

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

+ **CRL.A. No. 1192/2012**

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Reserved on: 21st January, 2014

Decided on: 21st April, 2014

NEERAJ

..... Appellant

Through: Mr. R.S. Gulia and Mr. Ashok Kumar
Sharma, Advs.

versus

THE STATE NCT OF DELHI

..... Respondents

Through: Mr. Neeraj Kr. Singh, APP for the
State with ASI Rich Pal Singh, PS
Tilak Marg, New Delhi.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By the present appeal, the Appellant challenges the judgment dated 25th July, 2012 whereby he has been convicted for offence under Section 376 (1) IPC and the order on sentence dated 3rd August, 2012 directing him to undergo Rigorous Imprisonment for a period of 7 years and to pay a fine of Rs. 100/- and in default thereof to undergo Rigorous Imprisonment for one day.

2. Learned counsel for the Appellant contends that the conviction has been based on mis-appreciation of facts and law. As per the Doctor, the Appellant was incapable of sexual intercourse. Thus he could not have been convicted for offence under Section 376 IPC. Further the hymen of the prosecutrix was intact. There was no injury either on the male organ or the private parts of the prosecutrix. The FSL result also does not support the

prosecution case. Material witnesses have not been examined. No witness has been examined who could have proved the deposit of the seized articles and the safe custody thereof. The FIR was registered belatedly after a period of two days. Though the explanation for registering the FIR belatedly is that the father of the victim was not available, however the case of the prosecution itself is that the father of the prosecutrix was present in home on 7th January, 2010. FIR is only a formal statement and FIR recorded after interrogation does not fall in the said category and cannot be used for corroboration or contradiction. Reliance is placed on *Golla Jalla Reddy and Ors. Vs. State of A.P. 1996 SCC (Crl) 713*. The conviction is based on the testimony of a child witness who was not found to be reliable and from cross-examination it was clearly evident that the child witness was tutored as she stated that the Police told her what to depose. Thus, there was no voluntariness in the statement of the prosecutrix recorded when she was examined under Section 164 Cr.P.C. by the Metropolitan Magistrate. Reliance is placed on *Surya Narain Vs. State 2001 (1) AD (SC) 51* and *Panchi Vs. State of U.P. AIR 1998 SCC 2726*. Hence the conviction of the Appellant be set aside and he be acquitted of the charge framed.

3. Learned APP on the other hand contends that there are no material contradictions in the testimony of the prosecutrix. The version of the prosecutrix has remained unshattered. Reliance is placed on *Sanjay Vs. State 134 2006 DLT 155*. The delay of two days in registration of FIR has been duly explained. Even slight penetration is sufficient to prove an offence under Section 376 IPC and the Doctor has not ruled out slight penetration.

In view of the unshattered testimony of the prosecutrix there is no infirmity in the impugned judgment.

4. Heard learned counsel for the parties and perused the records. The case of the prosecution is that the prosecutrix used to take tuitions from the sister of the Appellant and thus used to visit his house. On 7th January, 2010 PW8 father of the prosecutrix had gone to attend his work in the hotel and PW7 the mother of the prosecutrix had left the house at 9.30 AM for work in the Kothi. When PW7 the mother of the prosecutrix was going, the Appellant enquired as to where she was going to which she replied that she was going to Kothi. Thereafter, the Appellant enquired as to whether the victim had gone to school or not. PW7 stated to the Appellant that victim had not gone to school as she was not well and left for her work. Thereafter the Appellant went to the house of the prosecutrix where she was all alone. The Appellant took off his clothes and the undergarments of the prosecutrix and inserted his private part into the private part of the prosecutrix. He also inserted his two fingers inside her private parts. She wept loudly and thereafter the Appellant left. When PW7 the mother of the prosecutrix came back to her house she found the prosecutrix sleeping. On PW7 awakening her she started weeping and told to her mother about the incident. Both the prosecutrix and her mother became giddy. The father of the prosecutrix came to house on 8th January, 2010 at about 9.30 PM when the mother narrated the entire incident, where after the father consulted his employer after going to his residence who advised him to inform the Police and thus PW8 informed the Police and a FIR was registered. The MLC of the prosecutrix was prepared vide PW18/A by Dr. Hritikesh Chakravorty. The

prosecutrix was then referred to Gynae Department where she was examined by Dr. Divya Karan.

5. In the present case the MLC of the Appellant Ex.PW2/A is relevant. The opinion of the Doctor after clinical examination is that “I am of the considered opinion that it cannot be ruled out that accused is incapable of performing a sexual act.” It is further opined that the Appellant seems to be incapable of vaginal penetration”. PW2 Dr. Nevedita who examined the Appellant has stated in her cross-examination that on preliminary examination conducted by her on the patient the possibility of the accused potency cannot be ruled out either way. Dr. Rajeev Sood PW19 Head of the Urology Department, RML hospital who examined the Appellant has explained his opinion in the MLC Ex.2/A as that the patient by self-stimulation could not reach the full rigidity and tumescence, enough for vaginal penetration but ejaculated normally. Other primary and secondary sexual characters were normal and thus the Appellant seems to be incapable of vaginal penetration. On a Court question PW19 clarified that in an attempted intercourse if the penis is not inserted in the vagina then it is no vaginal penetration, however the penetration may be only upto the outer part of the female genital i.e. the vestibule.

6. As per the prosecutrix the Appellant inserted his Nunu inside her Nunu and then inserted two fingers insider her Nunu. So even the case of the prosecutrix is not that a complete intercourse took place and it was an insertion only, which the Appellant as per the testimony of PW19 was capable of doing. As per explanation to Section 375 IPC prior to the amendment with effect from 3rd February, 2013, penetration was sufficient to

constitute sexual intercourse necessary for the offence of rape. The contradiction so pointed out by the learned counsel for the Appellant shows that though in her examination-in-chief she stated that after inserting his Nunu the Appellant inserted his two fingers, however it was stated that the Appellant inserted one finger which cannot be said to be a material contradiction. As per the explanation to Sec. 375 IPC in order to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slight penetration of the male organ with the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of commission of offence of rape. Reference : *State of U.P. vs. Babul Nath (1994) 6 SCC 2.*

7. Learned counsel for the Appellant has stated that the explanation for delay in registration of FIR by two days as explained by the prosecutrix that her father was not at home incorrect. No doubt, the prosecutrix in her cross-examination has stated that her father had come home at night on the same day, when her mother told her father about the incident and thereafter her mother took her to the hospital and got medicine for pain. It may be noted that the prosecutrix was 9 years of age which fact was proved by PW13 as the date of birth recorded in the school was 10th September, 2000 and, thus, minor variations in her statement are bound to take place. The version of the prosecutrix is further supported by the fact that the human semen was detected on both P4 and A1 i.e. underwear of the prosecutrix and the Appellant.

8. Learned counsel for the Appellant has also tried to highlight that as per the statement of the witnesses the rukka was dispatched before the MLC was conducted whereas SI Shiv Karan states in his cross-examination that since the statement of the prosecutrix was to be recorded after her medical was conducted, no FIR was registered immediately.

9. A perusal of the MLC of the prosecutrix shows that the prosecutrix was taken to the hospital on 9th January, 2010 at 1.20 AM. In the history recorded by the Doctor it is noted that the prosecutrix told that on 7th January, 2010 in the morning when her parents had left the home for work she was alone at home at 9.30 AM. A boy Neeraj 23 years came to her home, he tried to put finger and penis inside vagina and ejaculated semen over victim. The Doctor also noted that the undergarment was stained with semen stains. The rukka was sent at 5.00 AM on 9th January, 2010 and was entered in as DD No. 45A at 5.20 PM at PS Tilak Marg on 9th January, 2010. PW16 SI Shiv Karan has clarified that though the statement of the prosecutrix was recorded at the servant quarter being Ex.PW6/A, however the FIR was registered only after her medical examination. Even PW6 has stated that her father made a telephone call to the Police and when the Police reached she narrated the incident to the Police and EX.PW6/A bears her signatures at point 'A'. PW6 has further clarified that her mother had taken her pink colour underwear which she gave to the Doctor Madam in her presence. Even PW7 has stated that her husband called the Police and thereafter the Police took them to Police Station, thereafter to RML Hospital, from RML hospital they returned at 6.00 AM and then the complaint was written. It is not the case of PW7 that the statement of the prosecutrix was

recorded after coming from the hospital as she is stating about the complaint which denotes the FIR. Even PW8 clarified that after returning from hospital FIR was registered. Thus, there is no contradiction in testimony of the witnesses on this count. There is no doubt that the testimony of a child witness should be carefully scrutinized and acted upon with caution which is a rule of prudence, however if the testimony of the child witness is corroborated in material particulars then the conviction can be safely based thereon. In the present case the version of prosecutrix is duly supported by the FSL report Ex.PW1/c as per which human semen was detected on the underwear of the prosecutrix. The testimony of the prosecutrix is sought to be discredited on the count that she was a tutored witness. No doubt the prosecutrix in her cross-examination has stated that the police official had taken her outside the court and told her what she had to depose in the court. At best this could be stated to be refreshing the memory of the witness. The prosecutrix has not stated anything different than what she stated in her statement to the learned Magistrate. There being nothing new in the statement of this witness her testimony cannot be discarded on this count.

10. Learned counsel for the appellant relying on *Golla Jalla Reddy* (supra) has contended that the statement of the prosecutrix on the basis of which FIR was subsequently recorded cannot be used to corroborate her version as investigation had already commenced. In *Golla Jalla Reddy* a complaint was taken down by the head constable on the basis of which investigation started. After half an hour a formal statement was taken on the basis of which FIR was registered. Thus the report noted that since the first complaint disclosed the commission of cognizable offence and the

investigation started thereon thus only that complaint could be used for corroboration. In the present case it is the statement of the prosecutrix on which investigation started and on the same FIR was registered though after medical examination. Thus this statement can be used for corroboration. Further FIR is only a previous statement which can be used for the purpose of either corroborating its maker or contradicting him.

11. Learned counsel for the appellant has tried to assail the testimony of prosecutrix also on the count that the doctor at Khan Market where she was first taken has neither been examined nor his medical certificate exhibited. It is well settled that conviction can be safely based on the sole testimony of the prosecutrix if the same inspires confidence. Even the cases where there is delay in lodging FIR and no medical evidence is available, conviction can be based on the trustworthy testimony of prosecutrix. Thus non examination of the doctor at Khan Market to whom the prosecutrix was first taken for treatment will not be fatal to the prosecution case.

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

(MUKTA GUPTA)
JUDGE

APRIL 21, 2014
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