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

+ **CRL.A. 803/2013**

GANGA SAHAY

..... Appellant

Represented by: Mr.Abhishek Vikram, Adv. for
Mr.Chetan Lokur, Adv.

versus

STATE

..... Respondent

Represented by: Mr.Manoj Ohri, APP for
State.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

ORDER

30.07.2014

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1. Ganga Sahay unlike his name showing no moral values has been held guilty for offences under Section 376(2)(f) IPC for committing rape of his minor daughter on the strength her statement coupled with the report of a medical examination and directed to undergo rigorous imprisonment for life and to pay a fine of ₹ 10,000/- and in default thereof to undergo further simple imprisonment for one month.

2. Ganga Sahay questions the verdict of guilt that there are material contradictions in the depositions of star witnesses, discrepancies in the statement of witnesses as to the place of arrest, his medical examination having not been carried out properly thus not depicting being intoxicated and the order on sentence not considering the mitigating circumstances that he was poor man with a large family comprising of his wife, 5 children of

which 4 were dependent on him and not being a habitual offender. He also assails the judgment as not extending the benefit of Section 85 of IPC.

3. Though no defence has been led, however in his statement recorded under Section 313 Cr.P.C. on the incriminating evidence put forth, he pleaded false implication and the answer to the question “Do you wish to say anything else?” was:

“I am innocent and have been falsely implicated in the present case. I was under the influence of liquor at that time and hence, I am not aware as to what had happened on that day.”

4. The prosecution case is based on the deposition of the victim baby ‘P’ PW-10 who on being ascertained by the Court to be a competent witness in a position to give rationale answers recorded her statement without oath in question-answer form. The relevant portion of her testimony is as under:

“Q. Kya aap school jate hain?

A. Nahi (by nodding head)

Q. Kya aap kabhi school nahi gae?

A. Nahi.

Q. Kya aap padhna likhna jante hain?

A. Nahi. Mai sirf apna naam likh sakti hoon.

Q. Tumhare Papa (father) kya kaam karte hain?

A. Rickshaw chalte hain.

Q. Kya tumhari mammi (mother) bhi koi kaam karti hai?

A. Haan (by nodding head)

Q. Tumhari mammi kya kaam karti hai?

A. Panni kathi karti hai.

(Court observation: witness means her mother is rag picker

who picks up polythene bags)

Q. Aap kitne bhai – behene hain?

A. Hum paanch bhai-behen hain. Sabse badi meri behen hai, uske baad mera bhai hai, fir mai hoon, mere baad meri chhoti behen aur fir chhota bhai hai.

Q. Behen bhai me se kisi ki saadi hui hai?

A. Haan. Meri badi behen ki sadi ho gai hai.

Court observation: I am satisfied that the child witness is understanding the nature of question being put to her. Now I proceed with recording her statement in verbatim.

Q. Aaj aap kis ke sath aye hain. Mammi kahan hain?

A. Meri mammi gaon gai hai. Meri Naani ka pair toot gya hai, isliye meri mammi gaon gai hai. Aaj mai apni badi behen ke saath court aye hoon. Meri badi behen 10-15 din se mere ghar par hi hai.

Q. Aapka gaon kahan hai?

A. Begusarai, Bihar.

Q. Beta aap hame batayenge ki kya hua tha? Sari baat sach sach batao.

A. Papa ne galat kaam kiya tha. (Court observation: witness has started speaking very slowly and appears extremely embarrassed and ashamed).

Q. Beta aap hame poori baat batao ki kya huha tha?

A. (Court observation: Child witness has now softly started telling the counsel for the DCW what had happened which is audible to the Court and to everybody in the Chamber).

Subah Papa Khana kha kar chale gaye the. Mammi bhi khana khar kar chali gaye thi aur apna lunch apne saath le gai thi. Mai apne bhai-behen ke saath kamre me so rahi thi. Mere

papa ghar wapas aaye aur mere saath galat kaam karne lage. (child witness has correctly identified the accused in the court). (Pause by the witness - Court question: Kya hua tha?) Mere papa ne mere niche wale kapde utar diye the aur jahan se wo susu karte hain wo mere ander jabardasti daal diya tha jahan se mai susu karti hoon. Jab mai roi aur chillai to unhone mera muh daba diya. Mujhe bahut dard hua aur ander se khoon nikalne laga aur mai jor – jor se chillane lagi. Mera shor sun kar kafi log ikkathae ho gaye. Jo hamare makan malik uncle hain, unhone mujhe bachaya aur makan malik aunti ne 100 number par phone kiya aur logon ne mere papa ko pakar liya. Meri chhoti behen, meri mammi ko bula layee aur jab meri mammi aaye toh mere mammi ne papa ko mara. Uske baad police aaye aur mujhe doctor ke paas le gai.”

5. In the cross-examination suggestions have been made to this witness about a quarrel with the landlord that he used to beat her father; on which the prosecutrix stated that the landlord beat her father only on the day when he rescued her from her father and his wife had called the Police.

6. The investigation into the present case swung into action on a call being made vide DD No. 63-B that one child ‘P’ aged about 9 years has been raped by her father and the child was profusely bleeding from her vagina. The prosecutrix was immediately taken to the hospital, medically examined and treated. On the statement of Anjula PW-10 the mother of the prosecutrix the FIR was registered who stated that her husband was a rickshaw puller and she was doing a job in a factory. She had three daughters and two sons, her eldest daughter being married. On that date she had left her house at about 9.00 AM and at about 9.30 PM one boy from the neighbourhood came to her factory and informed about the incident. When she reached home she found her daughter crying and public and Police gathered there.

7. Surender Singh PW-15 who made the call at the 100 number stated that he was a resident of the village and was residing with his parents, wife and children. The premises belonged to him where he had given some rooms on rent and Ganga Sahay was one of the tenants therein. On May 17, 2012 at about 2/2.30 PM while he was putting fodder for the cattle he suddenly heard the scream of a small child from the room of Ganga Sahay. When he went towards the room the scream suddenly stopped. The other tenants in the vicinity also stated that they heard screams from the room of Ganga Sahay. Thus, he peeped from the gap in the door and saw that Ganga Sahay and prosecutrix were inside in half naked condition and the prosecutrix was screaming and crying. He pushed the door and opened it and found the child bleeding from her private parts. He immediately made a call to the Police from his mobile number. Till the Police came, he along with other public persons held Ganga Sahay in one room.

8. Dr.Pratibha Aggarwal PW-8 appeared in the witness box and exhibited the MLC of the prosecutrix prepared by Dr.Deepika on May 17, 2012 at about 4.15 PM as Ex.PW-8/A. The MLC of the prosecutrix noted hymen torn, clotted blood present on perineum, small abrasion present on posterior vaginal wall. Though the DNA examination is not relevant in the present case as the prosecutrix is the daughter of Ganga Sahay and thus the alleles would be common; the opinion of the doctor that the child being very small aged 9 years of age the clotted blood on the perineum, and abrasion on the posterior vaginal wall were indicative of a forced sexual assault is sufficient to hold Ganga Sahay guilty of the offence charged.

9. Left with no scope of escape as having been caught red-handed while committing the incestuous crime with his own daughter, Ganga Sahay took

the plea of being intoxicated and not in a position to know what was happening to him. This plea taken in the guise of Section 85 of IPC is untenable. Section 85 IPC provides as under:

“85. Act of a person incapable of judgment by reason of intoxication caused against his will.- Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will.”

10. Thus, for a person to be incapable of judgment due to intoxication, the intoxication should be administered to him without his knowledge or against his will. Further, the MLC of Ganga Sahay Ex.PX and PX6 do not show any intoxication. This defence not being available to Ganga Sahay, we find no infirmity in the judgment of conviction. We also find no mitigating circumstance to reduce the sentence.

11. Consequently, the appeal is dismissed. Ganga Sahay who is in custody would suffer the remaining sentence.

12. Two copies of the judgment be sent to the Superintendent Tihar Jail one for the record and the other to be given to the appellant.

13. Trial Court Record be sent back.

PRADEEP NANDRAJOG, J.

MUKTA GUPTA, J.

JULY 30, 2014
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