close relation of brother of father of prosecutrix, the mother of the prosecutrix being a widow, having no family member willing to accompany her, proceeded alone to police station. **Delay in such a case was held as not fatal.**'*

13. The contention of learned counsel for the appellant that absence of injury on the person of child victim or the appellant in itself is sufficient to infer that no offence of rape was committed by him is liable to be rejected for the reason that it was not for the first time he was sexually assaulting his daughter. PW-3 – the child victim has specifically stated that it was going on for last five months. The report on the MLC revealing old hymen tear corroborate the testimony of the child victim. Even otherwise, in the case **Harpal Singh & Anr. vs. State of Himachal Pradesh** AIR 1981 SC 361, the Apex Court has held as under :-

'Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.' (Emphasis supplied)

"Sexual intercourse,- In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

The Supreme Court has held that absence of injuries on the private parts of the prosecutrix would not rule out her being subjected to rape.

14. In the case ***State of Himachal Pradesh vs. Gian Chand*** (2001) 6 SCC 71, it has been held by the Apex Court that :-

'In case of children who are incapable of offering any resistance external marks of violence may not be found.'

15. As per CFSL report Ex.PX, semen was detected on the pyajami Ex.3 of the child victim. The semen was detected on the pyajami of the child victim despite the fact that child victim had deposed that she slept during night time at the house of PW-1 Manju and in the morning as usual took bath and washed her clothes. No doubt, grouping of semen could not be done but it was for the reason that sample semen was putrefied and on this score, the appellant cannot even have benefit of doubt.

16. In a case of rape, the statement of victim does not require corroboration. In the case ***Krishan Lal vs. State of***

Haryana 1980 SCC (Cri) 667, it was observed as under :-

'The inherent bashfulness, the innocent naivete and the feminine tendency to conceal the outrage of masculine sexual aggression are factors which are relevant to improbabilise the hypothesis of false implication. The injury on the person of the victim, especially her private parts, had corroborative value. The presence of blood on her clothes and her complaint to her mother are also testimony which warranted credence. It would baffle belief in human nature that a girl sleeping with her mother and other children in the open yard would go back with injury to her private parts and blood on her garments unless she had been subjected to the torture of rape. To forsake such vital consideration and go by obsolescent demands for substantial corroboration of the prosecutrix's version would be to sacrifice commonsense in favour of an artificial concoction called 'judicial probability. The Supreme Court observed: "a socially sensitized Judge is a better statutory armour against gender outrage than long clauses of a complex section with all the protection writ into it.'

17. In another case **Fanibhushan Behera, Jeet Shankar Bohidar and Dina Bandhu Behera vs. State of Orissa** 1995 Cri.L.J. 1561 (Ori), it has been held as under :-

'The same degree of care and caution must attach in the evaluation of evidence of prosecutrix in rape cases as in case of an injured complainant or witness and no more.

What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge leveled by her. If totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. The Court, therefore, must consider one thing as to whether prosecutrix is able to understand.

If she is, there is no reason for her to allow the real culprit to go and implicate falsely an innocent person.'

18. In the instant case, the unfortunate girl Baby 'B' was the only child of her parents having lost her mother at the age of two. As per her statement under Section 164 CrPC Ex.PW3/B, she did not have any memory of her mother and she had also lost her grandparents. Hence, for her the appellant was the only person in this world to constitute family for her and provide protection, home and shelter to her. As per the MLC Ex.PW2/B, she was accompanied only by the police officer and had none by her side to even give consent for her medical examination. Even before the Doctor, she mentioned that she had been sexually assaulted by her father for last five months and lastly on 26.11.2005. She had not even reached the age of menarche. On examination, her hymen was found to be torn (old). Her statement before the Court is also that her father had been sexually assaulting her for about five months prior to lodging of this complaint on 27.11.2005 and lastly she was raped on 26.11.2005.

19. The sole testimony of child victim is sufficient to convict the appellant as it was in natural and plain words. The child victim had narrated as to what had been done to her by her own father in the following words :-

'the accused had removed his cloth as well as mine and had inserted his urinary organ in my urinary organ.'

20. It is worthwhile to mention here that the appellant was the only person in this world for providing protection, care and responsible for her upbringing. By making a statement

against her own father, she has lost not only the home but also has none to provide her emotional support after being ravished by her own father. As per MLC, there was none to even give consent for her medical examination and only the lady police officer accompanied her to the hospital. Neighbour's duty ended after taking her to the PCR to inform the police control room about the incident. None of the neighbour had any interest to even accompany her to the hospital to be present by her side when she was in emotional crisis.

21. Even if it is assumed for the sake of arguments that the child victim had some relation with the son of PW-1 Manju who himself was just 12 years of age, the defence which has already been held to be improbable, that itself would not be sufficient to infer that she would rope in her father by lodging a false complaint.

22. In the case ***Rameshwar vs. The State of Rajasthan*** AIR 1952 SC 54, the Apex Court has held as under :-

'Where rape has been committed on a child of tender years there is no rule of law requiring corroboration from an independent source of the evidence of the child as to the identity of the accused.'

23. An act of child rape is gruesome and abhorring which not only inhibits her growth and development but also instills a feeling of insecurity and brooding sense of shame for no fault of her own by this very nature of offence. Rape is an obnoxious act of highest order and physical injuries may heal but the mental scar left by the act is permanent. As a result of this case, victim has been rendered homeless and confined in the protective homes, thus lost her innocence and freedom as well as upbringing in natural family

environment.

24. I find myself in agreement with the conclusion arrived at by learned Trial Court while convicting the appellant under Sections 376/506-I IPC. The conclusion arrived at by learned ASJ is inescapable being formed on the basis of testimony of child victim duly supported by medical evidence. Appeal dismissed.

25. TCR be sent back. A copy of the order be also sent to the appellant through Jail Superintendent.

PRATIBHA RANI, J

JULY 11, 2012
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