

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

% *Judgment reserved on :24.9.2013*
Judgment delivered on :30.9.2013

+ CRL.A. 1366/2010

MOHD SALAUDDIN Appellant

Through: Mr. Neeraj Bhardwaj, Adv.

versus

STATE GOVT OF NCT OF DELHI Respondent

Through: Mr.Sunil Sharma, APP.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 The appellant is aggrieved by the impugned judgment dated 30.9.2010 vide which he has been convicted under Sections 376 & 506 of the Indian Penal Code (IPC) for having committed rape upon his daughter and having criminally intimidated her during this period. Vide order of sentence dated 07.10.2010 the appellant has been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.30,000/- for the offence punishable under Section 376 IPC; in default

on payment of fine to undergo rigorous imprisonment for one year. For the offence punishable under Section 506 IPC he has been sentenced to undergo rigorous imprisonment for three years and fine of Rs.10,000/-; in default on payment of fine to undergo rigorous imprisonment for three months.

2 The appellant is aggrieved by the aforementioned findings.

3 Version of the prosecution was unfolded in the statement of the prosecutrix Kumari J. Her version revealed that her father had been married three times. The prosecutrix was born out of the second wedlock. The first wife of the appellant had expired. The mother of the prosecutrix was living separately as the accused had got married for a third time to one lady by the name of Mehru Nisha. Since her father was not paying any money to her natural mother, Kumari J started residing with her step mother. Her step-mother had gone to Assam at her native village; Kumari J was cooking food for her father; on one night after dinner her father forcibly committed rape upon her which was without her consent and wish; she was threatened not to disclose this incident to any person. This act was repeated six to seven times in a period of one year; she finally mustered courage and informed her step-

CRL.A. No.1366/2010

mother about the incident.

4 On 06.3.2009, Mehru Nisha, the step-mother of Kumari J, made a call to the Child Helpline, Sunder Nagri, where Ms.Sobha (PW-2) was working as a social worker; on receipt of this information PW-2 deputed her colleagues Mangal Singh (PW-3) and Sunil (PW-5) to go and meet the prosecutrix. PW-3 and PW-5 have corroborated this version. Statement of Kumari J was recorded before the Child Welfare Committee (CWC) on the same day (Ex.PW-5/P2). This was in the presence of PW-3 and PW-5.

5 Thereafter on the complaint of PW-5, the report of the aforementioned crime was lodged with the local police station. The statement of Kumari J (Ex.PW-1/A) was recorded by ASI Sheela (PW-13); endorsement Ex.PW-13/A was made upon the same and the rukka was sent at 11.00 PM pursuant to which the FIR (Ex.PW-4/A) was registered by H.C. Pushpender Singh (PW-4).

6 Kumari J was taken to the GTB hospital by WHC Sunita (PW-9). She was medically examined by Dr.Sapna; her MLC Ex. PW-8/A evidenced history of sexual assault by her father; this MLC was proved by Dr.Kanika Aggarwal (PW-8) as Dr. Sapna had since left the hospital.

CRL.A. No.1366/2010

The vaginal swab of the prosecutrix was also seized and sealed vide memo Ex.PW-9/A. Site plan Ex. PW-13/B was prepared.

7 The accused was arrested vide memo Ex. PW-7/A. His personal search Ex.PW-7/B was conducted. He was medically examined by Dr.Amit Kumar Gupta (PW-12) vide MLC Ex.PW-12/A opining that there is nothing to suggest that the accused is not able to commit the sexual act. The blood samples of the accused were seized vide memo Ex.PW-7/C.

8 On 07.3.2009 the exhibits were deposited with H.C. Akhileshwar (PW-6) who was posted as the then MHCM in the police station. On 21.4.2009 the exhibits were sent to the CFSL through constable Vikram Singh (PW-10). The report of the FSL dated 17.8.2009 has been proved as Ex.PW-11/A and Ex.11/B. This report, however, was inconclusive and does not advance the version of the prosecution.

9 The statement of the accused was recorded under Section 313 Cr.P.C. He pleaded innocence. The defence sought to be set up was that his daughter Kumari J had a love affair with a person by the name of Aman; he being a schedule caste; this relationship was opposed by the accused which was the reason for the false implication of the CRL.A. No.1366/2010

accused by Kumari J.

10 In defence three witnesses have been produced . Smt. Khadiza Begum (DW-1) is the neighbour of the accused so also was Ms.Jasmine (DW-2) who was the daughter of DW-1. Ms.Babli, examined as DW-3 was another neighbour. Deposition of all these witnesses is to the effect that the accused had objected to the relationship of Kumari J with Aman who was a sweeper and this was the reason as to why the prosecutrix had implicated her father in a false case.

11 This was the sum total of the evidence collected by the prosecution both oral and documentary.

12 On the aforementioned evidence adduced, the trial judge had convicted the appellant both under Sections 376 and 506 of the IPC.

13 On behalf of the appellant, arguments have been addressed at length. Written submissions have also been filed. The main thrust of the arguments of the learned counsel for the appellant is that the prosecutrix had lodged a false complaint against her father only because her father had objected to her relationship with Aman. Aman was a member of the scheduled caste; he was a sweeper. This was the reason for the false implication of the appellant by Kumari J. Further

CRL.A. No.1366/2010

submission being that her statement is even otherwise inconsistent, embellished and contains several improvements; it is liable to be discarded. This version, in fact, is a tutored version; tutoring has been done at the behest of her step-mother Mehru Nisha who did not have cordial relations with the appellant and she had instigated the prosecutrix to lodge this false complaint against the appellant. This fabricated version of Kumari J is not safe to nail the appellant. The entire case is false. She has given inconsistent statements as to whether the rape has been committed at her mother's house at Behta Hajjipur or at Rehman Building, Shahdara i.e. the house of her father. There are substantial and material improvements made in her deposition on oath in court qua her earlier versions. Attention has been drawn to Ex. PW-5/P2 wherein the prosecutrix has stated that she had been made to eat a fruit by her father pursuant to which she had been intoxicated; she had been threatened by a screw driver by her father in order not to disclose the act of rape to any outsider. Submission of the learned counsel for the appellant being that this version in Ex.PW-5/P-2 did not find mention in the statement of the prosecutrix Ex. PW-1/A which was also recorded on the same date. Further submission being that in Ex.PW-1/A

CRL.A. No.1366/2010

it has been detailed that the act of rape had been committed upon her three to four months prior; these details were missing in Ex. PW-5/P-2. Attention has also been drawn to Ex. PW-14/B which was the statement of prosecutrix recorded on 23.3.2006 under Section 164 Cr.P.C. which was 16 days after the date of the incident. Submission being that there is a material improvement in this statement as a role has been attributed to her step-mother Mehru Nisha whereas in her first version (Ex.PW-5/P-2) she had not stated that she had disclosed the incident to her step-mother. Her deposition on oath in court contains further contradictions and improvements. No reliance can be placed upon such a witness who has taken shifting stands in all her four versions. There is no explanation as to why Mehru Nisha was not examined and non-examination of a material witness calls for an adverse inference to be drawn against the prosecution in terms of Section 114 (b) of the Indian Evidence Act. Attention has also been drawn to the site plan Ex.PW-13/B; submission being that not only has the place of the offence not been depicted but there is also no explanation as to why the bed where the alleged act of rape was committed had not been seized. The medical evidence also speaks of an old history of the hymen torn and the version of the CRL.A. No.1366/2010

prosecution that the last act of rape had been committed upon Kumari J just 3 days prior to her alleged complaint thus dislodges her version; no injury or signs of fresh rape mark have been noted in the MLC. Submission being that the versions of PW-2, PW-3 and PW-5 also cannot be believed. The appellant has been falsely implicated by the prosecutrix only for the reason that she was having a love affair with Aman and since her father had objected to this relationship, she has set up this false case; it is at the behest of her step-mother Mehru Nisha who also had a strained relationship with the appellant. On all counts the appellant is entitled to a benefit of doubt and a consequential acquittal.

14 Arguments have been refuted by the learned counsel for the State. It is pointed out that the case of the prosecution has been proved on all counts. Not only is the version of the prosecutrix clear and categorical which has also been noted by the trial judge; the medical evidence on record also speaks volumes. No ground is made out for interference.

15 Record has been perused. We have also appreciated the submissions advanced by the learned counsel for the parties.

16 PW-1 is the star witness of the prosecution. She has on oath deposed that her family comprises of two sisters and two brothers.; her
CRL.A. No.1366/2010

father was married three times; she is the daughter borne out of the second marriage of her father; her mother was named Gulshan. The third wife of her father is Mehru Nisha. Her father was not making monthly payments to her mother; she accordingly started residing with her step-mother at Gali No.2, Rehman Building, Shahdara. When her step-mother had gone to her native village at Assam she was cooking food for her father. One day when she was sleeping at night, at around mid-night her father forced himself upon her and committed rape upon her; she was threatened that she would be killed if she made a disclosure to any person; she passed blood in the urine and also from her private parts; in the morning of the following day when she raised objection to this, her father gave her a blow on her back. Her father also used to watch blue movies and forced her to see them. She did not narrate this incident to any person on that day because of fear of defamation but later on she narrated it to her mother but because of her instability of mind no action was taken. At Behta Hajjipur her father again came and asked her to come back to Shahdara for washing his clothes; she refused; he came to their house and attempted to commit rape upon her but could not succeed. On the following day when her step-mother

CRL.A. No.1366/2010

Mehru Nisha returned from her village Kumari J went to her father's house and informed her step-mother. Prosecutrix then made a telephone call to an uncle by the name of Sunil (PW-5) reporting the incident to him. PW-5 took her to the police station; where she lodged a report.

17 Kumari J was cross-examined at length. In her cross-examination, she stated that her father had raped her for about 6 to 7 times during the preceding period of one year. She did not disclose the incident earlier because of the disgrace and apprehension of disrepute; the last act of rape was committed upon her two to three days before the lodging of the complaint which was in March, 2009. She admitted that she knew a boy by the name of Aman who is of her age group and his sister was her friend. She, however, denied the suggestion that because of her love affair with Aman and this fact having come to the knowledge of her father she had falsely implicated her father. She also denied the suggestion that at instigation of her mother because of strained relations of her father and her step mother she has implicated her father falsely.

18 Four statements of Kumari J were in fact recorded. Her first statement had been recorded by the CWC (Ex.PW5/P-2); this statement was recorded on 06.3.2009. It reads herein as under (English CRL.A. No.1366/2010

translation):

“Statement made before C.W.C Mayur Vihar that my father Salauddin has been doing rape upon me for the one year. He makes her to eat fruit; due to which I get intoxicated and when I fell in sleep he rapes upon me. When I refuse to do so he takes a screw driver and does forcible act and say allow him to do such act without opposition otherwise he would insert the screw driver into my head. If have I told about this fact to anybody, he will kill me.”

19 Her second statement was the basis of the FIR. This version was recorded by PW-13 on the same date i.e. 06.3.2009. It is Ex. PW-1/A and reads as under (english translation) :

“ Statement made that I lives along with my step-mother Mehru Nisha. My mother Gulshan alongwith her family lives at Rati Ram Colony, Behta Hajjipur. My father plies a hired TSR. My step-mother hails from Assam; with whom my father had solemnized second marriage seven-eight years ago. My father has given a rented room on Rehman Building to Mehru Nisha and he keeps on coming to both the places. When Mehru Nisha having gone to Assam, my father took me to Rehman Building from Hajjipur and I started living there and I used to prepare food for my father. My father was having evil intention towards me and at night he forcibly with threat had started doing bad work with me, I time and again refused to do so but having found me alone he made me prey of his lust. When my step-mother returned back from Assam to Delhi three-four months ago, my father took back me to Behta Hajjipur and whenever he had gotten chance, he raped upon me there also; I was much frightened from my father due to which I could not told this incident to anybody. Today I came to my step mother Mehru Nisha and told

her the activities done by my father. My step-mother made call at 1098 number wherefrom a person by the name of Sunil came and took me and my step-mother to Children Court at Mayur Vihar where Judge Saheb was sitting and he made inquiries from me and prepared some documents and thereafter sent us with the Child Line Staff to Police Station Shahdara. I gave my statement at police station in front of these persons. My father had done bad work several times with me; legal action be taken against him.

20 On 23.3.2009 , Kumari J was examined under Section 164 of the Cr. P.C. by the learned Metropolitan Magistrate Mr.Sanjay Khanagwal (PW-14). Her statement Ex. PW-14/A reads herein as under (english translation):

“Statement of Johra D/o Salauddin R/o Behta, Hajjipur, U.P.

On S.A.

I live with my mother in Behta. Salauddin is my real father. He used to take me with him by saying to my mother that I have grown up and I should learn household work at Delhi by living with him. Last year he took me at his home for approximately one week and with threatening to kill me he committed rape upon me and during this period he committed rape upon me several times. Thereafter when I went back to my home, I told this fact to my mother but she is mentally weak, she does not understand my saying. Thereafter, several times he took me to Delhi; on one pretext or the other he committed rape upon me. Having frustrated by all this, one day I told this fact to the police.”

21 Her fourth version was her deposition on oath in court which was recorded on 23.03.2010 and had stretched to 22.4.2010 as well, details of which have been noted supra.

22 Perusal of the record does not substantiate the submissions made by the learned counsel for the appellant. Kumari J's version on oath in Court fully corroborates all her earlier versions i.e. her statement in Ex.PW-5/P-2, Ex. PW-1/A and Ex. PW-14/A. It has remained unaltered. In all her four versions she had clearly and categorically testified that her father had committed rape upon her forcibly for the last one year. She has been consistent that she did not disclose the incident earlier because of disrepute and also because of the threats extended by her father. She was under fear. This act was committed both at Rehman Building (house of her father) and sometimes at Behta Hajjipur where she was living with her mother. Merely because in one statement, one or the other detail is missing would not dent her other clear and cogent testimony. Also nothing has been elicited in her cross-examination which could discredit her.

23 When an incident is narrated by the same person to different persons on different occasions some difference in the mode of narrating

the incident are bound to arise. However, such differences which do not militate against the trustworthiness of the narration and unless the variations can be held to be so abnormal or unnatural as would not occur if the witness would have really witnessed what it was narrating. Such a version cannot be discarded.

24 In this context the Supreme Court in the case of 2003 (1) ACR 273 (SC) Shyam Sunder Vs. State of Chhattisgarh in so many words had noted as follows:

“ When an incident is narrated by the same person to different persons on different occasions some difference in the mode of narrating the incident is bound to arise. However, such differences do not militate against the trustworthiness of the narration unless the variations can be held to be so abnormal or unnatural as would not occur if the witness would have really witnesses what it was narrating. ”

25 The Supreme Court 2003(3) Crimes 156(SC) Sayed Ibrahim Vs. State of Andhra Pradesh had also observed:

“Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal

and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so."

26 The trial judge had in fact while recording the evidence noted that the prosecutrix was confident and was giving clear answers to all the questions. Needless to state that the demeanour of a witness can only be noted and recorded by the judge conducting the trial. The appellate court does not have such an advantage. Testimony of a eye-witness and that too of a victim of rape has to be appreciated in the light of the guidelines which have been laid down by the courts time and again.

27 This is one unfortunate case where the victim is possibly the closest blood relation of the accused; he is her own father. One can also not forget the fact that in our cultural setup it would be abhorrent on the part of a victim of such a crime to disclose such an incident; not only would she be conscious of ostracism by the society but also by her own close family members, relatives, friends and even neighbours. She would have to face the whole world and probably alone. This would be doubly difficult in a case where the accused is her own natural father.

28 This court is also conscious of fact that the prosecutrix was
CRL.A. No.1366/2010

illiterate; so much so she had put her thumb impression and could not even sign her name. However, her mental faculties were developed; she was consistent and fully well aware of what she was stating. This was also observed by the trial judge.

29 It is in the light of this background that the testimony of PW-1 has to be appreciated. The gist of the version has to be appreciated. If there is a ring of truth in it, the court must act upon it. Applying this test, it is clear that the testimony of PW-1 inspires confidence; it is cogent and credible.

30 This version of PW-1 has also been corroborated by PW-2, PW-3 and PW-5. Relevant would it be to first mention the statement of PW-2. PW-2 was working in the Child Helpline, Sundar Nagari as a social worker. On 06.3.2009 Mehru Nisha the step-mother of Kumari J informed her about the incident; PW-2 sent her colleagues PW-3 and PW-5 to investigate into the matter. PW-3 Mangal Singh and PW-5 Sunil Kumar reached the spot. They made inquiries from the prosecutrix as also from her mother Mehru Nisha. Kumari J was produced before the Child Welfare Committee at Mayar Vihar, Phase-I where her statement Ex. PW-5/P2 was recorded.

31 The fact that the matter was first reported to the local police through PW-5 on the statement made by PW-1 has been confirmed by PW-13 as well. PW-13 was posted as a sub-inspector in the local police station Shahdara when on 06.3.2009 Kumari J along with her step-mother Mehru Nisha and three members from CWC had detailed this version to her. PW-13 had also recorded the statement of the prosecutrix Ex. PW-1/A which had become the subject matter of the present FIR.

32 The ocular version of PW-1 is thus fully stood corroborated by the aforementioned testimonies of PW-2, PW-3, PW-5 and PW-13.

33 The medical evidence also corroborates the case of the prosecution. The MLC has been proved by PW-8. It is Ex. PW-8/A. The MLC was conducted on the patient on the same day. The patient had disclosed the history of the alleged sexual assault by her father two days ago. Similar assault having been committed in past; previous mental and physical abuse had been noted in Ex. PW-8/A. Hymen was torn and on medical examination it was found to be old hymeneal tear. This medical evidence was fully corroborative of the ocular version of PW-1 who stated that her father had committed rape upon her for a long

CRL.A. No.1366/2010

period and he had committed this act of six to seven times; it was for this reason that the hymen had an old tear.

34 The primary defence projected by the appellant is that the appellant has been falsely implicated by the prosecutrix at the behest of her step-mother Mehru Nisha for the reason that the prosecutrix was having a love affair with one boy by the name of Aman who belonged to a different caste; he was a schedule caste; this relationship was objected to by the appellant; this was the reason for the false implication of the appellant by Kumari J. In another line of defence, which has been set up and which emerges from the cross-examination of PW-1 is that the appellant has been falsely implicated by Kumari J at the behest of her mother because of discordant and strained relations between the appellant and Mehru Nisha. Yet a third defence has emerged in the suggestion given to PW-7 which is to the effect that Kumari J has given a false version at the behest of the Child Helpline.

35 To establish his defence, the appellant had produced three witnesses. DW-1, DW-2 and DW-3, all being neighbours of the appellant. DW-1 and DW-2 are mother and daughter; DW-3 is their cousin; she is also a neighbour of the appellant. DW-1 and DW-2 have

CRL.A. No.1366/2010

deposed that the appellant is a good man; Aman a sweeper of the same locality wanted to marry the prosecutrix which was objected to by the appellant. Quarrels took place on this count; prosecutrix has threatened the appellant that she would commit suicide and get the appellant arrested. In their cross-examination, both DW-1 and DW-2 have admitted that they are not summoned witnesses, they have come at the asking of Anwar i.e. the son of the appellant. Obvious implication being that they had come at the behest of Anwar to protect his interest. Anwar is also present in the court today, he is doing 'pairavi' of this case and this has also been noted by the trial judge.

36 This defence as set up by the appellant is palpably false. This is for the aforementioned reasons. Firstly, in the cross-examination of the witnesses of the prosecution, there are three kinds of suggestions which have been given to the witnesses. The first line of cross-examination is built up on the defence that because of the relationship of Aman with Kumari J and which was objected to by the appellant, Kumari J has falsely implicated her father. The second line of defence evidenced from the cross-examination of the witnesses of the prosecution is that the appellant has been falsely implicated by Kumari J at the behest of

CRL.A. No.1366/2010

her mother Mehru Nisha because of a discordant relationship between the appellant and the Mehru Nisha. A third line of defence has also been set up, which is evident from the cross-examination of PW-7, wherein a suggestion has been given to PW-7 that the victim had given the statement against the accused at the instance of the Child Helpline official. The appellant is not clear about his own defence; he is confused and unsure.

37 In his statement under Section 313 Cr. P.C., he had also relied upon the first version i.e. that he has been falsely implicated because he objected to the relationship of Aman with his daughter. However, if this was the factual position nothing prevented the appellant from producing Aman in defence. It has also come on record and in fact it has been admitted by the learned counsel for the appellant that the prosecutrix has since got married but admittedly she did not marry Aman. Learned public prosecutor points out that had this defence of the appellant been a genuine defence, nothing would have prevented the prosecutrix from marrying Aman as her father being in judicial custody could not have created any hurdle in her way. This submission also cannot be ignored.

38 There is no doubt to the proposition that the witnesses of the defence have to be given a weightage and if the defence set forth by the accused creates a dent in the version of the prosecution the benefit must accrue to the accused. However, in this case the defence raised by the accused as noted supra is a confused defence. Testimony of the defence witnesses was thus rightly rejected by the trial court.

39 Prosecution on all counts has proved its case. Not only is the testimony of PW-1 trustworthy but the testimony of PW-2, Pw-3 and PW-5 is also corroborative; medical evidence also advances the case of the prosecution and has corroborated this ocular version of the prosecutrix. The defence sought to be projected by the accused is bogus. The impugned judgment on no count calls for any interference.

40 In a judgment of the Apex Court report in 2006(1)ACR 250 State of Himichal Pradesh Vs. Asha Ram the court in the context of the offence of rape having been committed by a father upon his daughter had noted inter alia as follows:

“Ordinarily, the offence of rape is grave by its nature. More so, when the perpetrator of the crime is the father against his own daughter it is more graver and the rarest of rare, which warrants a strong deterrent judicial hand. Even in the ordinary criminal terminology a rape is a crime more heinous than murder as it

destroys the very soul of a hapless woman. This is more so when the perpetrator of the grave crime is the father of the victim girl. Father is a fortress, refuge and the trustee of his daughter. By betraying the trust and taking undue advantage of trust reposed in him by the daughter, serving food at odd hours at 12.30 a.m., he ravished the chastity of his daughter, jeopardized her future prospect of getting married, enjoying marital and conjugal life, has been totally devastated. Not only that, she carried an indelible social stigma on her head and deathless shame as long as she lives.

41 In these circumstances, the punishment imposed upon the appellant also calls for no interference. The appeal is without any merit. Dismissed.

42. Copy of this order be sent to the Superintendant Jail for necessary compliance.

INDERMEET KAUR, J

KAILASH GAMBHIR, J

SEPTEMBER 30, 2013

nandan