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

+ **CRL.A. 3/2018**

PARVEZ & ANR. .... Appellants

Through: Mr.Sumit Kumar, Advocate.

versus

THE STATE GOVT OF NCT OF DELHI ..... Respondent

Through: Mr.Kewal Singh Ahuja, APP

**CORAM: JUSTICE S.MURALIDHAR  
JUSTICE I.S.MEHTA**

**ORDER**  
**04.04.2018**

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1. This appeal is directed against the judgment dated 31<sup>st</sup> August, 2017 passed by the learned Additional Sessions Judge-1 in Sessions Case No.28/2013 arising out of FIR No.73/2012 registered at Police Station ('P.S.') Gokal Puri convicting both the Appellants for the offences under Sections 323/363/366A/354/376(2)/354/377/367 read with Sections 120-B and Section 34 IPC.

2. The appeal is also directed against order on sentence dated 20<sup>th</sup> September, 2017 whereby each of them were sentenced as under:-

“1) To undergo rigorous imprisonment for a period of 10 years each and shall pay fine of Rs.5,000/- each u/s 120B IPC. In case of non payment of fine, they will undergo further six months simple imprisonment in default.

(2) To undergo rigorous imprisonment for a period of 1 year each u/s 323 r/w section 120B IPC.

(3) To undergo rigorous imprisonment for a period of 7 years each and are directed to pay fine of Rs.5,000/- each u/s 363 IPC r/w section 120B IPG. In case of non-payment of fine, they will undergo further six months simple imprisonment in default.

(4) To undergo rigorous imprisonment for a period of ten years each u/s 366A r/w section 120 IPC and shall also pay fine of Rs. 5,000/- each. In default of payment of this fine, they will further undergo six months simple imprisonment in default.

(5) To undergo rigorous imprisonment for life and shall be also liable to pay fine of Rs.10,000/- each u/s 376(2) IPC and in default of payment of this fine, they will further undergo one year simple imprisonment in default.

(6) To undergo rigorous imprisonment for a period of 10 years and shall be also liable to pay fine of Rs. 5,000/- each u/s 377 IPC and in default of payment of this fine, they will further undergo six months simple imprisonment in default.”

3. The victim, in the present case, was at the time of the occurrence, a five year old girl child. She was visiting her maternal uncle along with her mother and had gone there on 8<sup>th</sup> March, 2012. The victim was playing on the street with other children, from where she went missing. Her uncle,

Abdul Gaffar (PW-2) and other family members searched for her throughout the night but could not find her. On 9<sup>th</sup> March, 2012 at 5:45 am whilst still searching for the victim, PW-2 noticed the victim with the Appellant, Parvez (A-2) near the drain at Shiv Vihar. A-2 then ran away leaving the victim there.

4. The victim disclosed to her uncle (PW-2) that A-2 and the co-accused Saddam (A-1) had committed rape on her. They had also bitten her on the cheeks and lips. PW-2 then called the police and took the victim to the GTB Hospital. The MLC of the victim Ex.PW-9/A shows that she was brought there by the ASI Sunder Singh on 9<sup>th</sup> March, 2012 at 7:45 a.m. It is noted in the MLC “alleged history of patient was missing from maternal uncle home situated in Indira Vihar at near about 6:00 p.m. on 8<sup>th</sup> March, 2012 and patient returned to home at above mentioned address at near about 5:45 am. on 9<sup>th</sup> March, 2012 as stated by grandmother.”

5. Among the injuries noticed in the MLC was a swelling over the left eye, bruises over both cheeks, abrasions over cheek, swelling over both lips, abrasions over the back and tear and bruises were present over the vaginal area. There is a noting in the MLC that “as per the gynaecological examination record patient had a fresh hymenal tear, small tear on fourchette but no active bleeding from vagina”. Samples were collected and sent to forensic laboratory.

6. Dr. Munish who examined the victim was not a witness but his signatures on the MLC were identified by Dr. Parmeshwar Ram (PW-9).

7. Sub-Inspector ('SI') Tejwati (PW-1) who was posted at P.S. Khazoori Khas, on instructions, reached P.S. Gokal Puri and learnt that the case had already been registered and the victim had already been removed to the hospital. She reached the hospital and made inquiries from the victim who disclosed that she had been raped by a person who was deaf and dumb and when she was being brought by that person from the park and reached near the corner of the street, he ran away after seeing the maternal uncle. On the statement of PW-2 a *Rukka* was drawn up on 9<sup>th</sup> March, 2012 and the FIR was registered at around 9:00 a.m. on the same day itself.

8. PW-1 along with ASI Dev Raj (PW-13) and Constable ('Ct.') Deepak (PW-15) searched for the accused accompanied by PW-2, the maternal uncle of the victim. During the search, a secret informer disclosed the address of the accused. Thereafter on the pointing out of the maternal uncle of the victim, A-2 was arrested from his house at Shiv Vihar. PW-1 has stated that during the interrogation, they learnt from the brother of A-2 that he was deaf and dumb by birth. They tried to arrange an interpreter but on account of 9<sup>th</sup> March, 2012 being a Government Holiday, a Government Interpreter could not be arranged and, therefore, through ASI Dev Raj (PW-13), a private interpreter Shamim Ahmed (PW-4) was arranged. A-2 is stated to have pointed out the place of occurrence and was then medically examined at GTB hospital. The clothes of A-2 were seized from his house and sealed thereafter.

9. The following day, i.e., 10<sup>th</sup> March 2012 the various proceedings with regard to A-2 were completed. Head Constable ('HC') Ashok Pal (PW-7)

deposed that on 12<sup>th</sup> March, 2012, they had gone to Chaman Park and reached Indira Vihar where a secret informer met the investigating officer ('IO') and told him that the accused wanted in this case was standing near Aksha Masjid, Ganda Nala. They then reached there and at the instance of the secret informer apprehended Saddam (A-1). On interrogation, it was revealed that A-1 was dumb and the same interpreter PW-4 was arranged. A-1's disclosure statement was recorded, after which he was arrested and sent for medical examination. His clothes which were seized were also taken into possession and sealed.

10. The statement of the victim under Section 164 Cr.P.C. was recorded before the learned Metropolitan Magistrate ('MM') on 3<sup>rd</sup> April, 2012. The learned MM took all the necessary precautions and satisfied herself about the victim having a rational understanding and being capable of making a statement. In this statement, the victim disclosed that on the day of Holi she had visited her maternal uncle. Whilst she was playing with other children in the evening, A-1 came there, closed her mouth and lifted her and took her to a different place which was at a distance. She further stated that A-1 would come to their place for wood work. Along with A-1, there was another person there whose name she could not recall. Both of them then started biting her on her cheeks, lips and chest. They inserted their private parts into her private part which was causing her tremendous pain. While she was crying continuously, they continued raping her in turns and after beating her threw her into the drain. She recollected that she had bled from her private parts. At that stage, she stopped her statement.

11. On completion of the investigation a charge sheet was filed against both the Appellants on 5<sup>th</sup> June 2012. Charges were framed by the trial Court on 10<sup>th</sup> May, 2013 for the offences already noted hereinbefore.

12. On behalf of the prosecution, 17 witnesses were examined. In her deposition in Court, the victim examined as PW-3 mentioned her version as spoken before the learned MM under Section 164 Cr PC. The learned trial Judge satisfied himself that the victim was capable of understanding the difference between speaking truth and speaking lies and also that she is competent to give a statement. The entire questioning was in question answer form. The victim correctly identified both the Appellants as the persons who did “*Batameejee*” with her. The victim was asked to explain what she meant by the “*Batameejee*”. The learned trial Judge proceeded to record as under: “*Pervez Ney Apni Susu Meri Susu Mein Daali Thi.*”

13. The learned APP felt that PW-3 was resiling to some extent from her previous statement and on his further questioning she disclosed as under:-

“I had told Judge Sahab in my statement Ex-3/A before Ld. MM that both the accused persons one by one forcibly entering their penis (*cheez*) into my vagina and anus i.e. “*wo ek ek kar meri pesaab wali jagah or tatti karne wali jagah par apni cheez jor jor se dard karke ghusa rahe the, wo dono gunge the. Mujhe bahut dard ho raha tha me roe ja rahi thi*”. I also told in my said statement that accused Saddam was doing “*galat kaam*” with me the other accused was standing there. I had told that accused persons has throw me in the drain. I had not told that I started bleeding from anus. It is correct that the accused Parvez was taking me to the house of my maternal uncle Pappu and on the way my maternal uncle Pappu met and the accused after seeing him ran away”.

14. PW-1 was then cross-examined by the counsel for the accused. When asked whether she raised an alarm when she was taken away by the accused, she replied "*Mera muh bheech diya tha*". The victim was subjected to a very detailed cross-examination. A suggestion was given to her that she was deposing falsely at the instance of her maternal uncle which she denied. She affirmed that she was speaking the truth.

15. Learned counsel for the Appellants submitted that at one stage in her examination the victim had stated "both the accused are able to talk". He, therefore, suggested that the victim could not have correctly identified the accused as admittedly both the accused were deaf and dumb and this was why it became necessary to engage the services of PW-4 as an interpreter.

16. The question that arises is whether this is a serious enough contradiction to discredit the testimony of the child victim. The Court thinks not. The victim was clearly able to identify both the Appellants. She knew one of them, that is, A-1 and that he used to visit the locality for wood work. She did not know A-2 from before but was able to correctly identify the said person who in any event had been seen by PW-2 in the early morning hours on 9<sup>th</sup> March, 2012 when he noticed him running away from the place near the drain where the victim was found. The material portion of her testimony concerns the rather brutal nature of the crime committed upon her, i.e., gang rape and her testimony is totally corroborated in that regard by the MLC. In her deposition in Court she specifically mentioned "*wo dono gunge the.*" The Court, therefore, does not consider this part of the statement of the victim to be a very serious discrepancy which discredits her entire testimony.

17. It was then submitted that the prosecution had initially applied to the learned MM for conducting the test identification parade (TIP) proceedings and had later withdrawn the said application. Considering the victim was of a tender age of 5 years, the reluctance on the part of the prosecution to proceed with the TIP proceedings is understandable.

18. It must be noticed at this stage that the entire recording of the testimony of the victim was in the Vulnerable Witness Court Room at the Karkardooma Court Complex. The victim saw the accused through video monitor. Further, the victim had a helper who was not a relative. The entire process ensured the highest degree of fairness. The identification in the Court, therefore, cannot, in such circumstances, be doubted although it has taken place for the first time in the Court. The Court is, therefore, not able to accept the submission of the learned counsel for the Appellants that the victim may have been under some genuine misapprehension as regards the identity of the accused.

19. The learned counsel for the Appellants then tried to show from the evidence of PW-4 that there was a mistake even about the exact day of the occurrence. PW-4 appears to suggest that his statements were recorded in 2011 and the case was registered in 2011 whereas the occurrence is of 2012. This appears to be some genuine misapprehension on the part of PW-4. It is too much to suggest that the MLC which clearly shows the date of the occurrence as the intervening night of 8<sup>th</sup> and 9<sup>th</sup> March 2012 was a document wrongly recording the date of occurrence. There is overwhelming evidence to show that the incident had occurred on the intervening night of

8<sup>th</sup> and 9<sup>th</sup> March 2012. Nothing much, therefore, turns on the fact that PW-4 in his statement did not correctly recollect the year in which the incident occurred or when the FIR was registered.

20. The evidence of the victim's uncle (PW-2) was also not able to be shaken in the cross-examination. He appears to be a natural and entirely truthful witness. An attempt was made by the accused to suggest to him in his cross-examination that on account of a quarrel with the mother of A-1, he was falsely implicating A-1. This was of course denied by him. The attempt by the accused in this regard was totally unconvincing. There is no reason at all for a child victim to falsely implicate the two accused. While it is true that both of them may be hearing and speech impaired, the nature of the crime is such that this disability of the accused can hardly constitute a mitigating factor.

21. There is absolutely nothing in the impugned judgment of the trial Court which can be said to be legally incorrect or perverse and calling for interference.

22. The learned counsel for the Appellant pointed out that the FSL report which did not come to the aid of the prosecution. In this regard, the Court would like to refer to the following analysis on this aspect by the trial Court in the impugned judgment:

“Mere fact that FSL report received (which is perse admissible in evidence) is not helping the prosecution in any manner because the DNA profiles could not be generated from the exhibits of the victim due to its degradation and thus no comparison could be made with her exhibits and blood samples of both the accused is of no consequences when MLC itself

fully proves that rape and unnatural sex was committed with the minor victim and during this process she was also mercilessly beaten. Prosecution also has failed to examine the concerned doctor who gave final opinion regarding nature of injuries as grievous in nature, so in such situation, the injuries have to be treated as simple.”

23. The Court is unable to find anything that can be said to be legally incorrect in the above analysis and conclusion of the trial Court. It is one thing to say that an FSL report disproves the case of the prosecution and another to say that the FSL was unable to generate a DNA profile as a result of degradation of the sample. In the face of the MLC of the victim which fully corroborates her testimony as to the nature of the offence, the fact that the FSL report did not further corroborate the said testimony is of no consequence as far as the accused are concerned. The Court concurs with the trial Court that the prosecution has fully proved the case against both the Appellants beyond reasonable doubt.

24. It was finally submitted that the sentence awarded to each of the Appellants is severe and that the trial Court itself noticed that apart from the fact that both the Appellants were themselves hearing and speech impaired, they came from the economically weaker section of the society. The wife of A-2 is apparently undergoing treatment for a heart problem and she is also hearing and speech impaired. A-2 also has two minor children and an aged mother to look after. As far as A-1 is concerned, it is pointed out that he has to maintain a family of eight members.

25. However, it must not be forgotten that the victim was as young as 5 years at the time of occurrence. As noted by the trial Court, on account of

the trauma of gang rape and the fear that resultantly developed in her mind, she was unable to travel alone anywhere and missed her studies for a year. She too is from an economically weaker section of the society. This is a case of a brutal gang rape which cannot help but be met with anything other than severe punishment as has been correctly awarded by the trial Court. Consequently, the trial Court thought it fit to award compensation to the victim amounting to Rs.5,00,000/- in addition to Rs.50,000/- already awarded as interim compensation under the Victim's Compensation Scheme, 2015. Furthermore, the entire fines recovered were directed to be paid to the victim as compensation under Section 357(1) Cr.P.C. in addition to the compensation already awarded.

26. The trial Court has also noted the difficulty caused to the family members of the accused and has directed the Social Welfare Department of the Government of NCT of Delhi to arrange for vocational training for dependent family members, free medical and educational facilities and sanctioning old age pension for the parents of the accused.

27. The Court, therefore, finds absolutely no scope for any interference with the sentence awarded by the trial Court for the offences for which the Appellants have been found guilty.

26. Consequently, the appeal is dismissed.

**S. MURALIDHAR, J.**

**I.S. MEHTA, J.**

**APRIL 04, 2018/ 'anb'**