

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 03.03.2020

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CRL.A. 281/2017 & CRL.M.(BAIL) 1673/2019

VINOD

..... Appellant

versus

STATE

..... Respondent

Advocates who appeared in this case:

For the Appellant: Ms Inderjit Sidhu along with appellant.

For the Respondent: Ms Meenakshi Chauhan, APP for State with
SI Bijender, PS Shalimar Bagh.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant has filed the present appeal impugning the judgment dated 03.11.2016 passed by the Learned ASJ, Rohini Courts, New Delhi, whereby the appellant was convicted for the offences under Sections 376-D/342 of the IPC. The appellant further impugns the order on sentence dated 09.11.2016, whereby he was sentenced to ten years of rigorous imprisonment for committing the offence under Section 376-D of the IPC and one year of rigorous imprisonment for committing the offence under Section 342 of the IPC.

2. The appellant contends that the Trial Court had failed to appreciate that there was no medical evidence to support the testimony of the prosecutrix (hereafter referred to as 'the victim'). Further, there were no independent witnesses to substantiate the case of the prosecution. It is contended that the Trial Court had erred in relying on the statement of the victim and convicting the appellant as there were material contradictions in her statements

3. The case of the prosecution is that on 14.06.2013, at around 10:00 in the morning, the victim had gone to the shop of *Kabari* to sell empty bottles and three-four boys had waylaid her and taken her to an empty room. They had pressed her breasts and inserted their finger in her vagina. They had let her go, when she raised an alarm. The victim narrated the incident to her mother at about 1:00 pm on the date of the incident, when she came back home for lunch. After coming to know of the alleged incident, she took the victim to the room where the incident had taken place. The three boys were found there in front of the shop of the *kabari* and she detained them in a room and bolted the door. Thereafter, public persons gathered and beat up the said boys and the boys managed to escape while they were being beaten. The mother of the victim called the police at 100 number.

4. On the basis of the statement of the mother of the victim, FIR No. 213/2013, under Sections 376D/354/342/506 of the IPC and Section 6 of the Prevention of Children from Sexual Offences Act, 2012 (POCSO Act), was registered with PS Shalimar Bagh. Thereafter, charges under Section 342 of the IPC and Section 5 (g) of

POCSO Act were framed against the respondent. And, in the alternative, charge under Section 376-D of the IPC was framed against the respondent. The respondent pleaded not guilty and the matter was set down for trial. The prosecution examined seventeen witnesses to prove its case.

5. Since it was alleged that the victim was a minor and her age was disputed, a Medical Board was constituted and medical examination of the victim was conducted on 31.07.2013. The members of the Medical Board were examined and deposed as PW9 and PW10. They deposed that as per her radiological examination, the age of the victim was around seventeen-nineteen years as on the date of examination. The Trial Court accepted that the victim was not a minor on the date of the alleged incident and accordingly, examined the evidence with reference to charges under Section 376D and Section 342 of the IPC.

6. After evaluating the evidence, the Trial Court, by the impugned judgment, held that the respondent was guilty of the offences under Sections 376D/342 of the IPC and accordingly, convicted the respondent.

Evidence

7. Before proceeding further, it is necessary to analyse the testimonies of material witnesses.

8. Lokesh, the owner of the premises No. 114-C, Gali No.1, Ambedkar Nagar, Haidarpur (the premises at which the alleged incident had taken place) deposed as PW1. He had provided an

electricity bill as a proof of ownership of the said premises. He deposed that he ran a welding shop on the ground floor and there were four rooms on the first floor, which he used to rent out to different persons. He deposed that he had rented out one of the rooms on the first floor of the said premises to Vijay, who used to keep his articles on a partly constructed room, at the rear of the plot on the ground floor. A few days prior to the incident, Sripal @ Chawdhry nephew of Vijay, (one of the three boys) had come to stay with him. He stated that he had heard that Sripal and his friends had brought one girl to the partly constructed room on the ground floor and had done *ched-chaad* with her. In his cross examination, he stated that he had not seen the incident himself and had heard about the said incident from other people.

9. Ct Kamlesh, was one of the police officers, who was present on 14.06.2013, deposed as PW2. He deposed that on 14.06.2013, he and the IO went to the place of incident, where they met SI Anil, the victim and her mother. The IO called an NGO counsellor and the victim and her mother were counselled. Thereafter, he accompanied the victim to BJRM Hospital and got her medically examined. After medical examination of the victim, the IO took the victim and her mother to the spot of the incident. PW2 stated that the victim accompanied the IO in search of the accused and during the said search, she pointed at three boys, namely Vinod (the appellant) and two other boys – Pankaj and Sripal – as the persons who had teased her. The said persons were apprehended and arrested.

10. On cross examination, PW2 stated that he had gone to the spot along with the IO, at about 3:30/4:00 pm. He deposed that the IO did not make any inquiry from the neighbors. He stated that it seemed that the victim was mentally challenged and exhibited abnormal behavior as she kept on laughing all the time. He stated that it was correct that the mother of the victim had spoken to the doctors and told them about the alleged incident. He denied the suggestion that the accused had been implicated at the instance of one Sunita, who had an illicit business of gambling and was not happy with the appellant since he had started a similar business and was earning more than her. He denied the suggestion that the mother of the victim had registered a false case in exchange of money.

11. Inspector Durga Kapri (the other IO) deposed as PW6. She deposed that on 27.06.2013, she was marked the said case as per the directions of the senior officials. She stated that on 09.07.2013, she produced Sripal for his examination by the medical board. She deposed that the victim was also examined by the medical board on 31.07.2013. She stated that she recorded the statement of the victim, the complainant (victim's mother) and other witnesses under Section 161 of the CrPC and also obtained the proof of ownership of the premises, where Sripal was residing. She deposited the aforesaid report of the medical board in respect of Sripal before the concerned Juvenile Justice Board (JJB). Thereafter, she prepared the charge sheet and filed it with the prosecution branch for scrutiny. In her cross examination, she stated that the victim appeared to be mentally

challenged but she did not obtain documents regarding the mental condition of the victim from her parents. She stated that it was correct that the mother of the victim had filed another complaint in the year 2011. She stated that it was correct that the elder sister of the victim was suffering with some abnormality in her mental capacity.

12. SI Anil Kumar had recorded the DD with reference to the present case and deposed as PW7. He deposed that on 14.06.2013, he was posted at Shalimar Bagh as SI and at about, 2:10 pm, he had received a telephonic call that someone had taken away the boy of the caller and that one boy and one girl had been apprehended. The said information was reduced to writing vide DD No. 32A dated 14.06.2013 (Ex. PW 7/A). PW7 went to the spot i.e. Gali No.1, Sanjay Camp, Haiderpur, Delhi, where he met Shameena Khatoon (mother of the victim) and the victim outside the *gali*. He stated that in the meanwhile, W/SI Sanju Rai also reached the spot and he handed over DD No. 32A to Sanju Rai and left the spot. In his cross examination, he stated that it was correct that the call was regarding kidnapping of a boy. He stated that no such incident of kidnapping was found when he reached the spot. He stated he did not record the said fact anywhere since he had handed over DD No. 32A to SI Sanju Rai for further investigation.

13. WSI Sanju, the first IO, deposed as PW17. She stated that on 14.06.2013, she was posted at PS Mahindra Park and was looking after the rape cases of Sub Division Shalimar Bagh. She stated that on that day, she received a call from PS Shalimar Bagh to reach there.

After reaching the PS, she took Ct Magan and W/Ct Kamlesh to the said spot at Gali No.1, Haidarpur Jhuggis, where she met SI Anil and the complainant-Sharmila Khatoon. The victim was also present there. She made enquiries from the victim and since she was unable to narrate the alleged events properly, she called a counsellor from an NGO to counsel the victim and her mother. Thereafter, she took the victim to BJRM Hospital for her medical examination and obtained her MLC (Ex. PW 3/A). From the MLC, she came to know that the victim was subjected to sexual assault. She recorded the statement of the mother of the victim, since the victim was unable to give her statement properly. On the basis of the statement of the mother (Ex. PW15/A), *rukka* was prepared and handed over to Ct Magan for registration. Thereafter, the victim and her mother were taken back to the spot and a site plan was prepared by PW7 at their instance. She stated that thereafter, she made an effort to find the accused persons. She stated that the appellant and the other juveniles were seen in the Gali, outside House no. 114, Haidarpur, Delhi. She stated that she arrested the accused persons at the instance of the victim and her mother.

14. In her cross examination, PW17 stated that the mother of the victim had told her about the case. She stated that though the victim was telling her some facts, she could not explain the same properly. She stated that she did not get the IQ level of the victim tested. She stated that it was correct that it had come to her knowledge that the mother of the victim had made a complaint against someone, where in

the elder sister of the victim was the victim. She stated that she did not collect any evidence regarding the said case. She stated that it was incorrect to suggest that the present complaint had been lodged at the instance of one Sunita, who was residing at Shalimar Bagh and was running a gambling business in her house. She stated that she did not know any such Sunita. PW17 also stated that she had not recorded the statement of any shopkeeper at the place of the incident. She stated that it was night hours when they had reached there and the shops were already closed.

15. In her statement recorded on 18.06.2013, under Section 164 of the CrPC, recorded before the Learned MM, the victim stated that on 14.06.2013, at about 10 am in the morning, she had gone to Gali No.1, Haiderpur for selling glass bottles to the *kabaddi wala*. Four boys were also present. She stated that the four boys took her inside a room and they made her lie down and showed her a knife. Then, they came over and inserted a finger inside her vagina. She stated that they did wrong things with her and also beat her up. After some time, they made her wear her clothes and took her out of the room. She came back home. Three of the four boys had been caught and one of the boys had run away.

16. The victim deposed as PW14. The Trial Court asked her basic questions to ascertain her mental faculties and after being satisfied that she was capable of deposition, the Court went on to record her statement. She deposed that on the alleged day, she had gone to sell empty quarter liquor bottles, which people throw away after

consuming liquor. She stated that she used to sell the bottles after collecting the same. She stated that she had gone to the *kabaddi wala* to sell the bottle, and there she met three boys. They grabbed her, took her inside a room and latched the door. Their names were Pankaj, Vinod and Chaudhary. She had asked them for money and they manhandled her. They also made her consume some medicine like substance and held a knife near where she urinates (*peshab wali jagah*). They dragged her on the floor. They, thereafter, touched her breasts and cheeks and inserted fingers inside her vagina (*peshab ki jagah*). She said that she wanted to go home but they did not leave her. Thereafter, she started crying. On seeing her cry, the boys ran away from the place. She stated that she came back home and told her mother about the alleged incident. Her mother took her to the *kabaddi ki dukan* and the three boys were standing there. Thereafter, public persons beat those three boys up and her mother called the police on 100 number. She was asked as to what the appellant had done with her, to which she replied that he had inserted a finger and gestured towards her private parts. She stated that thereafter, her mother took her to a doctor. She identified the appellant through the wooden partition as the person, who had put his finger in her private parts and had pressed her breasts and cheeks.

17. On being cross examined, the victim stated that she had met the three boys in the *kabaddi ki dukan*. She stated that the place where they took her to was a little further away from the *kabaddi wali dukaan* and closer to the chowmien shop. While they were taking her

there, no one had seen her. She stated that she had never seen the said three boys before and that while they were bolting the door, she had screamed. She stated that the police had told her the identity of the three boys.

18. The mother of the victim deposed as PW15. She deposed that at the time of the incident, she was working in a factory and had a lunch break at 1:00 pm. When she reached home, she saw that her daughter was crying while sitting near the stairs in their house. When she inquired from her, her daughter disclosed that some boys had committed wrong acts with her at the shop of the *kabaddi*. She deposed that her daughter told her that three boys met her at the *kabaddi* shop. They did not take her bottle and instead they had taken her inside a room and locked her in it. One of the boys had pressed her breasts, one other boy caught hold of her hands and the third boy removed her *paijami* and had committed wrong acts with her. When her daughter started crying bitterly, they left her. When she was asked to define 'wrong act', she clarified that wrong act meant that had inserted a finger inside her vagina.

19. She deposed that after hearing about the incident, she went to the place of occurrence and found that three boys were standing near the *kabaddi* shop. Her daughter identified them and she apprehended them, confined them in the room and latched the door from outside. Public persons collected at the spot and beat up the three boys. She stated she had called the police at 100 number and they reached the spot. Sanju, police madam, also came there. One NGO member also

arrived and counselled her daughter. Thereafter, she accompanied her daughter to the hospital where she was examined.

20. She stated that when she questioned her daughter about the knife and the fourth boy, her daughter stated that on hearing her cries, one boy had come to her rescue. According to her daughter, the knife that was used was a kitchen knife and the said knife was not recovered from the place of incident.

21. In her statement under Section 161 of the CrPC, as recorded on 14.08.2013, the mother of the victim (PW-15) stated that since her daughter had got flustered, she had not disclosed all the events to her. PW-15 stated that her daughter had disclosed that one of the boys had a knife and had threatened her with the same. She stated that the smallest boy had a knife with him and the said knife appeared to be a kitchen knife.

22. The MLC report of the prosecutrix (Ex. PW-3/A) was proved by Dr. Poonam Baranwal, who deposed as PW-11 since Dr. Smitha Pathak had left the services of the hospital. As per the MLC report made by Dr. Smita Pathak, there was no sign of any injury or bleeding and her hymen was not found intact.

Reasons and Conclusion

23. The appellant has served more than seven years of the sentence awarded to him (including the period of remission).

24. As is apparent from the testimony of various witnesses and the evidence obtaining in this case; the prosecution's case rests almost

entirely on the evidence of the victim and her mother. It is, thus, essential that the testimony of these witnesses be examined carefully. It is also relevant to examine whether any other evidence – other than that of the victim – would have been available to the prosecution.

25. The medical examination of the victim was done and the MLC (Ex.PW-3/A) does not support the case of the prosecution. No new injuries on the victim were found. Although the MLC had noted that the hymen of the victim was not intact, it was not expected to be so as a surgery had been performed on the victim's private part in and around 2010. The Trial Court had asked the mother of the victim (PW-15) as to why her daughter had to undergo an operative procedure on her private part (vagina) as reflected from her MLC, three years ago. PW-15 had explained that the victim had fallen down from the stairs while she was bringing food for her and due to her fall, two of her teeth were broken and she also suffered injuries on her private parts. She stated that she was treated at BSA Hospital and remained hospitalized for about ten days. However, she had not preserved documents regarding her hospitalization or treatment.

26. However, the MLC is relevant because it does not indicate that there were any injury marks or bruises on the body of the victim. This raises a serious doubt as to the victim's allegation that she had been beaten by the boys. In her statement recorded under Section 164 of the Cr.P.C., the victim stated that these boys had beaten her. Before the court, she also testified that she was also dragged on the floor. However, no injuries on her body were found.

27. A careful examination of statements made by the victim and her mother also indicate material inconsistencies. Concededly, the victim's mother had merely narrated what was informed to her by the victim. In her initial statement, which resulted in filing of the aforesaid FIR, she had stated that on returning home for lunch at about 1:00 PM, she found that her daughter (victim) was distressed and on inquiries, she had informed that three/four boys had taken her into an empty room and there they had pressed her breast and had inserted a finger from where she urinates. She was released on her raising an alarm. The victim's mother stated that, thereafter, she had taken her daughter near the said room and had found that there were three boys (Pankaj, Choudhary and Vinod). She had, thereafter, confined them to the room. However, the public had beaten them and three boys had fled from the spot. The FIR also records that inquiries were made from the victim but she was unable to narrate the incident with any clarity. Thus, the incident had been narrated by the mother of the victim after making inquiries from her. It is relevant to note that neither the victim nor her mother made any mention of a knife. It was not their complaint that any of the accused had threatened the victim with a knife.

28. The statement of the victim under Section 164 of the Cr.P.C. was recorded on 18.06.2013. In her statement, she stated that she had gone to Gali No.3, Haider Pur, Delhi for selling glass bottles to a *kabadi wala*. There were four boys who were present there. These four boys had taken her inside a room. They had made her lie down

and showed her a knife. She stated that then they came over her and inserted a finger inside her. They also did wrong thing with her (*mere saath galat kaam kiya*). They had also beaten her and after some time,, they made her wear clothes and took her out of the room. While, three boys were caught, one of them had run away. There was material improvement from her statement made under Section 161 of the CrPC. For the first time, she mentioned that she had been threatened with a knife. While, it was earlier stated that there were three-four boys and names of three accused were mentioned, it was now definitely stated that there were four boys involved. In the initial statement recorded under Section 161 of the CrPC, the prosecutrix had not stated that her clothes had been removed. Although, this was also not specifically stated in her statement recorded under Section 164 of the CrPC; but she stated that after some time they had made her wear clothes and had taken her out of the room. Thus, it is implicit that at some point, her clothes had been removed.

29. In her testimony before the Court, she stated that there were three boys and they had caught her and taken her inside room and had latched the door. She stated that she had asked them for money and on doing so they had thrust her on the ground (*maine pasie maange toh patak diya*). She stated that, thereafter, they made her consume something like a medicine (*mujhe dawai jaise kuch pila diya*) and they had placed a knife on her private part (*chaku meri pishab wali jagah pe laga diya*). She stated that they had touched her cheeks and her breast and had inserted a finger from where she urinates. She stated

that she asked them to leave her but they did not leave her, thereafter, she started crying and the boys had run away. In her testimony, she did not state that her clothes had been removed or they had made her wear her clothes and had thereafter, removed her from the room. On the contrary, she stated that on her crying, they had run away.

30. Her supplementary statement under Section 161 of the Cr. P.C was recorded on 15.07.2013. This statement was different from the earlier statement. She stated that whereas she had earlier stated that there were four boys that had assaulted her, in fact, there were only three boys and there was no fourth person. However, she also stated that there was a fourth person, who had freed her from the three boys. She did not know his name but could recognize him. She also stated that one small vegetable knife (*chota chaku subzi katne wala*) was in the hands of the Sripal when he confined her but when they went back to the room knife was not there. In her deposition before the Trial Court she, for the first time stated that the knife was placed on her private part from where she urinates. There appears to be no investigation with regard to ascertaining the identity of the fourth boy (if at all there was one). The victim's statement that a fourth unknown person freed her, runs contrary to the statement made earlier. The fourth boy does not find any mention in her testimony as well.

31. The testimony of the victim's mother (PW-15) also raises serious doubts. She testified that after hearing of the incident from her daughter she had gone to the place of the occurrence – that is, the room near the *kabadi* shop and had found three boys standing there.

Her daughter (victim) had pointed towards the said boys and told her that they had committed a wrong act with her. She stated that she apprehended these boys and confined them in the said room and latched the said room from outside. Various persons had collected at the spot and beat up the boys, who managed to escape from there. Thereafter, she stated that she called the police at 100 number and the police reached the spot.

32. In her deposition, she testified that her daughter had told her that one of the boys had pressed her breast and one of the boys had caught hold of her hands and the third boy had removed her *paijami* and the said boys had committed a wrong act with her. When she started crying bitterly, they left her. This was neither stated by her in the initial statement recorded under Section 161 of the Cr PC nor in her supplementary statement. The fact that her daughter had told her that third boy had removed her *paijami*, were not narrated by either the victim or her mother at any stage prior to the victim's mother recording her testimony. The victim had also not testified that any apparel had been removed. In her testimony, she had stated that on asking for money, she was dashed on the floor, and the boys had dragged her on the floor and then they had touched her cheeks and her breasts.

33. As is apparent from the above, there are serious inconsistencies in the version as to the incident and in view of the above it is difficult to ascertain as to how the actual offence was committed. The fact that there was a mention of a fourth boy in one statement, who was stated

to be one of the offenders and in another statement was stated to have freed the victim from the clutches of the three boys, also raises some doubt as to the case set up by the prosecution.

34. Apart from the above, there are other aspects that also raises doubts as to the prosecution's case.

35. The DD in the present case was DD no. 32A, was recorded on 14.06.2013, at about 2:10 pm by SI Anil Kumar (PW7). He deposed that he had received a telephonic call wherein someone had taken away the boy of the caller and a boy and girl were apprehended. Clearly, the said DD clearly does not relate to the facts of the present case. The Trial Court had considered the said consistency and had held it was not relevant in such cases, since calls are made by persons from public who are not acquainted with the facts. However, in the present case, the mother of the victim had deposed that she had made the call to the police at 100. The victim had also stated that her mother had made the call to the police. When PW7 and the other police officials had reached the spot of incident, they did not find any person on the spot other than the victim and her mother.

36. PW7 stated that he had reached the spot and thereafter, WSI Sanju, the IO, had reached the spot. It is also important to note that WSI Sanju, had deposed that on the date of the alleged incident, that is on 14.06.2013, she was posted in PS Mahindra Park and was looking after rape cases of Sub Division Shalimar Bagh. If this was the case, then WSI Sanju could not have reached the spot of the alleged incident on the basis of DD No. 32A, as it pertained to the kidnapping of a boy

and she was specifically handling rape cases in the sub division of Shalimar Bagh. It is not the case of PW7 that after reaching the spot, he had called WSI Sanju and asked her to come there or had called someone at PS Shalimar Bagh and had updated them with reference to the facts of the case. WSI Sanju had deposed that she had reached the spot of incident after receiving a call from PS Shalimar Bagh. PW7 had deposed that he handed over the DD to WSI Sanju when she had arrived. It is also important to note that WSI Sanju, who was examined as PW17, did not make any reference to the DD No. or note that the said DD mentioned different facts, not pertaining to the present case. The fact that the said DD No. (being DD No. 32A) was not mentioned by PW17 in her deposition, is a loose end in the case set up by the prosecution.

37. It is to be noted that the alleged incident took place in front of the shop of the *kabaddi wala*, where the prosecutrix had gone to sell empty whisky bottles. However, the said *kabaddi wala* (owner of the shop) was not examined as a witness in the present case. No other passersby, shopkeepers or persons of the locality, were made witnesses. WSI Sanju, the IO, in her cross examination deposed that she had not recorded the statement of any shopkeeper at the place of incident since they had reached there at night time and all the shops were closed. Whereas, Ct Kamlesh (PW2), one of the police officers, had stated in his cross examination that he had gone to the spot along with the IO at about 3:30/4:00 pm on 14.06.2013. This clearly shows that the IO did not make any effort to include any independent witness

and her explanation for not recording the statements of the shopkeepers was not valid. It is a settled position of law that it is not a mandatory requirement to include other witnesses and if the testimony of the official witnesses is clear and unimpeachable, the same should be accepted. However, when there is an inconsistency in the testimonies of the formal/police witnesses, it becomes necessary to examine independent witnesses.

38. The incident had taken place in a busy market and it is hard to believe that there was no opportunity to examine independent witnesses. Further, the mother of the victim had deposed that when she had apprehended the three boys, public persons had gathered and had beaten them up. However, no such independent persons were made witnesses in the present case and no such public persons had been mentioned in the deposition.

39. It is also material to note that the police officials had recorded that in the initial statement made by the victim, the victim was unable to explain the incident with any clarity. PW-2 (Ct. Kamlesh) had deposed that he had gone to the spot along with the victim at about 3:30-4:00 PM on the same day. The victim was behaving in an abnormal manner and she kept on laughing all the time. He was of the view that the victim was mentally challenged. This also makes it difficult to sustain the conviction, which is based almost entirely on the testimony/statements of the victim that, as noted above, are also found to be inconsistent.

40. The victim was subsequently asked whether any person had seen her and she had replied in the negative. She also stated that before the boys bolted the door, she had screamed. It is improbable that nobody would have heard the victim, if she had screamed. It is also improbable that nobody would have witnessed her being taken to the room in question.

41. In view of the above, this Court is unable to accept that the prosecution has established its case beyond reasonable doubt. As noted above, there are material irregularities in the testimony of the victim and her statement recorded earlier. Further, the incident had taken place in the middle of the day or in an area, which is not isolated. There are permanent establishments (shops) around the place of the occurrence and yet no witness was found who would corroborate the case set up by the prosecution.

42. In view of the above, the impugned judgment is set aside and the appellant is acquitted of the offences for which he is charged. He shall be released forthwith, if not wanted in any other case.

43. The pending application is disposed of.

44. The sureties given are discharged.

VIBHU BAKHRU, J

MARCH 03, 2020
MK