

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

+ **CRL.A. 36/2011**

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Reserved on: 11th February, 2013

Decided on: 6th May, 2013

VIKRAM KUMAR

..... Appellant

Through: Mr. N.K. Deo, Advocate.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Manoj Ohri, APP with SI Aditya
and Basant Kumar, PS Tilak Nagar.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The Appellant impugns the judgment dated 12th November, 2010 whereby he has been convicted for offences punishable under Sections 376 (2) (f)/377/376 read with Sections 511/506/323 IPC. The Appellant also impugns the order on sentence dated 18th November, 2010 whereby he has been directed to undergo Rigorous Imprisonment for a period of 14 years for offence punishable under Section 376 (2) (f) IPC and fine of Rs. 1 lakh and in default of payment of fine to undergo Rigorous Imprisonment for a period of two years; Rigorous Imprisonment for a period of 10 years for offence punishable under Section 377 IPC with fine of Rs. 50,000/- and in default of payment of fine to further undergo Rigorous Imprisonment for a period of six months; Rigorous Imprisonment for a period of 10 years for offence punishable under Section 376/511 IPC with a fine of Rs. 30,000/- and in default of payment of fine to undergo Rigorous Imprisonment for a period of six months and Rigorous Imprisonment for a period of one year each for offences punishable under Sections 506 IPC and 323 IPC.

2. Learned counsel for the Appellant contends that there are material contradictions in the testimony of prosecution witnesses. The learned Trial Court failed to appreciate that the result of DNA figure printing clearly shows that no offence of rape was committed by the Appellant on the three prosecutrix as no seminal discharge of the Appellant has been found on the clothes and the vaginal slides of the three prosecutrix. Reliance is placed on *Bhagwan Das and another vs. State of Rajasthan*, AIR 1957 SC 589. In *Kamti Devi and another vs. Poshi Ram*, AIR 2001 SC 2226 the Hon'ble Supreme Court held that the result of DNA test is scientifically accurate and the same supports the innocence of the Appellant. The learned Trial Court also failed to notice from the kind of injuries suffered by the prosecutrix PW1 and PW2 that the Appellant would have also suffered injuries on the pennies if he had committed the rape. As there are no injuries on the Appellant, the prosecution version is belied. (*Mohd. Habib vs. State*, 1982 (2) RCR 150). The Prosecutrix have admitted that they were tutored by the police officials and hence no reliance can be placed on their testimonies. (*Samay Singh vs. State* 1998 RCR (Criminal) 369). Further it has been held that even if the factum of rape is established beyond reasonable doubt, unless there is evidence to show that the accused committed the rape, he could not be convicted (*State of Assam vs. Mafizuddin Ahmed*, 1983 (2) SCC 14). The learned Trial Court has failed to appreciate that the evidence shows that there were other boys who have been let off and the Appellant has been falsely implicated. The Appellant confronted the prosecution witness with the counseling report of the NGO Swanchetan wherein it was written that there were four people who abducted the young girls and kept them in captivity. The Appellant has been falsely implicated, thus he be acquitted. The learned

Trial Court has failed to direct that the sentence awarded on different counts should run concurrently. In the alternative the sentences imposed be reduced and be directed to run concurrently.

3. Countering the argument Learned APP for the State submits that the Appellant committed rape on three minor girls, all aged four years. The MLC of PW1 and PW3 prove beyond reasonable doubt the offence committed by the Appellant. All the four witnesses have unerringly stated about the Appellant committing the offence. Not only this, the Appellant bit the cheek of PW3 and teeth marks were noticed in the MLC. Though suggestions have been given by the Appellant during trial to the witnesses that there were other boys present however, the same were clearly denied by all the witnesses. The Appellant not only committed rape on PW1, PW2 and PW3 but also committed oral sexual act with the three little girls resulting in offence under Section 377 IPC. The Appellant threatened the girls with a knife which fact was corroborated by PW4 as well. PW5, the father of PW1 saw the three girls getting down from the stairs of the Appellant's house, while crying and noticed blood on their clothes and thighs. They were immediately taken to the hospital and surgery had to be performed on two of them. The version of the three prosecutrix is further supported by PW26 who lives in the same house on the second floor and had gone upstairs on hearing the cries of young children. However, the Appellant stated that he was teaching the children. The witnesses have clarified that they were not tutored by the police official and they only stated that they should not fear from the Court. The medical evidence clearly corroborates the versions of the three prosecutrix. The absence of seminal discharge in the vaginal slides or the clothes of the prosecutrix does not belie the sexual intercourse since

for an offence of rape penetration is sufficient. Reliance is placed on *State of Himachal Pradesh vs. Suresh*, 2009 (8) Scale, 628; *Radhakrishna Nagesh vs. State of Andhra Pradesh*, Manu/SC/ 1106/2012; *Kuria vs. State of Rajasthan*, 2012 (9) Scale 42; *B.C. Deva vs. State of Kolkata*, 2007 (12) SCC 122; *Rakesh vs. State of Madhya Pradesh*, JT 2011 (10) SC 525; *Vishnu vs. State of Maharashtra*, AIR 2006 SC 508; *Madan Gopal Kakkad vs. Naval Dubey*, (1992) 3 SCC 204; *State of Maharashtra vs. Najakat Ali*, 2001 (6) SCC 311; *M.R. Kurda vs. State of Andhra Pradesh*, 2007 (2) SCC 772 and *State of Punjab vs. Madan Lal*, 2009 (5) SCC 238. Hence there is no merit in the appeal. The same be dismissed.

4. I have heard learned counsel for the parties at length.

5. FIR No. 225/2007 was registered under Section 376 (2) (f)/324/506/377 IPC at PS Tilak Nagar on the complaint of PW5, the father of PW1. PW5 stated that on 26th March, 2007 he found that his daughter was not at home and had gone to play in the park at about 5.00 p.m. He asked his wife about PW1 who went out and stated that two girls were missing. PW5 went out in search of his daughter. At about 9.00 p.m. when he reached in front of House of Bhola Nath, that is, the father of the Appellant, he noticed his daughter PW1 along with two other girls PW2 and PW3 getting down from the stairs of the house and weeping. He noticed blood on the clothes and legs of the girls. He inquired from his daughter as to what had happened. She stated that Vikram uncle called them for giving toffee and took them in the room situated at the top floor of the house. He laid over them and they started crying. They were also given beating and he bit PW3. PW5 called up 100 number and PCR van took the three girls to the hospital. From the medical examination it was revealed that the girls were

subjected to sexual intercourse. Finally the Appellant was apprehended on 29th March, 2007 and on completion of investigation, a charge sheet was filed. After recording of the evidence of the witnesses and the statement of the Appellant, the learned Trial Court convicted the Appellant as above.

6. PW1 aged four years at the time of incident, in her testimony stated that she along with PW2, PW3 and PW4 was playing in the park near the house of the Appellant. The Appellant took them to a room after climbing the stairs in his house by giving them toffees. The Appellant dropped water on her feet and put his organ by which he urinates in her mouth. He started doing 'gandi baat'. He lied down on her private parts after removing her underclothes and inserted his organ of urination in her private parts from where she urinates. PW1 started bleeding and weeping loudly. The Appellant inquired from PW4 whether he was a boy or a girl. When PW4 replied that he was a boy, the Appellant slapped him and sent him out of the room. The Appellant thereafter did wrong act with PW2. PW1 has been cross-examined and in her cross-examination she has clearly stated that the Appellant was alone and no other boys were with him. She denied the suggestion that the Appellant did not do any wrong act with her or that the same was done by two other boys who were with the Appellant.

7. PW2 also aged four years at the time of incident stated that she along with PW1, PW3 and PW4 was playing in the park in the evening. The Appellant came and on the pretext of giving toffees took them to his house. There was no one in the house of the Appellant. He gave one toffee each to all of them. The Appellant removed his pant and underwear and laid down on PW1 after removing her underwear. Thereafter he removed the underwear of PW2 and laid over her. The Appellant thereafter removed the

underwear of PW3 and laid over her. He also removed the underwear of PW4 and slapped him. She further stated that the Appellant did wrong act with her and that blood was also coming out of the private parts of PW1. In the cross-examination by the Appellant, PW2 also stated that the Appellant showed them the knife and she identified the Appellant in the Court. PW2 further stated that the Appellant put his male organ in her mouth. On cross-examination on behalf of the Appellant she stated that she had not told the Magistrate that there were three boys in the room and volunteered that there was one boy. She reiterated that there was no other person except the Appellant in the room where he had taken them.

8. PW3 also of the same age stated that she along with PW1, PW2 and PW4 was playing in the park. The Appellant took them to his room on the pretext of giving toffee. There he removed his underwear and pant. The Appellant showed them knife and a match stick. The Appellant put oil on himself and laid over them. She further stated that blood came out from her private parts and that of PW1. She was also bitten on her cheek. In cross-examination this witness also denied that there was anyone else in the room except the Appellant. This witness in the cross-examination categorically denied that no police official tutored her about what to depose in the Court. However, she stated that she met a police aunty outside the Court and the police aunty told her the name of the Appellant. On Court question, this witness further stated that she has deposed the incident as it happened. She stated that she was not tutored by the advocate present in Court.

9. PW4 aged four years at the time of incident stated that he was playing in the park with PW1, PW2 and one more girl whose name he did not remember. He was in class KG-1 at that time. They were playing when the

Appellant came there and gave chewing gum to him and the girls. The Appellant took them to his room and there he stated to PW4 “bhag ja, nahi to kat dunga’. Thereafter he came down and went to his house and the three girls remained in the room of the Appellant. The witness clarified that he remained in the room of the Appellant for about 30 minutes and there was none else in the room of the Appellant besides him and the three girls. This witness in the cross-examination stated that police aunty did not tell him as to what he was to depose in the Court. She only stated not to worry while in the Court. He denied the suggestion that there were four other boys and not the Appellant in the room.

10. PW5 the father of PW1 in his testimony has stated that on 26th March, 2007 he did not find his daughter at home at about 7.00-8.30 p.m. So he asked his wife to search her. When his wife could not find her, he went out to search her. While searching his daughter he reached the house of Bhola Nath and saw the three girls including his daughter getting down from the stairs and crying. He noticed blood on the clothes and thighs. His daughter told that the Appellant took them upstairs on the pretext of toffee and he laid upon her. Nothing could be elicited in the cross-examination of this witness.

11. PW26 Smt. Usha deposed that she was living in C-block on the third floor and on the fourth floor a hut was built. The landlord of the house was living on the ground floor and the first floor. The landlord had three daughters and three sons. In the month of March, 2007 at about 6.00-7.00 p.m. she was cooking meals when she heard the noise of crying of children. One Sonu was living on the second floor of the same building and she went and told him that she heard the noises of crying of children. Both of them heard the noise of crying of children and went to the fourth floor where the

door was bolted. The Appellant, that is, the son of the landlord was there on the fourth floor and PW26 asked him to open the door, when he asked what the matter was. When he was again asked to open the door, he replied that he was taking tuition of the children. She came down and asked the sister of the Appellant to look into the matter. The sister of the Appellant also asked the Appellant to open the door and he again replied that he was taking tuition of the children and was not going to open the door. On this his sister replied “pehle tu khud to pare le phir bachcho ko parana” and came down stairs. PW26 called her husband and when she was going with her husband, she saw the Appellant going downstairs with three or four children who were aged 6-7 years. Though PW26 has been cross-examined in view of the fact that she resiled from her earlier statement to the extent that she noticed blood on the clothes and legs of the three girls however, it would be noted that the testimony of this witness is relevant to highlight the conduct of the Appellant and sufficiently corroborates the testimony of PW1 to PW4 and PW5.

12. The version of PW1 to PW3 is further corroborated by the injuries they suffered. PW1 was immediately referred to surgery on reaching the hospital and as per Ex. PW22/A, PW1 suffered vaginal and rectal tears. She had to undergo surgery for repair of vaginal and rectal/anal tears and various other procedures under general anesthesia. She had suffered sexual assault and was bleeding from her private parts. This witness was admitted on 26th March, 2007 in the hospital and discharged on 21st April, 2007. Thus she remained in hospital for 25 days which would show the extent of injuries caused to PW1. The discharge summary of PW3, Ex. PW11/A shows second degree perennial tear, tear on the inner aspect of labia majora in midline and hymen was also torn. This witness also underwent surgery and was admitted

in the hospital for eight days. As per the MLC Ex. PW6/A the witness had tooth bite mark on the left cheek. The testimony of PW1, PW2 and PW3, duly corroborated by the testimony of PW5 and PW26 and their medical examinations proves the case beyond reasonable doubt against the Appellant.

13. Learned counsel for the Appellant has laid a lot of stress on the fact that in the DNA profiling of seminal discharge was not found in the vaginal slides of PW1, PW2 and PW3. An analysis of DNA profiling shows that on the vaginal slides of PW3 who had suffered tears no male fraction was observed. The DNA profiling of blood stains on the orange dress of PW1 did not match with either that of PW1 or the Appellant. The DNA sampling from the vaginal swabs of the three girls did not match with the DNA profiling of the Appellant. In the light of this DNA profiling suggestions were given to the witnesses that besides the Appellant there were other boys in the room.

14. No doubt the DNA profiling is taken as an accurate science however, in the present case each witness has unerringly named the Appellant. All the witnesses have denied the suggestion that besides the Appellant there were two other boys at the time of the incident. Further no male fraction was observed in the slide of PW2 and PW3. The same does not absolve the Appellant of the offence committed by him. To constitute an offence of rape, penetration is sufficient and no seminal discharge is required. In *Radhakrishna Nagesh* (supra) it was held that in a case of conflict between ocular and medical evidence, the Court has to examine which evidence is more reliable and corroborated with the other prosecution witnesses' evidence. It may be noted that except in the vaginal slides of PW1, no conflict even on medical evidence has arisen. The absence of seminal

discharge does not rule out rape. Suggestions to PW1, PW2 and PW3 clearly show that the Appellant did not deny his presence in the room but only suggested that besides him there are other people present. In *Tarkeshwar Sahu vs. State of Bihar, 2006 (8) SCC 560* it was held:

“10. Under Section 375 IPC, six categories indicated above are the basic ingredients of the offence. In the facts and circumstances of this case, the prosecutrix was about 12 years of age, therefore, her consent was irrelevant. The appellant had forcibly taken her to his Gumti with the intention of committing sexual intercourse with her. The important ingredient of the offence under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In absence of penetration to any extent would not bring the offence of the appellant within the four corners of Section 375 of the Indian Penal Code. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is 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 completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC. This Court had an occasion to deal with the basic ingredients of this offence in the case of *State of U.P. v. Babul Nath* (1994) 6 SCC 29. In this case, this Court dealt with the basic ingredients of the offence under Section 375 in the following words:

8. It may here be noticed that Section 375 of the Indian Penal Code defines rape and the Explanation to Section 375 reads as follows:

Explanation:- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

From the Explanation reproduced above it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. 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.

11. The ingredients of the offence have also been examined by the Kerala High Court in the case of *State of Kerala v. Kundumkara Govindam*. In this case, the Court observed as under:

The crux of the offence Under Section 376 IPC is rape and it postulates a sexual intercourse. The word "intercourse" means sexual connection. It may be defined as mutual frequent action by members of independent organization. By a metaphor the word "intercourse" like the word "commerce" is applied to the relation of sexes. In intercourse there is temporary visitation of one organization by a member of the other organization for certain clearly defined and limited objects. The primary object of the visiting organization is to obtain euphoria by means of a detent of the nerves consequent on the sexual crisis. There is no

intercourse unless the visiting member is enveloped at least partially by the visited organization, for intercourse connotes reciprocity. In intercourse between thighs the visiting male organ is enveloped at least partially by the organism visited, the thighs; the thighs are kept together and tight.

12. The word "penetrate", according to Concise Oxford Dictionary means "find access into or through, pass through".

13. In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact. In view of the explanation to Section 375, mere penetration of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 India Penal Code.”

15. Further the expert evidence on DNA profiling is only an opinion evidence, which the Court may or may not take into consideration while forming its final opinion to arrive at a finding. In *Madan Gopal Kakkad (Supra)* it was held:

“35. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.”

16. Learned counsel for the Appellant has further laid stress on the fact that if a minor girl is subjected to rape by a fully developed man then there

are bound to be injuries on the male organ of the accused and absence of such injuries would point to his innocence. In the present case it may be noted that the Appellant was not arrested immediately but after three days of the incident. Further the victims have alleged penetration and not aggressive sexual act. Hence the possibilities of the injuries not being there on the male organ of the Appellant cannot belie the otherwise credible evidence of the three prosecutrix and their friend PW4. Further the contention of the Appellant that the tooth impression report examination was not sent to the FSL is also misconceived. A perusal of the MLC of PW3 Ex. PW6/A itself opines the marks as bite marks but intricacy could not be matched as the same were not clear. In *O.M. Baby (Dead) by L.Rs. vs. State of Kerala, JT 2012 (6) SC 117* it was held:

“16. A prosecutrix of a sex offence cannot be put on a 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. 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 levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. 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. The

nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the 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.”

17. Coming to the last issue regarding the sentence it may be noted that the sentences awarded to the Appellant on different counts have not been directed to run concurrently by the learned Trial Court. Section 31 Cr.P.C. provides as under:

“31. Sentences in cases of conviction of several offences at one trial.-

(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that-

- (a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years;
- (b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.”

18. It is thus evident that the learned Trial Court was competent to direct the sentences to run consecutively but for the fact that the sentence to imprisonment cannot be longer than 14 years. The Appellant has been awarded sentence for rigorous imprisonment for 14 years for offence under Sections 376(2)(f) IPC. Thus if the sentences are to run consecutively the sentence would exceed 14 years. In view of the legal position, the substantive sentences awarded to the Appellant are directed to run concurrently. In the facts of the case I am not inclined to reduce the fine amounts and the sentences required to undergo in default thereto. The impugned judgment of conviction and order on sentence passed by the learned Trial Court are upheld with a modification that the substantive sentences shall run concurrently. The appeal is accordingly disposed of.

(MUKTA GUPTA)
JUDGE

MAY 06, 2013
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