

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

+ **CRL.A. No. 1046/2008**

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Reserved on: 31st January, 2013

Decided on: 3rd May, 2013

SATISH KUMAR S/O ACHARYANAND Appellant
Through: Mr. Chetan Lokur, Adv.

versus

STATE Respondent
Through: Mr. Mukesh Gupta, APP with SI
Mangej Singh PS Prasad Nagar.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this appeal the Appellant challenges the judgment dated 28th November, 2006 wherein the Appellant has been held guilty of offence under Section 376 IPC and the order dated 29th November, 2006 whereby he has been directed to undergo Rigorous Imprisonment for a period of 14 years and a fine of Rs. 2000/- and in default of payment of fine to undergo further Simple Imprisonment for a period of six months.

2. Learned amicus curiae for the Appellant contends that the Appellant has been convicted on the allegations of commission of offence of rape on 10th February, 2003 on two minor girls PW1 and PW6 aged 12 years and 11 years respectively. The alleged incident was reported belatedly on 14th February, 2003. The hymen of PW6 who was aged 11 years was found to be intact and as per PW2 Dr. Shakun Tyagi there was no clinical evidence of rape when she was examined on 14th February, 2003. Though the hymen of

PW1 aged 12 years was ruptured however there was no other sign of rape and thus PW3 Dr. Anita after examining the PW1 the prosecutrix in the cross-examination admitted that there was no clinical evidence of rape except hymen being torn. There were no external injuries on the body of either of the two prosecutrix or the Appellant. In case the alleged offence had been committed by the Appellant, it was not possible that there would have been no injuries on the body or the private parts of the Appellant or the two prosecutrix. Admittedly as per the prosecution witnesses PW1, PW4 and PW18, the Appellant was handed over to the Police on 13th February, 2003 where after he was beaten and implicated in this case. As per PW6 the Appellant was handed over to the Police on 12th February, 2003. The version of the prosecutrix is not corroborated by her teacher PW7. There is no evidence to prove that the semen stains found on the clothes of PW1 and PW6 belonged to the Appellant. Even if the allegations of the prosecutrix are taken on their face value, at best an offence under Section 354 IPC is made out. Reliance is placed on *Mohd. Mian Vs. State* 37 (1989) DLT 39 and *Pappu Vs. State of Delhi* 2009 (111) DRJ 313 (DB). It is lastly contended that during the trial, there was violation of the constitutional right of the Appellant as he was not defended by a lawyer. In view of the absence of legal aid, there is no cross-examination of PW12, PW20 and PW21 of which PW20 & PW21 were the investigating officers and thus very crucial witnesses. In *Mohd. Hussain alias Zulfikar Ali Vs. State (Govt. of NCT of Delhi)* 2012 (2) SCC 584 the two Judge Bench of the Hon'ble Supreme Court relying upon *Zahira Habibulla Sheikh Vs. State of Gujarat* (2006) 3 SCC 374 held that in case an accused is tried in the absence of lawyer, the same amounts to violation of Article 21 of the Constitution of India. A

counsel has to be provided in a substantial and meaningful sense. Legal aid should be given to the accused and not merely offered. Since the two Hon'ble Judges differed in the conclusion, the matter was referred to the larger Bench and in *Mohd. Hussain alias Zulfikar Ali Vs. State (Govt. of NCT), Delhi AIR 2012 SC 3860* the three Judge Bench remanded the matter for retrial. Similarly, in *Mohd. Ajmal Mohd. Amir Kasab alias Abu Mujahid Vs. State of Maharashtra AIR 2012 SC 3565* the Supreme Court held that even if the accused does not ask for a lawyer or remains silent, the same is not sufficient. The accused must voluntarily make an informed decision. An informed decision is a decision where the Court informs the consequences and the danger of the waiver and it must clearly be noted that the accused understood the consequences of waiver. Reliance is placed on *Godinez, Warden Vs. Moran 509 US 389 (1993)*. On an application moved by the Appellant, the prosecutrix was recalled for examination and despite the counsel being not available for cross-examination, the Appellant was asked to cross-examine the witnesses. Hence the impugned judgment is liable to be set aside on this count itself.

3. Learned APP on the other hand contends that the testimony of two prosecutrix PW1 and PW6 is consistent. Since the prosecutrix are much below 16 years of age consent is immaterial. As per the FSL report Ex.PW21/A semen stains of Group 'A' were found on the kurta and salwar of PW1, underwear of PW6 and the clothes of the Appellant. Since the hymen of PW1 was ruptured, the same is sufficient to prove that sexual intercourse was committed with her. Further there is no motive attributed for false implication to the two prosecutrix. In the statement of the

Appellant recorded under Section 313 Cr.P.C. no defence has been taken and the Appellant has chosen to remain silent. An amicus curiae was offered to the Appellant, however the Appellant specifically refused to take an amicus curiae which is evident from the order dated 1st September, 2006. Hence the Appellant now cannot take the plea that he was denied legal aid. Reliance is placed on *Mohd. Hussain alias Zulfikar Ali Vs. State (Govt. of NCT), Delhi AIR 2012 SC 3860* to contend that even if this Court comes to the conclusion that the right of legal aid was denied to the Appellant and he was not in a position to take the informed decision, the matter is required to be remanded back.

4. I have heard learned counsel for the parties and perused the record. Briefly the case of the prosecution against the Appellant is that FIR No. 45/2003 under Section 376/354/511 IPC was registered at PS Prasad Nagar on the complaint of PW1 that the Appellant allegedly committed rape on two minor girls PW1 and PW6 aged 12 years and 11 years respectively on 10th February, 2003 in a house at Karol Bagh in the evening hours at 6.00 PM where he was living as a tenant. PW1 the complainant on whose statement the FIR was registered stated that she was studying in 5th standard and her father was doing the work of repairing of mobiles. On 10th February, 2003 she was in her class when her friend 'K' told PW1 that her uncle gives money to her. PW1 along with 'K' went to the house of her uncle at Bapa Nagar i.e. the Appellant herein. 'K' went inside the house and after some time called PW1. The Appellant asked 'K' to prepare tea, who went outside to fetch milk and thereafter prepared tea for all. The Appellant removed the clothes of 'K' and his own clothes and committed wrong acts with 'K'.

Thereafter the Appellant committed the same act with PW1 as he committed with 'K'. The Appellant asked both the girls to wear clothes and handed over Rs. 10 to 'K' and Rs. 5 to PW1. Thereafter they went to their respective homes. For two-three days PW1 did not go to the school. On Thursday when she went to the school her teacher asked why she reached home very late at 7.30 PM on Monday PW1 told the teacher that 'K' had taken her to the house of Appellant and narrated the incident. Parents of PW1 were called through the chowkidar and they were informed about incident by the teacher. PW1 came back to her house with her parents and thereafter all of them went to the house of the Appellant where he was not found and it was found that he was in the factory. The Appellant was apprehended from the factory by the mother of PW1 where he was given beatings and thereafter handed over to the Police. PW1 states that thereafter she was sent back with her maternal uncle from the factory by her mother. On 14th February, 2003 PW1 was first taken to the Police station where enquiries were made and she gave the clothes she was wearing on the date of incident i.e. the school dress consisting of salwar, kamij and underwear. Her statement was recorded as Ex.PW1/B which she signed and her clothes were seized vide memo Ex.PW1/A. She stated that 'K' is also known as 'P'.

5. Statement of PW6 'K' @ 'P' was also recorded. She stated that on 14th February, 2003 in the evening time she along with PW1 went to the house of Appellant. She left the school at about 5.00 PM and went to the house of the Appellant as he was a tenant of her grand-mother and PW1 had told her that she was in need of money. When they entered the room of the Appellant he was lying on the Cot and there were two more persons present.

After a while the two other persons left the room and thereafter the Appellant took off her wearing clothes and dragged her in his blanket. The Appellant put off his clothes also and started touching parts of her body. Thereafter the Appellant committed “Galat Kaam” with her. The witness described the act done by the Appellant. PW6 further stated that thereafter he called PW1 and committed the same act with PW1 and gave Rs. 10 to her and Rs. 5 to PW1. At the time of illegal act, the Appellant stated “Maja Aata Hai, Aur Ladkiyon ko bhi lee aana”. She stated that she did not go to the school on Tuesday, however on Wednesday the Police came to her house as father of PW1 had lodged the complaint and apprehended the Appellant from the factory.

6. PW1 and PW6 have thus categorically stated about the acts committed by the Appellant. As per the medical evidence on record, the hymen of PW6 was intact whereas hymen of PW1 was ruptured. For commission of an offence of rape, complete sexual intercourse is not required and mere penetration is sufficient. The testimony of PW1 and PW6 is further corroborated by the FSL report Ex.PW21/A. As per report Ex.PW21/A human semen was detected on salwar belonging to PW1, the bed-sheet and the pant of the Appellant and the underwear of PW6. Further the human semen present on Ex.1b, 2a, 2b and Ex.4 were all of ‘A’ group. This report is exhibited by PW21 the investigating officer. In the report there appears to be a typographical error as to the semen being detected on kurta instead of salwar of PW1. The same is clarified by the report of grouping of semen stains on the different clothes.

7. It may be noted that PW21 the investigating officer was not cross-examined by the Appellant as no counsel appeared on his behalf. Thus this brings me to the most crucial aspect of the matter whether the Appellant was denied the right of legal aid. In this regard it would be relevant to note some of the order sheets of the learned Trial Court. The charge was framed against the Appellant on 17th February, 2004 where after the evidence of PW1 started on 3rd September, 2004. Though other PWs were also recorded, however the counsel for the Appellant submitted that he was not available after lunch and thus the matter was adjourned to 29th October, 2004. On 29th October, 2004 PW3 was partly examined, however her cross-examination could not be conducted on that date. The matter was thereafter transferred to another Court. Thereafter till 5th December, 2005 the Appellant attended the proceedings with his counsel and witnesses were examined. On 5th December, 2005 since the counsel for the Appellant sought leave to withdraw his vakalatnama on behalf of the Appellant, he was discharged. The Appellant stated that he wants to contest his case on his own, thus all the witnesses who were present were bound down for the next date. On 20th January, 2006 when the matter came up for hearing again, the Court again offered him for providing lawyer at State expense but the Appellant flatly refused to take lawyer on State expense and stated that he will cross-examine the witnesses himself. On that day PW14, PW15 and PW16 were examined, cross-examined by the Appellant and discharged. Though PW12 was present, however the Appellant stated that he would cross-examine her on the next date being a material witness. On 20th January, 2006 the Appellant filed an application for recalling PW1 and PW6 and on his request PW1 and PW6 were re-summoned for further cross-examination on the next date.

Vide order dated 20th February, 2006 the learned Trial Court observed as under:

“20/2/06

Present. Ld. Addl. P.P. for the State.

Accused Satish Kumar is in J.C.

PW17 H.C. Ram Kishor examined, cross-examined by the accused himself and discharged. PW12 Lady const. Sunita is present for his cross-examination but the accused has stated that he is unable to cross examine this witness as she is the main witness in the case. In the morning at the submission of the accused, the entire photocopy of the statement of the witnesses have been supplied to him at 11 AM at the State expenses and, thereafter, at his request, the case taken up after lunch as he wants to go through the said statements but after lunch he again took the plea that no entire copy has been given to him. So, he is unable to make the cross-examination of the witness and shouted that he again engage his counsel. So, the attitude and behavior of the accused is not good and he wants to become over smart in the court. For his behavior, he is warned not to do such a practice to delay his matter because PW12 Sunita used to appear on each and every date for cross-examination and IO SI Harshvardhan for his statement. In view of this, the accused again asked if he wants lawyer, the lawyer can be provided to him on State expenses but he has flatly refused. So, in the interest of justice, the case is adjourned with direction to the accused to come to the Court with preparation to make the cross-examination of the witnesses. Both the PWs are bound for their cross-examination. SI Satish appeared before lunch but after lunch after filing the application, he has gone. He be summoned again with other PWs who are left to be examined. One P.W. Jagdish is also present. He is also bound down for the next date of hearing. Now to come up on 9/3/06.

ASJ. DELHI
20.2.06”

8. It would be thus seen that repeatedly the Appellant was offered a lawyer at State expense which he refused and at the same time expressed his inability to cross-examine the witnesses in the absence of his counsel. Again when the matter came up on 9th March, 2006 both PW1 and PW6 who had been recalled were present, however the Appellant stated that he will cross-examine these witnesses in the presence of his lawyer. The Court noted that Appellant had been asked on a number of dates for providing lawyer at State expense which he was repeatedly refusing and would state that he would do his case on his own. On that day when the witnesses were present and recalled, the Appellant stated that he would like to do their cross-examination in the presence of his lawyer and thus the conduct of the Appellant amounted to harassing the child witnesses PW1 and PW6. The Court also observed that the case was being delayed due to the behavior of the Appellant. Thereafter remaining witnesses were examined on 28th March, 2006 and 17th April, 2006. PW2 was repeatedly present, however on 27th April, 2006 the Appellant again expressed his inability to cross-examine the witness and prayed for an adjournment. On 27th April, 2006 the Appellant sought transfer of his case to another Court and consequently it was transferred to another learned Additional Sessions Judge. On 1st June, 2006 the Appellant expressed his willingness to accept legal assistance and thus he was provided an amicus curiae. The witnesses present were discharged and recalled for the next date. On 1st June, 2006 the Appellant was again offered legal assistance when he was willing to accept the same. On the request of the Appellant, Shri Rambir Singh, Advocate was appointed as Amicus Curiae. The witnesses were discharged for the day and the matter was fixed on 25th July, 2006. On 25th July, 2006 cross-examination of the

witnesses was again deferred on the request of learned Amicus Curiae as he wanted to go through the file. Thus the witnesses present were discharged. However, the Appellant again interrupted the proceedings for which he was warned. Immediately, the Appellant requested to appear before the learned District and Sessions Judge, which prayer was allowed. On 1st September, 2006 the Appellant was present with the amicus curiae, however the Appellant stated that he did not need the assistance of amicus curiae. His signatures were duly taken and the learned amicus curiae was discharged. On 12th September, 2006 the last witness was also examined by the Court. On 26th September, 2006 the learned Trial Court noted that the Appellant is reluctant to continue the trial and he refused to give the statement under Section 313 Cr.P.C. The matter was thus sent to the District and Sessions Judge for transferring the same. On 28th September, 2006 the Appellant stated before the learned Additional Sessions Judge that he was willing to make the statement under Section 313 Cr.P.C. before the Trial Court and thus the file was sent back for 6th October, 2006. Again on 10th October, 2006 the learned Trial Court observed that the Appellant was not cooperating in recording of the statement under Section 313 Cr.P.C. and stated that he wanted a decision. Court explained him that his statement was necessary for the disposal of the case, however the Appellant remained unwilling to give any reply to the statement under Section 313 Cr.P.C. It was noted that earlier also the Appellant did the same thing and thus the Appellant was sent to the JC and the matter was adjourned sine-die with liberty to the Appellant to move an application as and when he felt necessary to record his statement. An application was filed by the Appellant under Section 313 (3) Cr.P.C. on 13th October, 2006 on which notice was issued

for 17th October, 2006. The statement was recorded, however the Appellant did not reply anything. The Appellant kept quite and did not give answer to any of the questions including the question whether he wants to lead defence evidence. In view thereof the judgment was pronounced by the learned Trial Court.

9. Learned counsel for the Appellant has laid a lot of stress on an informed consent. A perusal of the order-sheets as noted above would show that the present is a case where repeated offers for providing legal aid were made to the Appellant, however he did not cooperate in the same. The issue of informed consent came up before the Hon'ble Supreme Court in *Mohd. Ajmal Mohd. Amir Kasab alias ABU Mujahid Vs. State of Maharashtra* (supra) wherein it was held:

487. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the Constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (see *Suk Das v. UT of Arunachal Pradesh*: (1986) 2 SCC 401).

10. It is thus clear that unless the accused in clear and in unambiguous terms states that he does not want the assistance of a lawyer and would rather defend himself personally, the obligation to provide him a lawyer is

absolute. In the present case the Appellant was represented by a lawyer, however the counsel withdrew in the midst of trial and thereafter repeatedly the Appellant was asked whether he wanted a counsel at State expense which he refused. An amicus curiae of the Appellant's choice was appointed for the Appellant, however, he refused to accept the same after few dates. Statement of the Appellant was recorded on 1st September, 2006 that he did not want any amicus curiae, which was duly signed by him in acknowledgment thereof. Learned counsel for the Appellant has stated that the duty of the Court does not end at offering a lawyer. He should be informed about the consequences and danger of the waiver. He relies upon *Godinez, Warden Vs. Moran* (supra) wherein it was held:

“A criminal defendant may not be tried unless he is competent, *Pate v. Robinson*, 383 U.S. 375, 378 (1966), and he may not waive his right to counsel or plead guilty unless he does so “competently and intelligently,” *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938); accord, *Brady v. United States*, 397 U.S. 742, 758 (1970). In *Dusky v. United States*, 362 U.S. 402 (1960) (*per curiam*), we held that the standard for competence to stand trial is whether the defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and has “a rational as well as factual understanding of the proceedings against him.” *Ibid.* (internal quotation marks omitted). Accord, *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (“(A) person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial”). While we have described the standard for competence to stand trial, however, we have never expressly articulated a standard for competence to plead guilty or to waive the right to the assistance of counsel.

Relying in large part upon our decision in *Westbrook v. Arizona*, 384 U.S. 150 (1966) (*per curiam*), the Ninth Circuit adheres to the view that the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial. See *Seiling v. Eyman*, 478 F. 2d 211, 214-215 (1973) (first Ninth Circuit decision applying heightened standard).

A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. *Parke v. Raley*, 506 U.S. 20, 28-29 (1992) (guilty plea); *Faretta, supra*, at 835 (waiver of counsel). In this sense there is a “heightened” standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence*.

11. Even applying the strict standards laid down as above, it is evident that the Appellant was quite conscious of his acts and took decisions knowing all facts intelligently. Despite different Judges offering him counsel at State expense, he at times voluntarily accepted and then refused to accept them. When the witnesses were present or recalled, he refused to examine them. It is thus apparent from the conduct of the Appellant that he had taken up an uncooperative attitude in the proceedings and it was a clear conscious decision on his part to ensure that the trial does not proceed further. An informed consent to waive the right to a counsel has to be inferred from the facts of the case. The Appellant was made aware of his right to a counsel and offered repeatedly. He would exercise his choice as per his requirements. Thus, on the facts of the case, it cannot be said that there was a denial of the constitutional right of fair trial to the Appellant.

12. For the aforesaid discussion, I find no illegality in the impugned judgment of conviction and order on sentence. Appeal is dismissed.

(MUKTA GUPTA)

MAY 03, 2013
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