

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

Reserved on : 17.09.2014

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Pronounced on : 30.09.2014

+ CRL.A.707/2011

ARJUN

.....Appellant

Through : Mr.Manish Aggarwal &
Mr. Vikram Saini, Advs.

versus

STATE OF DELHI

..... Respondent

Through: Mr. Neeraj Kr. Singh, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J

1. The present appeal has been preferred by the Appellant Arjun impugning the judgment and order on sentence dated 31.03.2011 passed by learned Addl. Session Judge in Session Case No.1/07 whereby he has been held guilty for committing the offences punishable under Sections 363/376 IPC for kidnapping and committing rape on the child victim aged about 4½ years and sentenced to undergo RI for three years with fine of Rs.500/- and in default, to undergo RI for seven days for the offence punishable under Section 363 IPC and further to undergo RI for ten years with fine of Rs.1,000/- and in default, to undergo RI for 15 days for the offence punishable under Section 376 IPC.
2. Perusal of the record reveals that vide judgment dated 27.03.2008

the Appellant was convicted and sentenced by learned Addl. Session Judge only for committing the offence punishable under Section 376 IPC. When the Appellant impugned his conviction and sentence by filing Criminal Appeal. No.367/2008, vide order dated 19.07.2010, this Court remanded back the matter for the purpose of further recording the statement under Section 313 CrPC of the Appellant and return a finding on the charge under Section 363 IPC. After complying with the directions of this Court in CrI.A. No.367/2008, vide judgment and sentence dated 31.03.2011 the Appellant has been convicted for committing the offence punishable under Section 363/376 IPC and sentenced in the manner stated above.

3. Feeling aggrieved by his conviction and sentence for the offences punishable under Section 363/376 IPC, the Appellant has questioned the legality and validity of the judgment and order on sentence dated 31.03.2011 passed by learned Addl. Session Judge on the following grounds:-

- (i) The learned Addl. Session Judge has ignored the contradictory statement made by the child victim and other witnesses.
- (ii) The learned Addl. Session Judge has also failed to take note of the version of the prosecutrix that she follows all the directions of her parents.
- (iii) The prosecutrix was a tutored witness and even as per prosecution she was brought by her father to identify the Appellant and the conviction has been based on probabilities though even medical examination of the Appellant does not connect with the crime.

(iv) No recovery has been effected from the Appellant and he is not a previous convict. The testimony of the child victim has been believed without any corroboration from any independent source and Appellant has been convicted without there being any evidence to base his conviction.

(v) No proper opportunity has been given to the Appellant to lead his defence evidence to prove his innocence.

(vi) The sentence awarded to him is harsh.

4. In brief the case of the prosecution is that on 6.9.2006 at about 5.50 a.m., DD No.41A Ex.PW-2/E was recorded at P.S. Sangam Vihar in respect of information received from Telephone No. 26046779 about the rape being committed on a five year old girl by the person who had been apprehended. The said DD was assigned to ASI Karambir who along with constable Rajbir left for the spot.

5. ASI Karambir reached the spot and recorded the statement Ex.PW1/A of Ikramuddin who also informed that Arjun had kidnapped his daughter 'G' (name withheld to conceal her identity) aged about 4½ years and had committed rape on her. Appellant Arjun and the child victim, who was in injured condition, alongwith her mother were taken to AIIMS for their medical examination. The child victim was medically examined vide MLC No.113066/2006 and the commission of rape was confirmed. Thereafter, on the basis of the statement of PW-1 Ikramuddin, case FIR No.889/2006 under Sections 363/376 IPC was registered at PS Sangam Vihar. After completion of investigation, the Appellant was sent to face trial for the offences complained of.

6. The prosecution has examined 8 witnesses in support of its case. Appellant Arjun was also examined under Sections 313 Cr.P.C. to enable him to explain the incriminating evidence appearing against him wherein he pleaded his innocence and false implication in the present case. Opportunity was also given to the Appellant to lead defence evidence but he failed to produce any defence witness.

7. After considering the testimony of material prosecution witnesses and the medical report, learned Trial Court handed down verdict holding the Appellant guilty for committing the offences punishable under Section 363/376 IPC and sentenced him in the manner stated above.

8. I have heard learned counsel for the Appellant Mr.Manish Aggarwal, Adv. as well as Mr.Neeraj Kumar Singh, APP for the State and also carefully gone through the record.

9. Learned counsel for the Appellant Mr. Manish Aggarwal, Advocate has filed written synopsis and assailed the judgment by learned ASJ on the ground that the impugned judgment has been based on no evidence, ignoring all material improvements and contradictions appearing in the testimony of child victim and her father. He further submitted that as per the FIR the Appellant kidnapped the victim and had taken her to his room where he committed rape on her. When the victim started weeping due to pain, he allowed her to go. PW-1 Ikramuddin - father of the child victim saw her in nude condition and she was weeping at that time. PW-3 – the child victim led her father to the room of the Appellant where he was found present and sleeping. Learned counsel for the Appellant contended that had the Appellant committed the rape, there was no reason for him to be present in his room. Rather he would have

ran away from there. Learned counsel for the Appellant further pointed out the improvements made by the child victim in her statement that she was taken by the Appellant to jungle and she was shown two big knives and knife was put on her neck saying that he would kill her sister but no knife has been recovered from the Appellant. Not only that when PW-3 – the child victim met her father PW-1 Ikramuddin, she did not inform him about any knife being shown to her.

10. Learned counsel for the Appellant while referring to the MLC and statement of PW-8 Dr. Aparna Sharma, contended that even from the medical examination no offence of rape is proved as no active bleeding per vagina was found present at the time of examination. Even the MLC of the Appellant shows that there was no abrasion or swelling on the male organ which is sufficient to prove that he has not committed the offence of rape. He has also referred to the statement of PW-1 and PW-6 to bring on record that the contradiction in their version on the suspect as to whether the victim was seen in nude condition by any person other than PW-1, the father. Learned counsel for the Appellant also submitted that in this case the Appellant has not been given a fair trial as his plea for examination of Safeeq as defence witness was not permitted by the learned Trial Court while bringing on record the motive for false implication of Arjun in this case and so landlord Satya Prakash wanted the Appellant to be evicted from the tenanted premises for about 4 years and had threatened to implicate him in some false case. He further submitted that the sample blood of the Appellant was sent for examination and as per the report human blood of 'A' group was found

on the part of the Appellant which is of a person other than the Appellant.

11. Thus, in the given circumstances when testimony of complainant PW-1 Ikramuddin - father of the victim, PW-3 – the child victim and PW-6 Smt. Krishna – the neighbour are not corroborated by each other as well as by the medical and scientific evidence, the Appellant was entitled to be acquitted by giving him benefit of doubt.

12. Learned counsel for the Appellant has placed reliance on the *Tameezuddin alias Tammu v/s State (NCT) Delhi 2009 (15) SCC 566*, *Joseph v/s State of Kerala 2000 (5) SCC 197* and *Subhash Chand v/s State of Rajasthan 2002 (1) SCC 702* in support of his contentions and prayed for acquittal of the Appellant.

13. Learned APP for the State submitted that this is a case where the child victim aged about 4½ years was sleeping with her father on a cot when she was taken away by the Appellant. PW-1 Ikramuddin - father of the victim when found his daughter missing from the cot, searched for his daughter. PW-3 - the child victim was seen by him without clothes and she was weeping at that time. Learned APP further submitted that PW-6 Smt. Krishna - an independent public witness also proved that while she was present outside her house, she saw the child victim in nude condition coming out of the plot situated in front of her house.

14. Mr. Neeraj Kumar Singh, learned APP for the State further submitted that merely because PW-1 Ikramuddin did not notice that PW-6 has also seen his daughter in nude condition, cannot be termed as contradiction for the reason that at that time Ikramuddin must be looking

towards his daughter only and not his surroundings. Learned APP for the State submitted that Ikramuddin had nothing to do with the dispute, if any, between the Appellant and his landlord for his eviction from the jhuggi which was stated to be about four year old. Further, the medical report confirmed rape on the child victim who was intelligent enough to lead her father to the place where she was raped as well as the person who committed the act. Thus the prayer made by Mr. Neeraj Kr. Singh, learned APP is that the Appellant has been rightly convicted on the basis of testimony of PW-1 and 3 which is duly supported by medical and scientific evidence. Hence the impugned judgment and order on sentence may be maintained.

15. In the instant case, while the FIR has been registered on the statement of PW-1 Ikramuddin, father of the victim, the child victim was produced before learned MM for getting her statement recorded under Section 164 Cr.P.C. In her statement before learned MM she has given her full name as well the class and the school in which she studied at that time. She has given the details of all her siblings stating that she was the youngest. She named the Appellant Arjun to be the person who did *ganda kaam* with her. On being questioned by learned MM '*beta kya hua tha koan le gya tha*' she informed learned MM that on the night of 5th she was sleeping with her papa near the gate of the house when she was taken away by Arjun. He abused his mother and sisters, shown her the knife and also placed the knife on her neck and thereafter he did *ganda kaam*. When learned MM questioned as to whether she felt pain somewhere, the answer given by child victim and recorded by learned MM is as under:-

“Yes. (She has pointed towards her body part narrating she was sexually assaulted badly & further stated that her clothes were removed by Arjun & was raped by him. She stated that she started crying with severe pain & got bleeding).”

16. The MLC Ex.PW2/H of the child victim was prepared on 6.9.2006 at 7.21 a.m. where the name of the relative is mentioned as mother. The alleged history recorded on the MLC is as under:

“Alleged history of being abducted in sleep on or about 23.36 hrs. of 5/9/06. Patient was allegedly put to sleep by side of her father on whose side some other person was asleep who allegedly gagged the child and abducted the child to took her to a nearby hill where she was allegedly sexually assaulted. (Child unable to describe at present) Patient returned nude in morning from hill and narrated the story to the mother.

Now c/o vaginal bleed. No other complaints/sig P/H otherwise. Unvaccinated child. No c/o dizziness/palpitation/thirst.

After above examination, the child victim was referred to SR, Gyane. The history and the report recorded on the MLC by SR, Gynae is as under :

‘6.9.06

8.00 AM

History given by mother.

Alleged history of sexual assault by a vagabond person. He took the sleeping child to nearby hills and assaulted her sexually. The child told the mother regarding vaginal and anal intercourse c/o BPV, unable to pass urine, pain abd.

O/E - vital stable, no marks/external injury on breast/abdomen.

L/E - Perineum and external genitalia mud stained

Occasional blood stain also seen.

Hymen torn.

Labiaminora abraded.

No active BPV (bleeding per vagina)

No periurethral or perineal injury.'

17. The child victim was examined as PW-3 and the learned ASJ before commencing her examination, put several questions to her to test her understanding. After questioning her and recording her answers the learned ASJ has recorded his observation as under:-

“ On questioning, the child has answered in Hindi in very intelligent manner. Therefore, I am of the opinion that she understands the questions and rationally answers the same. Accordingly, she is competent witness testify in the present case. Learned Prosecutor is allowed to ask questions.”

18. As per her deposition, on the night of incident when she was sleeping with her father, Appellant Arjun picked her and took her to nearby jungle where he inserted his private part into her private part, this act of the Appellant has been described by the child victim in Hindi to the Court. She also stated that she was bleeding from her private part and taken by her mother to hospital. She further stated that Appellant had taken out the frock and *Kacchi* which she was wearing and placed the same in her own underwear after committing the rape and that she returned home in naked condition and she had also earlier made a statement before a madam in a Court.

19. No doubt, in her cross-examination she stated that she obey the directions of instructions of her parents and follow whatever they asked her to do. However, this answer by the child victim in her cross-examination does not mean that she was tutored by her parents to depose against the Appellant. She must have answered in the above manner when questioned whether she was an obedient child. It cannot be ignored that the child was too young to understand the act of the

Appellant, her physical and medical condition at the time of preparation of MLC prove that she was disoriented at that time. A four and half years young girl was sexually assaulted by a grownup man aged about 22 years. The young girl was hardly in a position to offer any resistance at that time. Thus, there was no question of any injury appearing on the person of the Appellant. Police was informed immediately after the occurrence and the Appellant who was apprehended from his room in a plot, on being pointed out by the child victim. The Appellant and the child victim were immediately taken by the Police to AIIMS. Thus, there was hardly any time gap between the time of apprehension of the Appellant and his medical examination as well that of the child victim at AIIMS. Presence of mud on the private part of the child victim corroborates her version that she was taken by the Appellant in a nearby Jungle/hilly area and raped by him. The presence of bleeding in the private part Labiaminora abraded, has been recorded and presence of blood group 'A' on the pant of the Appellant has been established through FSL result. 'A' is not the blood group of the Appellant as recorded by learned ASJ and presence of human blood on his pant which is not his blood group is a strong circumstance against him. The blood group of the child victim could not be ascertained as the sample was putrefied.

20. There is another clinching evidence against the Appellant which in itself is sufficient to nail the Appellant for commission of offence of rape on the child victim PW-3. From the statement of PW-6, public witnesses and father of the victim, PW-1, it is proved on record that when the child victim PW-3 was returning home she was not wearing her frock and

Kacchi and was totally nude. The Appellant Arjun was examined on 6.9.2006 at AIIMS and on his MLC Ex.PW2/G the doctor has recorded as under:-

“Girl’s frock found with in the pant. Yellow cloth piece also found.

Genitalia is of adult male size.

Pubic & axillary hair present. No congenital anomaly present.

No white discharge present at urethra.

Enlarged inguinal lymph node with on right side and left perineal region.

Cremasteric & abdominal reflex present.

Not wearing underwear.

Opinion – There is nothing to suggest that alleged accused is incapable of performing sexual intercourse under normal circumstances”

21. Although the contention of the learned counsel for the Appellant is that the frock and *Kacchi* were planted on the Appellant, this contention is liable to be rejected for the simple reason that the doctor at AIIMS had no reason to be privy to any such attempt by the complainant or investigating agency. In this regard statement of PW-4 Dr. Sunay M. at AIIMS is very crucial. He has stated that on 6.9.2006 while he was posted at AIIMS as Junior Resident one Arjun was produced before him for potency test he examined Arjun and prepared MLC Ex.PW2/G. He has further stated that :

“On local examination of the accused, one girl’s frock was found in the pant of the accused and one yellow cloth piece (which is generally worn by the girls as underwear) was also found in his pant. Girl’s frock yellow cloth/Kacchi, pant of the accused were sealed. Blood Gauze of accused was prepared and sealed and same was handed over to the IO with sample seal.”

22. PW-4 Dr.Sunay M. has also identified the frock Ex.P1 and kacchi/yellow cloth piece Ex.P2 to be the same which were recovered from the pant Ex.P3 of Appellant Arjun. During his cross-examination he further stated that:-

“Kacchi and frock of girl was found in the pant of accused for examination. I sealed the pullanda myself. The seal available in the chamber of forensic medicine. The accused was examined by me personally. The button of the pant was opened by the accused himself and he did not resist his examination. I cannot say whether the frock and the Kacchi were placed by the police in the pant of the accused. Voluntarily (no such things took place in my presence)”.

23. Learned counsel for the Appellant has placed reliance on ***Joseph S/o Kooveli Poulo vs. State of Kerala*** (Supra) to establish that in case no injury is found on the vagina/private part of the victim, the offence of rape is not proved. In the case relied upon by learned counsel for the Appellant, the deceased with whom the rape was committed, was 26 years old whereas in the present case, the victim is a very young girl aged about 4½ years. Otherwise also, at the time of medical examination of the child victim, the doctor has noticed the injuries i.e. perineum and external genitalia were mud stained with occasional blood stain, hymen was found to be torn and labiaminora was abraded.

24. In the case ***Tameezuddin @ Tammu vs. State (NCT of Delhi)*** (supra), it was held that testimony of Prosecutrix, though, to be given predominant consideration, cannot be accepted if the story is improbable and belies logic. Here, in the instant case, the child victim, though, very young school going child, had given clear description of the incident as

per her understanding which stands corroborated by the medical evidence as well. She was seen in nude condition not only by her father i.e. Pw-1 Ikramudin but also by neighbour i.e. PW-6 Smt. Krishna. Apart from that, recovery of frock and *kacchi* of the child victim from the pant of the Appellant by the Doctor at the time of his medical examination renders necessary corroboration to the version of the child victim

25. The Appellant cannot derive any help by placing reliance ***Subhash Chand vs. State of Rajasthan*** (Supra) as in that case, the victim of rape, aged about 5 years old, was murdered and the prosecution relied on the testimony of a four years old child, to establish that she alongwith deceased was returning home after purchasing balloon when the accused took the deceased inside his house. A doubt was created as to how and in what manner investigating officer came to know about this child witness so as to record her statement during investigation. Here in the instant case, fortunately the child victim is alive and it was at her instance that the Appellant was apprehended from his room by her father and handed over to the police.

26. Now let us have a brief look at the deposition of material prosecution witnesses to ascertain whether the Prosecution had proved the guilt of the Appellant beyond any reasonable doubt and he had been rightly convicted on the basis of evidence adduced in this case.

PW-3 ‘G’ – the child victim

PW-3 – the child victim has been opined to be a competent witness to testify not only at the time of her examination under Section 164 CrPC but also during her deposition initially by learned MM and thereafter by learned Addl. Session judge. From the testimony of PW-3

– the child victim, the following facts are proved :

- (i) On the night of occurrence, she was sleeping alongwith her father outside her house.
- (ii) She was taken away by Appellant Arjun from the cot to ‘Jungle’.
- (iii) Appellant Arjun inserted his private part into her private part.
- (iv) From Jungle, she was brought by him to his house where he slept and she returned home and narrated the incident to her parents.
- (v) Accused had taken out the frock and *kacchi* worn by her and after commission of rape, placed the same in his own underwear.
- (vi) She returned home in nude condition.

PW-1 Ikramudin – father of the child victim

Following facts are proved from the statement of PW-1 Ikramuddin – father of the child victim:

- (i) His daughter ‘G’ was sleeping with him during night and in the morning at about 5.00 am, he found her missing on the cot.
- (ii) He started searching for her and saw her coming in nude condition.
- (iii) She was weeping and also had blood on her private part.
- (iv) Her daughter narrated the incident and also took him to the place where accused was found present and caught by him.
- (v) Her daughter informed him that the accused had inserted his *susu* into her *susu* and police was informed.
- (vi) He handed over the accused to the police.

PW-6 Smt. Krishna – the neighbour

Pw-6 Smt. Krishna has proved the following facts:

(i) On 06.09.2006 while she was taking water from tap outside her house, at about 5.00 am she saw muslim girl aged about 5 years coming in nude condition.

(ii) The accused was apprehended from a plot.

27. From the MLC Ex.PW2/G of the accused/Appellant Arjun, it is proved that frock and yellow cloth piece i.e. *kacchi* were recovered by the Doctor from the pant of accused at the time of his medical examination.

28. From the MLC Ex.PW2/H of the child victim, it is proved that at the time of medical examination of the child victim, the doctor has noticed the injuries i.e. perineum and external genitalia were mud stained with occasional blood stain, hymen was found to be torn and labiaminora was abraded.

29. I am conscious of the fact that the victim of rape in the present case was a child aged about 4½ years, however, there is no hard and fast rule that child witness can never be relied upon. Rather the child witness is more innocent and is likely to speak truth.

30. In the case of *State of Madhya Pradesh vs. State & Anr. (201) 4 SCC 786*, wherein it was observed as under :

'In State of U.P. v. Krishna Master and Ors. MANU/SC/0553/2010 : AIR 2010 SC 3071, this Court held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly

when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.'

31. In the instant case, the statement of child victim, though, does not require any corroboration, stands corroborated not only from the statement of PW-6 Smt. Krishna who had seen her coming in nude condition but also by the fact that at the time of medical examination, the frock and *kacchi* of the child victim were recovered from the pant of Appellant who had been caught from his room in the plot by the father of the child victim at her instance.

32. The contention raised by learned counsel for the Appellant that had the Appellant committed the rape, he would not have been found present in his room, deserves to be rejected for the reason that the child victim had no control on the subsequent conduct of the Appellant. The possibility that the Appellant might be under the belief that child victim, because of her very young age, might not be able to remember who committed the sexual assault, would have preferred remained in the room as his absence would have made him suspect.

33. Thus, there is sufficient corroboration to the testimony of child witness despite the fact that in such type of cases if the testimony of the child victim is creditworthy and inspiring confidence, the same does not

require corroboration in rape cases.

34. So far as the contention raised by learned counsel for the Appellant that no proper opportunity has been given to the Appellant to lead his defence evidence to prove his innocence, is concerned, perusal of the Trial Court Reveals that ample opportunities were given to the Appellant to lead the defence evidence not only when initially the case was decided vide order dated 27.03.2008 but also after the case was remanded back by this Court, hence the Appellant cannot claim that he has not been given fair trial in this case.

35. It has also been submitted by learned counsel for the Appellant that he had remained in custody for more than eight years in this case and he may be released for the period already undergone by him in this case. Section 376 (2)(f) IPC (pre-amendment) reads as under :

'376. Punishment for rape –

(1) xxx xxx

(2) Whoever –

xxx xxx

(f) commits rape on a woman when she is under twelve years of age;'

xxx xxx

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.'

36. In view of the provisions of Section 376(2)(f) IPC (pre-amendment), since the victim of rape in the present was about 4½ years at the time of incident and the minimum sentence prescribed for the said offence is ten years, the prayer of the Appellant for sentencing him to the period already undergone by him in this case, cannot be acceded to.

37. In view of the above discussion, I find that there is absolutely no tangible ground to discredit the prosecution version which is based on oral testimony of the victim as well as the medical evidence. Resultantly, the appeal preferred by the Appellant being devoid of any merit, deserves to be dismissed.

38. Accordingly, the appeal is hereby dismissed. TCR be sent back alongwith copy of this order.

39. A copy of this order be also sent to the concerned Jail Superintendent for information.

(PRATIBHA RANI)
JUDGE

September 30, 2014

nk/st