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

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Date of Decision : May 16, 2016

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CRL.A.1452/2011

BHAGWAN DASS

.....Appellant

Represented by: Mr.Ankur Sood, Advocate

versus

STATE

..... Respondent

Represented by: Mr.Varun Goswami, APP

SI Amrish Giri, PS IP Estate

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

PRADEEP NANDRAJOG, J. (Oral)

CrI.M.A.No.629/2016

The applicant seeks early hearing of the appeal. It has been renotified for July 13, 2016. The appeal is at No.1 of the list of final hearing matters today. Arguments have been heard.

The application is disposed of.

CrI.A.No.1452/2011

1. Anuj Maya PW-7, made a call at police helpline at around 3:45 AM (before dawn) on March 17, 2008 and informed that his daughter was missing from his jhuggi at Anna Nagar slum cluster near WHO Building, IP Estate, Ring Road, which fact was recorded in DD No.6A, Ex.PW-2/C, copy whereof was handed over to ASI Surender Pal Singh PW-2 for investigation who accompanied by HC Arvind Kumar PW-4 proceeded to the slum cluster and met Anuj Maya at 4:00 AM (before

dawn) on March 17, 2008 and recorded Anuj's statement Ex.PW-2/A to the effect that his daughter aged 8 years (and not to disclose her identity and yet not reduce her to a letter, I shall call the child '*Faith*') was sleeping on a cot next to the door of their jhuggi and was missing a little past midnight. FIR Ex.PW-13/A for an offence punishable under Section 365 I.P.C. was registered.

2. The same day, after the sun rose, at about 7:00 AM Faith was found by Anuj Maya in a disheveled condition; hair scattered, blood on her legs with a white coloured cloth inserted in her private parts in front of WH Building on Ring Road near the slum cluster.

3. Since after registration of the FIR, investigation had been entrusted to SI Sushil Kumar PW-17, information of Faith returning to her jhuggi was given to him. He proceeded to the slum cluster with ASI Sumitra PW-10 accompanying him. The two reached the slum cluster. ASI Sumitra took Faith to LNJP Hospital where she was medically examined and two sealed pullandas, with seal of LNJP Hospital were seized by ASI Sumitra vide seizure memo Ex.PW-10/A, in which slides of the vaginal swabs of Faith and the white coloured, blood stained cloth inserted in her vagina, were kept.

4. Faith's statement was recorded by SI Sushil Kumar in which she informed him that she was sleeping on a cot next to the door of her jhuggi and her slumber broke in the night when she was removed and put on the seat of a white coloured car and a man in the car told her to keep quiet and slapped her. He removed her underwear in the car itself and inserted a finger in her vagina (paishab karne wali jagah). He then drove off in the car with her and took her to a jhuggi. He removed his clothes and inserted his penis in her vagina. She started bleeding profusely. In the morning that man left her in the same car on Ring Road.

5. In view of Faith's statement offence punishable under Section 376 IPC was added in the FIR.
6. Taken to LNJP Hospital, as per MLC Ex.PW-17/F Faith was examined by Dr.Sagar Gaurav, a senior resident who recorded injuries on her private parts and thus admitted her. Her blood sample as also slides of swabs taken from different areas around the vagina and anus were prepared which were seized by Ct.Arvind Kumar PW-4 as recorded in the memo Ex.PW-4/A.
7. Faith was admitted at Lok Nayak Jai Prakash hospital on March 17, 2008, after she was medically examined because she had suffered fairly grievous injuries and was discharged on March 28, 2008. The discharge slip Ex.PW-17/4, records Faith suffering a perineal tear on the right posterolateral extending up to right labral fornic of vagina, hymen and fourchette was torn; a superficial tear in the medial aspect of labia majora on the right side was also noted. The vestibule was torn. Superficial layers of rectal (illegible) was also torn.
8. SI Sushil Kumar had a clue. It was a white coloured car in which Faith had been removed.
9. It is the claim of the prosecution that a secret informer informed that the offender was Bhagwan Dass, a driver employed by Mahesh Chand Saini PW-6, and that he would be coming to the Chanakya Puri taxi stand near Orissa Bhawan. HC Sudesh Kumar PW-3, who was a beat officer in Anna Nagar area and knew Bhagwas Dass was thus associated in the investigation by SI Sushil Kumar, who took along with them Ct.Sanjay Kumar PW-5, and reached Chanakya Puri taxi stand where they apprehended Bhagwan Dass on March 19, 2008 and seized a white coloured Ambassador car Ex.P-8 bearing No.DL 2C M 0495 in which Bhagwan Dass was sitting and saw blood stains on the seat cover

with a few strands of hair. The car seat cover Ex.P-1 was seized vide Memo Ex.PW-3/C and sealed with the seal SK. Four strands of hair were likewise seized vide memo Ex.PW-3/D. The car was seized vide memo Ex.PW-3/E. His underwear Ex.P-7 was seized as recorded in the memo Ex.PW-3/I. Brought to the police station, Bhagwan Dass made the disclosure statement Ex.PW-3/F and took SI Sushil Kumar and HC Sudesh Kumar to his jhuggi No.18-A, Gautam Nagar, Yusuf Sarai from where a dari Ex.P-4, a shawl Ex.P-5 and a mattress Ex.P-6 were seized as recorded in the Memo Ex.PW-3/G. Eight strands of hair were also seized from the jhuggi as per seizure memo Ex.PW-3/H.

10. Bhagwan Dass was taken to LNJP hospital for potency test and as per MLC Ex.PW-17/H was opined to be capable of performing sexual intercourse. His blood and semen sample was taken by the doctor. His MLC Ex.PW-20/A records an abrasion over left ear pinna, opined to be two days old. Ct.Arvind Kumar collected the blood and the semen sample of Bhagwan Dass from LNJP hospital as per memo Ex.PW-4/E.

11. The various exhibits collected and the samples seized were sent for DNA analysis.

12. On March 24, 2008 Faith was produced before the learned Metropolitan Magistrate who, after satisfying himself that Faith, aged 8 years, was capable of understanding questions put to her and answering them cogently, recorded Faith's statement under Section 164 Cr.P.C. It reads as under:-

“On 16/03/2008 which was Sunday, I was sleeping in my aforesaid house alongwith my parents. One person put cloth on my mouth and took me to his jhuggi in Janakpuri. I could know the name of place as Janakpuri since same was written in Hindi on some board hanging over. There was gym in said jhuggi as instruments for exercise were lying there beside cow-

dung, cows etc. Said jhuggi is situated near park. He had taken me in white car at about 4:00 AM.

In his jhuggi, he removed my clothes and inserted his finger of hand inside my private part to which I felt great pain and I raised cry. Blood had also ooze out from my said part. Said person slapped me on my face and also gave beatings on my chest as also grabbed my neck. After some time, he threw away my panty and gave one hanker chief of white colour for putting on the private part. Then he again took me to Bhoomi (Paidal Park Path) in said car via India Gate, zoo and left me there and went away. Then, I went to my house and told the entire facts to my parents. Police official were also present there. I was taken to hospital.”

13. Put in a tabular form, the FSL opinion concerning the handkerchief i.e. the white coloured piece of cloth inserted in the vagina of Faith and removed by the doctor at LNJP hospital when she was examined on March 17, 2008, the vaginal swabs, underwear of Bhagwan Dass, car seat cover, dari, shawl and mattress, blood sample of Faith and blood and semen sample of Bhagwan Dass is as under:-

S. No.	Exhibit	Parcel Seal	FSL Opinion
1.	Handkerchief of victim Ex.1	1 LNJP	Blood + human semen but no DNA generated
2.	Vaginal slides Ex.2 (a) and 2(b).	2 LNJP	Blood + human semen but no DNA generated
3.	Underwear of accused Ex.7.	7 SK	Blood +semen not detected
4.	Car seat cover Ex. 8	8 SK	Semen + DNA generated. Blood not detected.
5.	One Shawl Ex. 9 (a) One Dari Ex. 9 (b) One Mattress	9 (coll.) SK	Blood detected. Semen+ DNA not generated.

	Ex. 9(c)		
6.	4 strands of hair from car seat	SK	Not subjected to forensic examination
7.	8 strands of hair	SK	Not subjected to forensic examination
8.	Blood Sample of accused Ex. 5	5 FSL	Alleles from Ex. 5 does not match alleles from Ex. 10
9.	Blood sample of prosecutrix Ex. 10	10 FSL	Alleles from Ex. 5 does not match alleles from Ex. 10

14. From the report it is apparent that human semen was detected on the white piece of cloth removed from the vagina of Faith when she was examined at LNJP hospital on March 17, 2008, and in the vaginal swabs collected by the doctor at LNJP Hospital and the seat cover of the car. Semen could not be detected on the underwear which the accused was wearing when he was arrested as also on the shawl, dari and mattress. Blood was detected on the white coloured cloth removed from the vagina of Faith, her vaginal swabs and the shawl, dari and mattress. DNA profiles were isolated from the blood sample of Bhagwan Dass, but not from the human semen detected in the white coloured cloth removed from the vagina of Faith as also vaginal swabs, but were isolated from the semen stain on the car seat cover, and to be fair to Bhagwan Dass, it must be noted that there is a categorical opinion that the source of the alleles could not be accounted for with reference to his blood and semen samples.

15. At the trial, Atul PW-1 deposed that Bhagwan Dass was known to him and was a driver and he had parked his Ambassador car near a tower on the intervening night of March 16, 2008 and March 17, 2008 and he went inside the jhuggi. ASI Surender Pal Singh PW-2 deposed having recorded Anuj Maya's statement Ex.PW-2/A on basis whereof the FIR

was registered. HC Sudesh Kumar PW-3 deposed having accompanied SI Sushil Kumar when secret information concerning Bhagwan Dass was received and he being apprehended. He deposed having witnessed the recoveries referred to by us in paragraph 9 above and the seizure memos drawn up. He identified the seat cover of the Ambassador car as Ex.P-1, and to my surprise the strands of hair collected from the ambassador car and the jhuggi of the appellant as Ex.P-2 collectively and Ex.P-3 collectively. I wonder as to how he did so! He identified the dari Ex.P-4, the shawl Ex.P-5 and the mattress Ex.P-6. The underwear of the appellant as Ex.P-7. The ambassador car as Ex.P-8.

16. I have perused the testimony and the cross-examination of HC Sudesh Kumar and would be failing not to highlight that no serious attempt has been made to discredit his testimony concerning the recoveries made from the jhuggi of Bhagwan Dass. The whole attempt of the cross-examination is to discredit the witness regarding Bhagwan Dass being arrested from the Chanakya Puri taxi stand; and the attempt has failed. Ct.Sanjay Kumar PW-5, who was with SI Sushil Kumar and HC Sudesh Kumar has deposed in sync with HC Sudesh Kumar and from the tenor of his cross-examination I find that once again attempt was to discredit the prosecution version of Bhagwan Dass being apprehended from the taxi stand at Chanakya Puri.

17. Mahesh Chand Saini PW-6 deposed that he was the owner of car bearing No.DL 2CM 0495 and Bhagwan Dass was employed by him as a driver. Bhagwan Dass was living in a jhuggi. He had given a shawl, a dari and a mattress to Bhagwan Dass which were seized in his presence from Bhagwan Dass's jhuggi and the seizure memo Ex.PW-3/G relating to the three bore his signatures and that the strands of hair lifted from the jhuggi and seized vide memo Ex.PW-3/H also bore his signatures.

18. It is thus apparent that PW-3, PW-5 and PW-6 have corroborated each other concerning recoveries made of the shawl, dari and mattress from the jhuggi in occupation of Bhagwan Dass, and from the FSL report, as noted by us hereinabove, blood was detected on the three as also semen, but DNA could not be generated. But one thing is proved, the shawl, the dari and the mattress was stained with blood as also with semen.

19. Anuj Maya PW-7 deposed in sync with his statement Ex.PW-2/A and that when he saw his daughter a few hours later, she was in a disheveled condition, with blood oozing from her private parts and a white coloured cloth inserted therein. I have perused his testimony and cross-examination and note that nothing has been brought out to discredit his testimony, which I find is corroborated by the testimony of his wife Ms.Rani PW-8.

20. SI Sushil Kumar PW-17 has deposed in sync with the testimony of PW-3, PW-5 and PW-6. He has proved the recoveries pursuant to the disclosure statement and learned counsel has been unable to show anything which discredits his statement.

21. Vidya Prakash PW-21 has proved the proceedings held by him on March 24, 2008 and Faith's statement recorded by him under Section 161 Cr.P.C. Relevant would it be to highlight that he has also proved TIP proceedings Ex.PW-21/B as per which it is recorded that Bhagwan Dass refused to participate in the TIP proceedings on the plea that he had been shown to Faith.

22. Eschewing reference to the testimony of the police officers who deposed of receiving the pullanDass and depositing the same in the malkhana and therefrom transmitting the same for FSL analysis, because no argument is advanced that any tampering took place, I straightaway

note that Faith appeared as PW-9. She had matured by the date when she deposed as a witness being 10 years. She was a student of class VI. She proved her capability to understand the questions when she answered them wisely before the learned Court of Sessions. She deposed in sync with what she told SI Sushil Kumar as also her statement recorded by the Magistrate under Section 164 Cr.P.C., with the variation that while deposing in Court she did not state that she was taken to a jhuggi in Janakpuri; a fact stated by her in her statement recorded under Section 164 Cr.P.C., with an explanation that she knew the name of the place to be Janakpuri because she had seen some board hanging, written in Hindi, that it was Janakpuri.

23. In the teeth of aforesaid evidence, I proceed to note the arguments advanced by learned counsel for Bhagwan Dass and simultaneously deal with the same.

24. The first argument is that the jhuggi wherefrom the blood stained dari, shawl and mattress as also eight strand of hair were seized, was in Gautam Nagar, Yusuf Sarai and in her statement recorded under Section 164 Cr.P.C. Faith said that she had been removed in a car to Janakpuri and strengthened her version by saying that she knew the place to be Janakpuri because she had seen an over hanging sign board. Learned counsel urged that in her deposition in Court Faith deliberately withheld disclosing that the jhuggi where she was removed to was in Janakpuri.

25. The argument is noted and rejected by me for the reason Faith was aged 8 years when she was removed from the jhuggi and taken to the jhuggi where she was raped. The young girl may have seen a over head signage, which we see by the dozens in the city of Delhi, giving directions to prominent colonies. Thus she said with confidence that she was taken to a jhuggi in Janakpuri when her statement was recorded by

the learned Metropolitan Magistrate on March 24, 2008. The second reason is that an opportunity was not given to Faith to explain said fact stated by her in her statement under Section 164 Cr.P.C. During cross-examination she was not confronted with her previous statement made to said effect. It is settled law that unless a witness is confronted with a previous statement made by the witness vis-à-vis the latter statement, no argument can be built on the plea that the latter statement makes an improvement. The reason is simple. The maker of a statement may have a good and a valid explanation to render.

26. Second contention urged is that the white coloured piece of cloth removed from Faith's vagina by the doctors at LNJP Hospital when she was examined was not got identified by anybody and was not put to Faith by the prosecution and got exhibited.

27. The argument remains simply an argument, without anything being deduced therefrom. Be that as it may, what has happened is that when Faith was examined the case property had not been summoned and the learned Trial Judge rightly did not defer Faith's further testimony because she was recollecting a traumatic experience, and therefore, the seized exhibits were not put to her for identification. But as noted above PW-3, PW-5, PW-6 and PW-17 have deposed in sync and have corroborated each other regarding the recoveries.

28. The next argument advanced is that the FSL report categorically rules out semen detected on the car seat cover Ex.P-1 as that of Bhagwan Dass and that Bhagwan Dass's semen could not be identified on the dari, shawl and mattress, Ex.P-4, Ex.P-5 and Ex.P-6 respectively.

29. Nothing turns on this for the reason Faith did not depose, nor made any previous statement that she was raped in the car. She simply said that Bhagwan Dass inserted his finger in her private parts when he put her in

the car and she bled. Semen, not connected with Bhagwan Dass from the car seat cover is obviously the result of the car being used by somebody else for a sexual act and in the process semen falling on the car seat cover. As regards semen detected on the dari, shawl, mattress and vaginal swabs of Faith not being linked to Bhagwan Dass, as noted by us above the opinion remained inconclusive because DNA could not be generated therefrom. It is thus an evidence which would be in the category of '*not proved*'. But the fact of the matter would remain that there was blood and semen on the dari, shawl and mattress. The three were recovered from the jhuggi of Bhagwan Dass. The fact that the three were blood stained is incriminating, though weightage may be less.

30. It is settled law that testimony of a rape victim, unsupported by any corroborative material, is sufficient to sustain a verdict of guilt. I have carefully perused Faith's testimony and find no infirmity therein. That she was brutally raped is proved from the discharge summary Ex.PW-17/4. Therefore, conviction of the appellant for having committed an offence of kidnapping and thereafter raping Faith is maintained and so is the sentence to undergo rigorous imprisonment for 10 years and pay fine in sum of ₹3,000/- and in default to undergo RI for 3 years is also maintained and further direction by the learned Trial Judge that the sentence shall commence after sentence imposed upon Bhagwan Dass in an earlier case would be over.

31. But that would not be the end of the matter because the victim needs to be compensated. Section 357 of the Criminal Procedure Code, 1973 obliges the Court to compensate the victim. Considering the trauma suffered by Faith and the injuries suffered by her ends of justice would warrant a compensation of ₹3,00,000/- (Rupees Three Lacs only) to be paid to Faith. The Government of NCT of Delhi has on February 02,

2012 notified a Delhi Victims Compensation Scheme in exercise of Section 357A in the Code of Criminal Procedure, 1973 as applicable in Delhi and for a victim of rape envisaged compensation is between ₹2 lacs and ₹3 lacs. The compensation is paid out of a fund and the Nodal Agency is the Delhi Legal Services Authority. I therefore direct the Delhi Legal Services Authority to ensure that Faith receives the compensation, which would be in the form of a fixed deposit in her name with a term of 3 years. As of today Faith would be around 17 years of age. Interest on the fixed deposit would be capitalized and the compensation with the accrued interest thereon shall be paid to Faith on maturity of the deposit.

32. TCR be returned.

33. Copy of this decision be sent to the Superintendent Cental Jail Tihar for updation of jail record and thereafter to be supplied to Bhagwan Dass.

(PRADEEP NANDRAJOG)
JUDGE

MAY 16, 2016

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