

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

Reserved on: 1st April, 2013
Pronounced on: 2nd April, 2013

+ **CRL.A. 481/2009**

SAJID

..... Appellant

Through: Ms. Charu Verma, Advocate

Versus

STATE (GNCT) OF DELHI

..... Respondent

Through: Ms. Rajdipa Behura, APP for State

CORAM:

HON'BLE MR. JUSTICE G.P. MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. This Appeal is directed against a judgment dated 15.10.2008 and the order on sentence dated 24.10.2008 whereby the Appellant was convicted for an offence punishable under Section 376 of the Indian Penal Code (IPC) and was sentenced to undergo Rigorous Imprisonment of ten years with fine of ₹2,000/- and in default of payment of fine he was to further sentenced to undergo simple imprisonment for three months.
2. The prosecution version as brought out by PW-2's testimony is that prosecutrix 'G' (name withheld it being a case under Section 376 IPC) was a resident of a five storied building in Mandawali Delhi. Each floor consisted of 15 rooms. PW-2 Darvesh Rai, family of the prosecutrix, (including the prosecutrix) and the Appellant were residents of the same building. On 27.04.2005 at about 3:30 P.M. Darvesh Rai (PW-2) was reading some book while sitting on the stairs of the house. He noticed the Appellant taking a small child in his lap and moving upstairs. After sometime, PW-2 heard the cries of the said girl from the terrace. He then

noticed the Appellant running after jumping over him. PW-2 reached the terrace and found the child crying and her clothes soaked in blood. He (PW-2) brought the child from the terrace and handed her over to her mother who was residing on the third floor of the same building. The prosecutrix was removed to Lok Nayak hospital by her aunt Tanzim PW-1). On medical examination, the doctor noticed a CLW 1.5 cm x 0.5 cm present at the right side of the labia extended to fourchette. Hymen was found to be torn. The doctor reported tenderness and blood clots at vagina.

3. The FIR was recorded on the statement of Tanzim. During investigation statement of witnesses including PW-2 were recorded and the Appellant was arrested at the pointing out of PW-2.
4. On Appellant's pleading not guilty to the charge, in order to establish its case the prosecution produced 14 witnesses. PW-1 Tanzim and PW-2 Darvesh Rai are the star witnesses of the prosecution on the factum of allegation of rape committed upon the prosecutrix whereas PW-6 Constable Subhash, PW-12 SI Manvender Singh and PW-13 Insp. Alka Azad are the witnesses with regard to arrest of the accused and completion of the various formalities at the spot. In fact, PW-13 is the IO of the case.
5. On appreciation of evidence, the learned ASJ drew an inference of the Appellant's having committed rape upon the prosecutrix on the basis of last seen evidence and the Appellant's subsequent conduct as deposed by PW-2. Thus, the Appellant was convicted and sentenced as stated earlier.
6. The following contentions are raised by Ms. Charu Verma, learned counsel for the Appellant:-

- (i) In the FIR Ex.PW-7/A recorded on the basis of the statement made by Tanzim, there is no mention of the Appellant's name. Her statement as PW-1 in the Court to the effect that the prosecutrix disclosed Appellant's name is an afterthought and a material improvement. PW-1's testimony in this regard therefore, cannot be relied on.
 - (ii) The prosecution case rests only on circumstantial evidence as deposed by PW-2. PW-2 did not know the Appellant previously and thus from his testimony no irresistible conclusion can be drawn that it was only the Appellant who was responsible for committing the crime. From PW-2's testimony only a suspicion could be raised against the accused. The suspicion, however, strong cannot take place of proof. Thus, the Appellant is entitled to the benefit of doubt.
 - (iii) No external injury was noticed on the Appellant's male organ. It is well settled that if a young person commits rape on a small child there are bound to be some injury on the offender's male organ. The absence of injury would point to the Appellant's innocence.
7. On the other hand, Ms. Rajdipa Behura, APP for the State argues that PW-2's testimony unerringly points an accusing finger towards the Appellant. Immediately after the Appellant took the victim to the terrace, PW-2 heard the cries and noticed the Appellant hurriedly escaping. It is submitted that the Appellant has not attributed any motive or any animosity towards PW-2 and thus it is difficult to comprehend that PW-2 will falsely implicate the Appellant in this heinous crime.

8. I have before me the statement Ex.PW-1/A made by Tanzim (PW-1) on the basis of which the present case was registered. Admittedly, it does not contain the Appellant's name. Therefore, PW-1's testimony that on their way to the hospital 'G' disclosed the name of the offender as Sajid cannot be relied on. Had it been so, PW-1 must have disclosed the name of the offender to the doctor and the same must have been recorded in the MLC. Therefore, I would agree with the learned defence counsel that PW-1's testimony about the disclosure of the Appellant's name by the prosecutrix cannot be believed. This statement appears to have been made by PW-1 to strengthen the prosecution case.
9. There is no dispute about the proposition of law that when the case of the prosecution rests on circumstantial evidence, circumstances should in the first place be conclusively proved; the circumstances so proved must unerringly point to the guilt of the accused; the circumstances proved must form a complete chain of evidence not to leave any reasonable ground for conclusion consistent with the innocence of the accused and the circumstances proved must be such that within all human probability the act must have been done by the accused.
10. *Hanumant Govind Nargundkar & Anr. v. State of M.P.*, AIR 1952 SC 343, is the basic judgment of the Supreme Court on appreciation of evidence, when the case depends only on circumstantial evidence, which has been consistently relied in later judgments.
11. In '*Sharad Birdhichand Sarda v. State of Maharashtra*', AIR 1984 SC 1622, the three Judge Bench of the Supreme Court relying on *Hanumant Govind Nargundkar (supra)* set out the conditions which must be fulfilled

before a case against the accused can be said to be fully established. The conditions are :-

- “1. The circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established,*
- 2. All the facts so established should be consistent only with the hypothesis of the guilt of the accused.*
- 3. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.*
- 4. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused; and*
- 5. It must be such as to show that within all human probability the act must have been done by the accused.”*

12. Learned counsel for the Appellant has taken me through the statement of the IO (PW-13) and urged that statement of PW-2 under Section 161 was recorded only after Appellant's arrest. PW-1 did not know the name of the culprit. Thus, the prosecution has not given any basis for arrest of the Appellant. It will, therefore, indicate that the Appellant was arrested only on suspicion and was implicated in the case. It is urged that even if PW-2 statement is believed, the only circumstance is the evidence of last seen which will not be sufficient to hold that it was only the Appellant who was responsible for committing the crime.
13. I have gone through the testimony of Darvesh Rai (PW-2), Constable Subhash (PW-6), SI Manvender Singh (PW-12) and Inspector Alka Azad (PW-13). The arrest memo Ex.PW-6/D shows that the Appellant was arrested from the street on the night intervening 27-28.04.2005 at 12:30 A.M. PW-6 was specific that from the hospital he accompanied PW-13 to Gali No.3, House No.5, Sadan Block, Mandawali (the place of

occurrence). He testified that the people were interrogated and statement of one tenant whose name he did not remember (Darvesh Rai PW-2) was recorded and the Appellant was arrested at the instance of the said tenant (PW-2). Sequence of events has been similarly stated by SI Manvender Singh (PW-12). He was more specific when he deposed that he along with Inspector Alka Azad and Constable Subhash proceeded to the place of occurrence from the hospital. He deposed that the IO conducted inquiry from the local persons and one Darvesh Rai (PW-2) disclosed about the involvement of Sajid in the case. He deposed that his (PW-2's) statement was recorded by the IO. After some time accused Sajid (the Appellant) was arrested on the identification of the persons of the locality. PW-13 (the IO) testified as under:-

“..... I recorded statement of parents of prosecutrix. From hospital I went to the place of occurrence and prepared rough site plan Ex.PW-13/A on the pointing out of Darvesh. I deposited the pullanda in the malkhana. In the night of 27/28.4.05 accused Sajid present in the court was arrested from the gali of the said house vide his arrest memo Ex.PW-6/D. His personal search memo is Ex.PW-6/E. I recorded statement of Darvesh Rai and other PWs. Wearing clothes of accused i.e. Jeans pant, T shirt, under wear were sealed in a pullanda with the seal of MS and taken into possession vide memo Ex.PW-6/A.....”

14. From PW-13's testimony it cannot be gathered that the statement of Darvesh Rai (PW-2) was recorded only after the arrest of the Appellant. It was a general statement regarding recording statement of Darvesh Rai and other PWs.
15. PW-2 was cross-examined at length. But nothing was elicited in his cross-examination which could suggest that he would falsely depose against the Appellant. In fact, not even a suggestion was given to this witness if he had any motive or ill will to falsely implicate the Appellant.

Thus, from PW-2's testimony it is established that on 24.04.2005 at about 3:30 P.M. he saw the Appellant taking the prosecutrix in his lap to the terrace by crossing over him while he (PW-2) was sitting in the stairs. Immediately thereafter he heard the cries of the girl child and he noticed the Appellant escaping after jumping over him. PW-2 immediately rushed to the terrace and found the child lying and her clothes soaked in blood. From the MLC Ex.PW-5/A and the testimony of Dr. Rakesh Singh (PW-11) it is established that CLW 1.5 cm x 0.5 cm was found present on the right side of labia extending to fourchette. The prosecutrix's hymen was found torn. It was also established that there was tenderness and bleeding per vagina. All these circumstances taken together unerringly point that it was the Appellant and the Appellant alone who had sexually assaulted the prosecutrix. The Appellant has not given any explanation as to why he took the girl child to the terrace. His case is of simple denial. The learned counsel for the Appellant relies on a Division Bench decision of this Court in *Chander Dev Rai v. The State (NCT of Delhi) 2009 (1) JCC 67* wherein this Court acquitted the accused for an offence under Section 376 IPC. The only circumstance in the said case was that the prosecutrix was recovered from the Appellant's room at 9:45 P.M. and she was found bleeding per vagina. On appreciation of evidence it was noticed that the Appellant was living in one room tenement with his wife and child and there was no complaint of any type against the Appellant. Thus, the only circumstance in that case was the recovery of the child from the room where the accused resided with his family. There was no evidence that the accused in that case was found with the prosecutrix or anybody saw him with the prosecutrix. It was in those circumstances that the Division Bench held that the circumstances

established were not sufficient to base conviction of the accused. The authority relied upon by the learned counsel for the Appellant does not advance the Appellant's case.

16. Learned counsel for the Appellant also relies on *Rahim Beg & Ors. v. The State of U.P. AIR 1973 SC 343* to contend that in case of rape of a small child there would have been some injury on the Appellant's male organ if he had committed the crime. She refers to Para 26 of the judgment which is extracted hereunder:-

“26. According to Dr Katiyar, Medical Officer of District Jail, Rae Bareli, if a girl of 10 or 12 years who is virgin and whose hymen is intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. No injury was, however, detected by the doctor on the male organ of any of the two accused. The absence of such injuries on the male organs of the accused would thus point to their innocence. The examination of the two accused by Dr Katiyar, was on August 5, 1969. The two accused, however, had been arrested, according to the prosecution, on the morning of August 4, 1969. No cogent explanation has been furnished as to why they were not soon thereafter got medically examined by the police.”

17. In this case no such question was asked to Dr. Rakesh Singh (PW-11) who was examined by the prosecution. In the instant case, the rape has been committed on a small child of about three years. The skin and fourchette of a small child of tender age may be so soft as not to cause any injury on the offender's male organ. In any case, in the absence of any cross-examination or any evidence in this regard, the absence of any injury on the Appellant's male organ cannot absolve him of the guilt, which in my opinion is fully proved.

18. The circumstances established above unerringly point to the guilt of the Appellant. There is no circumstance which may be consistent with the Appellant's innocence. There is no infirmity in the impugned judgment.
19. The Appeal is devoid of any merit; the same is accordingly dismissed.
20. Pending Applications also stand disposed of.
21. The Appellant is directed to immediately surrender before the concerned Superintendent Jail to serve the remaining sentence.
22. Copy of the order be sent to the concerned Trial Court as well as to the Superintendent Jail for necessary compliance.

(G.P. MITTAL)
JUDGE

APRIL 02, 2013

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