

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

% Crl. A. 221/2012

+ Date of Decision: 17th July, 2014

OM PRAKASH @ RAJU Appellant

! Through: Mr. A.K. Singh, Adv.(amicus curiae)

versus

\$ STATE (GOVT. OF NCT OF DELHI) Respondent

Through: Mr. Sanjay Lao, APP

CORAM:

*** HON'BLE MR. JUSTICE P.K.BHASIN**

HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

P.K.BHASIN, J:

By way of this appeal the convicted-accused has challenged the judgment and order dated 19th November, 2011 passed by the learned Additional Sessions Judge whereby he has been convicted for the commission of the offence punishable under Section 376(2)(f) of the Indian Penal Code ('IPC' for short) for having raped a five years old girl and sentenced to undergo imprisonment for life and also to pay fine of Rs.5,000/-, with a default stipulation of two months simple imprisonment in case of on payment of fine.

2. The relevant facts leading to the trial and conviction of the appellant-accused, as noticed by the learned trial judge in the impugned judgment are as under:-

“The case of the prosecution in nut shell is that on 04.06.2009 “A” aged about 5 years, along with her brother Master Om aged about 4 years and another boy, namely, Shivam aged about 5 years was playing in the gali outside her house No.B-203, Baljit Vihar, Aman Vihar, Delhi in the evening. It is further the case of the prosecution that after some time, when Ms. Geeta who is mother of the prosecutrix & Om came outside at about 9.00 pm, she could not find them in the gali and during search, her son Master Om came and apprised her that one “buggiwala” had taken them in his “jhotta buggi” who had left them on the way who took his sister i.e. the prosecutrix “A” with him towards the field on which Smt. Geeta went to the house of said “buggiwala” i.e. the accused Om Prakash @ Raju and saw that the accused Om Prakash @ Raju was having the prosecutrix with him on his lap(godi) who was crying, on which the complainant Ms. Geeta snatched her daughter from the accused and she also noticed blood spots and stains on her nicker and also saw that blood was oozing out from private parts of the prosecutrix and thereafter the “buggiwala” i.e. the accused tried to run away, however, he was apprehended by the neighbourers and other persons on hue and cry raised by Ms. Geeta whereupon the police officials were also informed and accordingly PCR officials and local police officials reached there who apprehended the accused, whom the prosecutrix had duly identified to be the same person, who had raped her.....”

3. The accused-appellant was apprehended at the spot itself and was handed over to the local police officials which also came there on getting the information of the offence of rape from the PCR. During investigation statement of the child victim(PW-1) was got recorded under Section 164 of the Code of Criminal Procedure('Cr.P.C.'). Since the victim child and her mother(PW-7) had levelled allegations of rape against the accused-appellant and medical opinion obtained by the police immediately after the incident also confirmed that the child girl(PW-1) had been subjected to sexual assault the police filed a charge sheet in the concerned Magistrate's court against the accused-appellant. In due course, the case came to be committed to Sessions Court where charge under section 376(2)(f) I.P.C. was framed against the accused-appellant to which he had pleaded not guilty and, therefore, the prosecution was called upon to adduce its evidence for establishing his guilt.

4. During the trial the prosecution had sought to establish the guilt of the accused-appellant on the basis of the testimony of the rape victim(PW-1) and corroboration of her statement was sought to be derived from medical evidence as well as the evidence of her mother to whom PW-1 had soon after the incident narrated as to what had been done to her by the accused-appellant. Before

recording the statement of PW-1 the learned trial Judge had questioned her generally to satisfy herself that this witness was capable of making a statement or not. On being satisfied that the child was capable of giving evidence the trial Judge recorded her statement without oath. The learned trial Court accepted the evidence of the child victim and the relevant portion of that statement we re-produce below:-

“On the day of incident I along with my younger brother Om and one Shivam (residing in my neighbourhood) were playing in the street in front of our house. There accused Om Prakash present in the court today(correctly identified) came there on his "Bhaisa Buggi" and accused made us to sit on the said "bhaisa buggi". After travelling to some distance, accused alighted Shivam and my brother Om from the said "bhaisa buggi" and asked them to go home and told, "main isko (prosecutrix) ghuma kar abhi lata hoon".

Accused took me upto his home in the said "bhaisa buggi" and after closing his home, he lifted me in his lap (godi) and took me to a field. There in the field accused made me to lay on the ground and thereafter he removed my kachi (panty) and inserted his "su su" (penis) into my "su su" - (vagina). While deposing so the witness pointed out towards her vagina stating that the accused had inserted his "su .su" there. I felt pain and started weeping and blood also came out of my "su su" (vagina)..... On asking of my mother, I narrated whole incident to her. Thereafter I was taken to the hospital by my mother and one aunty..... ”

5. In the cross-examination of PW-1 nothing at all could be elicited from her which could make her testimony doubtful. It was not even suggested to her that she had made a false statement in her examination-in-chief or that somebody had tutored her to make allegations of rape against the accused-appellant. The learned trial

Judge has observed in her judgment that *“The prosecutrix has narrated before the court very clearly the act of rape as committed by the accused Om Parkash @ Raju without mincing words.....”* and that her version had a ring of truth and there was no reason to disbelieve her.

6. In order to represent the accused-appellant we had appointed Mr. A.K. Singh, Advocate as an amicus curiae. He took a lot of pain to persuade us that in the facts and circumstances of this case the child witness (PW-1), who was the victim of rape, could not be said to be reliable witness at all and should not have been relied upon by the learned trial Judge. His contention was that as per the prosecution case statement of the child witness (PW-1) was got recorded under Section 164 Cr. P.C. during the investigation stage and in that statement the girl had not leveled allegations of rape against the accused-appellant and in fact had claimed that the accused-appellant had inserted his finger into her vagina while in Court he took a totally different stand to the effect that she had been raped by the accused-appellant. It was also submitted that even before the Gynecologist before whom she was produced by the police for her medical examination she had informed the Doctor that it was a case of insertion of finger into her vagina. Mr. Singh also pointed out that even PW-4, father of the victim child,

had deposed that his daughter told him that the accused inserted his finger in her vagina. Mr. Singh thus forcefully argued that the improved version which was totally contradictory to her original stand during the investigation makes the evidence of the child witness highly doubtful and the prosecution case in its entirety becomes liable to be rejected on this ground. In support of his contention Mr. A.K. Singh had cited many judgments of the Supreme Court and different High Courts in which it has been held that whenever a witness makes contradictory statements in respect of the incident of rape during the stage of investigation and then before the Court during the trial the testimony of that witness becomes unreliable. We need not refer to those judgments cited by Mr. Singh in view of the fact that there is no dispute about the fact that testimony of a witness who makes improvements before the Court and gives a statement contradictory to what had been stated either in the FIR, or in a statement under Section 164 Cr. P.C. or under Section 161 Cr. P.C. becomes unreliable. However, the legal position is that evidence of such a witness cannot be rejected on this ground unless the defence confronts the witness with his/her prior statements in order to bring on record the contradictions and to show that before the Court an improved version of the incident of crime was given from the side of the prosecution through the evidence of its witnesses. In the present case, the child witness

(PW-1) was not at all asked in her cross-examination on behalf of the accused-appellant as to whether she had stated in her statement before the Magistrate under Section 164 Cr. P.C., to the doctor and also to her father that the accused-appellant had inserted his finger into her vagina. In the absence of that confrontation, it cannot be said that PW-1 had given an improved statement in Court contradictory to what she had stated in her statement under Section 164 Cr. P.C. In none of the judgments cited by Mr. A.K. Singh, it has been held that testimony of a witness can be rejected as an improved statement or a contradictory statement without drawing the attention of the witness to that part of the statement which the witness had made during the investigation stage. The Court on its own cannot compare the statements of any witness made during the investigation stage and the one made during the trial to bring on record improvements/contradictions for the defence. We kept on asking Mr. A.K.Singh to cite any one judgment of the Supreme Court which supported his submission that this Court should reject the evidence of the child victim by comparing her statement in Court with the statements made by her during investigation under Section 164 Cr.P.C. or to the doctor who had examined her or even to her father who stated in Court that his daughter(PW-1) had told him that the accused had inserted his finger into her vagina but Mr. Singh kept on citing judgment after judgment, which effort made

by him as an amicus curiae, of course, we appreciate, but in none of those judgments it had been held that if a witness makes a statement in Court which runs contrary to the prior statements made during investigation the prosecution case would become doubtful even if the attention of the witness is not drawn to the earlier contradictory statements.

7. In this regard, learned additional public prosecutor Mr. Sanjay Lao had cited one judgment of the Supreme Court reported as **2010 (6) SCC 493, “Utpal Das and Another Vs. State of West Bengal”** in which it has been very clearly held that the Court cannot compare the statements of any witness made during the investigation stage with the statement made in Court during the trial to bring on record contradictions or improvements and it is for the accused to confront the witness with earlier statements which the accused considers to be contradictory to the one made during the trial. Mr. Lao had also cited some judgments of the Supreme Court to show that a statement under Section 164 Cr. P.C. can be used either to corroborate the statement of the maker of that statement or to contradict the witness. We need not notice those judgments since there is no quarrel with the said legal position nor did Mr. A.K.Singh dispute that position.

8. In our view, the unchallenged and unshattered statement of

the child witness(PW-1) itself is sufficient to uphold the judgment of the trial court holding the accused-appellant guilty of raping PW-1.

9. Though no corroboration was required of the testimony of the victim girl in view of the fact that her testimony has remained totally unchallenged in cross-examination, still the prosecution had adduced sufficient corroborative evidence and which also has been accepted by the trial Court. That evidence is in the form of evidence of the doctor(PW-12) who had examined her after the incident and had found her hymen torn and blood discharge from vagina was also seen and so had opined that sexual assault upon this child could not be ruled out. Her statement reads as under:-

“On 04.06.2009 Patient (name has been omitted by me) was referred for Gynae Examination vide MLC No-42155. I examined (name again omitted by me) during examination I found the Hymen was torned, tear at 6 O'clock, blood stained discharge was present. Also the victim was giving history of finger insertion in her local parts so possibility of sexual assault cannot be ruled out.....”

10. Evidence of PW- 7, Geeta, mother of the child victim, also corroborates the evidence of the child victim since she had immediately after the incident told her about the commission of rape upon her by the accused-appellant. She had deposed as under before the trial Court:-

“On 04.06.2009 I was at my residence and my children Om than

aged around 4 years and daughter Shipra than aged around 5 years were playing in the gali. At that time my husband was not in the House and had gone to Allallabad. I run a shop in my house and since I had to go to toilet, I asked one lady Neetu to sit on my shop till I come back . When I Came back from toilet, I could not see my children and I searched for them. In the mean time my son Om came who told me that he and shipra sat on the jhotta Bhuggi and the person who was riding (driving) the said Jhotta Bhuggi had taken Shipra the nearby fields. I had gone towards the field, I saw that the said Jhontta bhuggi wala whose name I Came to know later on as Om prakash was coming having my daughter in his lap (godi). It was around 9 pm at that time. My daughter was crying. I snatched my daughter from the accused Om prakash present in the court today (correctly identified). I enquired the accused ask to why and where he had taken my daughter and I saw that on the "Nicker" of my daughter Shipra there were blood spots and blood was oozing from her private parts. Accused Om Prakash tried to escape from the spot but, after hearing my cries some persons collected there and apprehended the accused. My daughter Shipra identified the accused in the PS and I made my complained regarding commission of rape by the accused with Shipra. Same is Ex. PW-7/A.....”

11. PW-2 Om deposed as under:-

“On the day of incident, I along with Shivam and Shipra were playing in the street. There accused present in the court today (Om Prakash) correctly identified, came there on a "bhaisa buggi". We all pushed the "bhaisa buggi" from the back side and thereafter boarded on the said buggi. After travelling to some distance, buggiwala uncle (accused) alighted me and Shivam from the buggi and took Shipra along with him. Thereafter I along with Shivam came to my house and on asking of my mother about Shipra, I told my mother that Shipra had been taken by one bhaisa buggiwala in his bhaisa buggi. When my mother was searching Shipra said bhaisa buggiwala (accused) came in the street outside my house and at that time Shipra was in his lap (godi). At that time Shipra was weeping.”

12. PW-11 HC Banwari Pd. deposed as under before the trial Court:-

“On 4.6.2009 I was posted as Incharge PCR Van at L-45. At about 9.32 p.m. I received a call regarding quarrel near transformer at Baljeet Vihar. On this information I along with my staff reached there where some public persons were present there and accused Om Parkash present in the court today was in the custody of the public persons. Public persons were giving him beatings on the aspect of that he had committed rape upon a minor girl aged about 5 years. The mother of the prosecutrix was also present there along with prosecutrix. I rescue the accused from the crowd and got him seated in the PCR van”

13. PW-16 SI Jai Prakash, the investigating officer, deposed as under before the trial Court:-

“On 04.06.2009 I was posted as SI at PS Aman Vihar. On receiving the DD No-41 A regarding rape of a girl, attested copy of the same is EX PW-16/A given by the DO. I alongwith Ct Mukesh went to the spot i.e, B-203 Baljeet Vihar Delhi near Kirari Village. There a PCR Vehicle was standing alongwith number of public persons and one person was apprehended by the PCR Officials. PCR incharge briefed me about the facts and hand over the assailant namely Om Prakash to me. Prosecutrix Shipra was also present alongwith her mother. After formal interrogation, mother Smt Geeta was recorded same is EX PW-7/A signed by her at pt A and attested by me at pt B. The accused/assailant was handed over to Ct Bhupesh and he was sent in PCR Van to PS Aman Vihar and he was stated to come to the hospital alongwith L/Ct. I alongwith prosecutrix and her mother went to SGM Hospital and Ct Bhupesh came to the hospital from PS alongwith L/Ct Suman. Medical examination of the prosecutrix Shipra was got conducted under the protection of L/Ct Suman. After medical examination concerned doctor has given 6 sealed pullanda which was given to L/Ct was taken in possession vide memo EX PW-3/A signed by me at pt B. Thereafter I prepared rukka same is EX PW-16/B.....”

14. Evidence of all these witnesses remained unshattered in their cross-examination and all of them render full credence to

the prosecution case. In fact, the accused-appellant himself did not explain in his statement under Section 313 Cr.P.C. as to how he came to be apprehended by the public and arrested by the police at the spot and how the child victim was seen in his lap with blood oozing out of her vagina.

15. We are therefore of the view that there is no merit in this appeal and accordingly it is rejected.

16. We place on record our appreciation for a sincere effort made by the learned *amicus curiae* for securing acquittal of the accused appellant. For the effort done by him and assistance rendered to the Court, we direct Delhi High Court Legal Services Committee to pay honorarium of Rs.15,000/- to the *amicus curiae*.

P.K. BHASIN, J

J.R. MIDHA, J

JULY 17, 2014