

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

Reserved on: 20th September, 2013
Pronounced on: 26th September, 2013

+ **CRL.A. 1113/2012**

JOGINDER @ VIRENDER SHARMA Appellant

Through: Mr. Sunil Kapoor, Advocate with
Ms. Sudha, Advocate.

versus

GOVT. OF NCT OF DELHI Respondent

Through: Ms. Rajdipa Behura, APP for the State.

CORAM:

HON'BLE MR. JUSTICE G.P. MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. The dilemma in the instant appeal which arises out of a judgment dated 06.08.2012 and order on sentence dated 07.08.2012 passed in Sessions case No. 48/2010 whereby the Appellant was convicted under Section 376 read with Section 511 of the Indian Penal Code, 1860 (IPC) is whether the Appellant really attempted to commit rape on the prosecutrix 'G', a small girl of eight years or it was merely a sexual assault.
2. On 21.02.2010 at about 8:37 P.M., DD No.31-A was recorded in Police Station (PS) Nihal Vihar to the effect that one Rajender Singh, son of Late Harnam Singh had informed that his neighbour Virender (the Appellant) had did a wrong act with his daughter 'G'. He had been caught by the public near Shiv Vihar Dispensary. The DD was assigned to SI Kuldeep Singh who reached the spot and proceeded to record the

statement of the prosecutrix. The prosecutrix informed the SI that on that day at about 7:00 P.M. her mother had asked her to get some *numkeen* (*matar*) from a shop downstairs. When she reached the shop, she noticed the Appellant standing there. The shopkeeper informed her that the earlier said *matar* was finished. The Appellant offered her (the prosecutrix) to get *matar*. He took her to a deserted place near Shiv Vihar Dispensary. He (the Appellant) opened the zip of his pant and put her hand inside his trousers. He started pulling down her underwear. She (the prosecutrix) started crying and raised an alarm. Thereupon some men and women reached the spot and saved her from the Appellant's clutches. Public also extended beatings to the Appellant. The statement Ex.PW-1/A was signed by the prosecutrix as also by her mother (PW-4). The IO made an endorsement Ex.PW-13/B for registration of a case under Section 376 read with Section 511 IPC on the basis on which the present FIR Ex.PW-6/A was recorded. The prosecutrix and the Appellant were medically examined. Statement of the prosecutrix was also got recorded under Section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) wherein the prosecutrix stated that the Appellant had also tried to touch his male organ with her vagina. That is how the charge sheet for an offence punishable under Section 376/511 IPC was filed against the Appellant.

3. On the Appellant pleading not guilty to the charge, the prosecution in order to establish its case examined 15 witnesses.
4. The prosecutrix who entered the witness box as PW-1 is the star witness of the prosecution who corroborated her statement recorded under Section 164 Cr.P.C. and leveled allegations of the Appellant making an

attempt to touch his male organ with the prosecutrix's vagina. PW-4 prosecutrix's mother and PW-14 Dev Shree corroborated PW-1's version regarding the prosecutrix leaving her house for getting *numkeen (matar)*. PW-14 deposed that on 21.02.2010 at about 7:00 P.M., the Appellant was standing in front of her shop. The prosecutrix came to her shop to buy *numkeen (matar)*. Since the same had finished in her shop, she told the prosecutrix about the same. While the prosecutrix was returning to her house, the Appellant asked her to get *numkeen (matar)* purchased from another shop and told her to accompany him. She deposed that the prosecutrix left her shop with the Appellant.

5. The prosecution examined Ram Babu (PW-5) to prove that he had heard screams of the prosecutrix and had seen the Appellant, who had already removed the prosecutrix's underwear trying to touch his male organ to the private part of the prosecutrix. This witness, however, did not support the case of the prosecution and simply deposed that on 21.02.2010, while he was returning to his home, he found that the prosecutrix, who was the daughter of his neighbour was missing from her house. He also tried to search the prosecutrix. When they reached Shiv Vihar, they noticed some police officials were taking away the Appellant with them. The prosecutrix, who was also present, was crying. Some ladies were also present in the crowd. Other witnesses have provided various links in the prosecution case.
6. On close of the prosecution evidence, the Appellant was examined under Section 313 Cr.P.C. He denied the allegations of the prosecution and pleaded false implication on the ground that there was some dispute

between the Appellant and the prosecutrix's father's younger brother on some *nali* (small drain). The Appellant stated that he has been falsely implicated in order to take revenge. The details of the dispute were, however, not put to either of the prosecution witnesses and the same were not even disclosed by the Appellant in his examination under Section 313 Cr.P.C.

7. On appreciation of evidence, the learned ASJ found that the prosecutrix's testimony is corroborated by her statement recorded under Section 164 Cr.P.C. as also by the testimonies of PW-4 and PW-14. The learned ASJ found that the prosecutrix was reliable and trustworthy. He further held that the Appellant's act had gone beyond preparation to commit the offence as he had opened the zip of his pant and had tried to touch his male organ with the prosecutrix's vagina. Thus, the Trial Court held that but for the screams and shouts of the prosecutrix, the Appellant would have completed the act of rape and thus, the Appellant was held guilty for the offence punishable under Section 376/511 IPC and was sentenced to undergo rigorous imprisonment for a period of five years and a fine of ₹1,000/-. In default of payment of fine to undergo simple imprisonment for a period of 15 days.
8. Criticising the impugned judgment, the learned counsel for the Appellant argues that the First Information Report (FIR) is a very important document as it contains the earliest version of the complaint lodged with the police. The Trial Court did not give any reason as to why the factum of trying to touch his male organ by the Appellant with the prosecutrix's vagina was not mentioned in the FIR. There are material contradictions

and discrepancies in the statement of the witnesses and the place where the incident took place. The prosecutrix was a small child of eight years who could have been easily tutored to falsely implicate the Appellant. Relying on *Rajoo & Ors. v. State of Madhya Pradesh*, AIR 2009 SC 858, the learned counsel argues that although the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable, but her testimony cannot be taken as a gospel truth. Referring to *Mumtaz v. State (Govt. of NCT of Delhi) Crl.A.214/2011 decided on 22.05.2013*, the learned counsel argues that conviction can be based on the sole testimony of a prosecutrix only if it is of sterling quality.

9. On the other hand, learned APP for the State argues that the proposition of law is well settled that conviction can be based on the sole testimony of the prosecutrix if the same is found to be reliable and credible. Reliance is placed on the reports of the Supreme Court in *Rameshwar v. State of Rajasthan*, AIR 1952 SC 54, *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384, *State of U.P. v. Pappu @ Yunus & Anr*, (2005) 3 SCC 594 and *Vijay @ Chinee v. State of Madhya Pradesh* (2010) 8 SCC 191. She contends that minor discrepancies, variations and improvements are bound to occur in every criminal case particularly in case of sexual assault on a child. Undue importance cannot be attached to such contradictions to disbelieve the prosecutrix, who has no reason to falsely implicate the accused. Learned APP for the State relies on para 12 of the judgment in *Madan Lal v. State of J&K* (1997) 7 SCC 677 to contend that the instant case where the Appellant had tried to touch his male organ with the prosecutrix's vagina would show the Appellant's determination to

commit rape and it was only on account of the prosecutrix's screams that people were attracted and the Appellant could not complete the act.

10. As stated above, the prosecutrix was going to the shop down stairs to purchase *numkeen (matar)* is established from PW-1's statement which is duly corroborated by PWs 4 and 14. The Appellant accompanied the prosecutrix to purchase *numkeen (matar)* is sufficiently proved from the statement of the prosecutrix which is corroborated by PW-14. No substantial reason has been ascribed to PW-14 to make a false statement. The Appellant has set up a defence that he was implicated falsely as there was a dispute between him and the uncle of the prosecutrix on the issue of a *nali* (small drain). What was the dispute, as stated earlier, has not been explained by the Appellant. The Appellant expressed his willingness to produce evidence in defence, but did not produce the same. The contradictions as to the place of the incident, in my opinion, are not very material. In the prosecutrix's statement Ex.PW-1/A recorded under Section 161 Cr.P.C., the place of incident was given as a deserted place near Dispensary. To the same effect is her statement under Section 164 Cr.P.C. In the statement recorded in the Court, the prosecutrix stated that the Appellant took her to the dispensary. A perusal of the site plan Ex.PW-13/C prepared by the IO shows that the dispensary and the open plot mark A are very close to each other. Even in her testimony in the Court, the prosecutrix referred to the presence of a boy and a girl on a motorcycle outside the dispensary. Thus, in all probability, the incident took place at the deserted place close to the dispensary. There is also a contradiction as to where the prosecutrix met her mother after the

incident. In her statement made to the police, the prosecutrix stated that her mother also reached the place of the incident after the public had gathered on hearing her screams. In her statement in the Court, the prosecutrix deposed that she met her mother at the stairs of her house where she was taken by some women. To the same effect is the testimony of PW-4. Apparently, this may sound to be a discrepancy in the prosecution case. But, it has to be borne in mind that the statement of the prosecutrix was recorded at the spot which was attested by her mother PW-4. Since the plot was not far away from the prosecutrix's house, in all probability, the prosecutrix who was a small child of eight years may have been taken to her house by some women, as stated by PW-1 and PW-4, to make her (the prosecutrix) comfortable and she might have been brought back to the spot after information of the Appellant was given by the prosecutrix's father. The attention to the statement Ex.PW-1/A was not drawn by the defence and in the absence thereof, the same cannot be taken as a material contradiction. Thus, leaving apart the actual act, there does not appear to be any major contradiction in the testimonies of the prosecution witnesses and the case set up in the FIR. The Appellant has not proved his defence and even on the touch stone of preponderance of probabilities, it is difficult to believe that the prosecutrix, at the instance of her parents would level false allegations of molestation/sexual assault and that too on some alleged dispute with regard to some *nali*, which has not even been explained by the Appellant. It is difficult to believe that the prosecutrix's parents would level false allegations of sexual

molestation against the Appellant just to settle some dispute with regard to a *nali*.

11. The vital question for consideration, however, is as to what was the actual act committed by the Appellant, that is, was it only the putting of the prosecutrix's hand in his pant after opening its zip as stated in the statement Ex.PW-1/A on which the FIR was recorded, or was it trying to touch his male organ with the prosecutrix's vagina. The prosecution has not given any explanation as to why the act of trying to touch the male organ with the vagina was not stated by the prosecutrix in her initial statement Ex.PW-1/A. Admittedly, the mother of the prosecutrix was also present at that time. It is important to note that in the subsequent statement, the prosecutrix also leveled allegations of pulling, hitting and slapping her by the Appellant while she was being taken towards the dispensary. It is highly improbable that at about 7:00 P.M. when all the persons are out in the street/market, the Appellant would have the audacity of slapping, hitting or pulling the prosecutrix. In her initial statement Ex.PW-1/A, the prosecutrix stated that the Appellant opened the zip of his pant and put her hand in the trouser and started pulling down her underwear. She also stated that there upon she screamed and started crying whereupon people gathered at the spot. It may be noted that the incident in question had taken place at a deserted place. The prosecutrix has not explained as to how the act of trying to touch the male organ with her vagina was done by the Appellant. It cannot be just while walking or just standing at the deserted place. The prosecutrix is completely silent if she was laid on any article to do this act. Thus, in the

absence of any explanation by the prosecution as to why the act of trying to touch the male organ with her vagina was not stated in her initial statement and also in the absence of the prosecutrix's statement as to how this act was actually performed, especially when the prosecution claims that this was done at a deserted place (in an open plot of land), it will be difficult to believe that the act of trying to touch the male organ with the vagina was actually done by the Appellant. In my view, this improvement in the subsequent statement was only an exaggeration of the actual incident. So, it would be highly unsafe to believe the improved portion of the prosecutrix's testimony that the Appellant tried to touch his male organ with her vagina. Bereft of this, the Appellant's act of opening the zip of his trousers and forcing the prosecutrix's hand in his trousers and then pulling her underwear will only amount to an indecent assault which is punishable under Section 354 IPC.

12. In view of the foregoing discussion, the Appeal is liable to be allowed. The Appellant's conviction and sentence for the offence punishable under Section 376 read with Section 511 IPC is set aside and instead he is held guilty for the offence punishable under Section 354 IPC.
13. It may be noticed that the acts of indecent assault towards females, particularly, children are on the rise. The reason is that most of the times the same are not reported to the police to save family honour. Thus, it is only a few cases which are reported to the police and in many such cases on account of pressure from the neighbours, the witnesses are prevailed upon and sometimes the prosecutrix herself does not support her version.

Thus, wherever cases of indecent assault on children are proved, the Court should not show any sympathy to the offender.

14. It may also be noted that the legislature by virtue of Criminal Law Amendment Act, 2013 has also increased the maximum sentence of imprisonment for the offence punishable under Section 354 IPC from two years to five years. In the circumstances, I sentence the Appellant to undergo rigorous imprisonment for a period of two years and to pay a fine of ₹25,000/- or in default to undergo SI for a period of six months for the offence punishable under Section 354 IPC. The fine, if recovered, shall be paid to the victim as compensation.
15. The Appeal is disposed of in above terms.

(G.P. MITTAL)
JUDGE

SEPTEMBER 26, 2013

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