

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

RESERVED ON : 27th MARCH, 2015

DECIDED ON : 7th MAY, 2015

+ CRL.A. 305/2004

SHABIR AHMAD

..... Appellant

Through : None.

VERSUS

STATE (NCT OF DELHI)

..... Respondent

Through : Ms.Kusum Dhalla, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant – Shabir Ahmad challenges the legality and correctness of a judgment dated 17.02.2004 in Sessions Case No.23/01 arising out of FIR No.341/2000 PS Badarpur by which he was held guilty for committing offences under Sections 376/506 IPC. By an order dated 21.02.2004, he was awarded RI for seven years with fine ₹ 5,000/- under Section 376 IPC and RI for one year under Section 506 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on and before 16.09.2000 in House No.A-58, Main Road, Alipur Extension, Badarpur, the appellant committed rape upon the prosecutrix 'X' (assumed name) aged around eight years and criminally intimidated her. Victim's aunt Omvati (PW-1) lodged report and the Investigating Officer registered First Information Report after recording her statement (Ex.PW-1/A) on 18.09.2000. 'X' was taken for medical examination. The accused was arrested and medically examined. Statements of the witnesses conversant with the facts were recorded. 'X' recorded her statement under Section 164 Cr.P.C. Exhibits were sent for examination to Forensic Science Laboratory. After completion of investigation, a charge-sheet was filed against the appellant in the Court for commission of the aforesaid offences. The prosecution examined sixteen witnesses to establish appellant's involvement in the crime. In 313 Cr.P.C. statement, the appellant denied complicity in the crime and pleaded false implication. The trial resulted in his conviction. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. Crucial testimony to infer the appellant's guilt is that of the prosecutrix 'X' aged around eight years. PW-1 (Omvati), her aunt, came to know about the incident on 16.09.2000 itself. Since X's parents were

not available at home due to their presence in the hospital for treatment of their son, PW-1 (Omvati) reported the incident to the police of Police Station Sarita Vihar on 17.09.2000. She was informed that the 'area' where the occurrence took place did not fall within their jurisdiction and the complaint was to be lodged at Police Station Badarpur. Omvati, thereafter, took 'X' to lodge complaint at Police Station Badarpur on 18.09.2000. The Investigating Officer registered the FIR after recording Omvati's statement (Ex.PW-1/A). In her statement, the complainant gave detailed account as to how and under what circumstances, the appellant had sexually assaulted 'X' after putting her in fear on various occasions. In her statement under Section 164 Cr.P.C. (Ex.PW-2/B), 'X' gave vivid description about the crime committed by the old man to whom she addressed 'Tau ji'. The accused taking advantage of the absence of X's parents and finding her alone in the house committed sexual intercourse with her. She was threatened not to disclose the incident or else she would be killed by a knife. In her Court statement as PW-6, she implicated the appellant for the crime. She deposed that on the day of occurrence when her parents had gone to hospital to get her younger brother medically examined, she was sleeping on the roof alone. At about 9 or 10 p.m. it was dark due to electricity break-down. The accused came at the spot, opened

the nara of her salwar and put his 'organ' used for passing urine into the place where she passed urine. She started weeping. Thereafter, the accused left the spot after bolting the door from outside. When her cousin Sangita arrived after some time and enquired as to why she was weeping, due to fear, she did not tell anything to her. Subsequently, she went to her aunt's house and narrated the whole incident to her. She further disclosed that the accused had committed similar act earlier also once or twice. In the cross-examination, she elaborated that the previous incident had taken place about 25 days before at about 08.00 P.M. On the second occasion at about 09.00 P.M., the accused had come in the bathroom where she was taking bath and did the same thing. Her parents were away at their shop on both the occasions. She fairly admitted that the said incident was not disclosed by her to her parents. She further deposed that accused used to call her by making a sign with hand. She denied if the statement was tutored by her father or that no such incident had taken place.

4. Analysing the statement of the child witness, it reveals that no vital infirmities could be elicited in her cross-examination. Material facts, stated by 'X' in examination-in-chief, remained unchallenged and uncontroverted. No extraneous motive was assigned to the little child to make false allegations against the appellant. Her testimony is consistent

throughout. She has not deviated from her previous version recorded under Section 164 Cr.P.C. No compelling valid reasons exist to suspect reliability of her statement. She did not have strong motive to falsely implicate the appellant. Unless such an incident had really been happened, 'X' a little child of tender age around eight years would be highly reluctant to make such serious allegations of rape in the absence of any prior animosity against an old man who lived in the neighbourhood.

5. PW-1 (Omvati), who had the responsibility to take care of the child in the absence of her parents came to know about the incident on 16.09.2000. She waited for X's parents to return from the hospital to lodge report. When they were unable to come, she took 'X' on 17.09.2000 to Police Station Sarita Vihar where she was told that the 'area' did not fall within their jurisdiction. She was directed to approach the police of Police Station Badarpur. Without wasting further time on 18.09.2000, she lodged the report with the Police Station Badarpur. Apparently, there was no inordinate delay in lodging the report. The delay, if any, has been duly explained and there are no reasons to take adverse view on that account. In the cross-examination, she elaborated as to how 'X' was ravished on various occasions by the appellant as disclosed to her. She had no ulterior motive to falsely implicate the accused in the absence of any previous ill-

will or enmity. PW-4 (Kamlesh) and PW-5 (Shiv Kumar), X's parents have also corroborated her version on relevant facts. X's statement has been corroborated by FSL reports (Ex.PW-14/A and Ex.PW-14/B). Semen stains of 'AB' group were found on Ex.3a (salwar) and Ex.3b (jhampar of the prosecutrix). It is true that in the FSL report blood on Ex.2 i.e. gauze cloth piece was determined to be of 'B' Group. The Trial Court has dealt in detail this discrepancy and declined to place reliance on the expert report given by Mr.A.K.Srivastava whose report in another case '*State vs. Gurbachan Singh*', FIR No.863/2000 under Sections 366/376 IPC PS Hauz Khas, Sessions Case No.63/2001 decided on 25.07.2003 by the learned Addl. Sessions Judge was dis-believed in similar circumstances.

6. Undoubtedly, when 'X' was medically examined by MLC (Ex.PW-9/A), no external or internal injuries were found on her body and her hymen was intact. The alleged history recorded therein, however, reveals that sexual assault was committed 2 to 3 times by a neighbour, an old man, who lived near her house.

7. Settled legal preposition is that absence of injuries on the body of the prosecutrix does not give rise to an inference that she was consenting party to coitus. Absence of injury or mark of violence on the

private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on her part. Absence of violence or stiff resistance may as well suggest helpless surrender to the inevitable due to sheer timidity. In the instant case, the victim was a child aged about 8 or 9 years. Due to fear, no resistance was put by her to the nefarious act committed by the accused. Even her consent was immaterial as she was below 16 years of age on the day of occurrence. The appellant was held in high esteem by 'X'; she was not physical capable to put up stiff resistance, the accused being aged about 60 years. The young girl became victim of lust of the accused and yielded to sexual intercourse to a man who was like her grandfather.

8. It is true that as per medical examination, hymen of the victim was found intact. Again, to constitute the offence of rape neither Section 375 IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim / prosecutrix. In other words, 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 slightest penetration of the male organ within the labia majora or

the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375/376 IPC. It is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact (*Radhakrishna Nagesh vs. State of Andhra Pradesh*, 2012 (12) SCALE 506). In *Ranjit Hazarika vs. State of Assam* (1998) 8 SCC, the Apex Court has observed that merely because there were no injuries on the person of the victim and the hymen was intact, does not lead to a corollary that there was no coitus.

9. Indisputably, the findings of guilt in a case of rape can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix cannot be rejected on the basis of minor discrepancies or contradictions. In the case of *State of Punjab vs. Gurmit Singh and others*, 1996 CrL.L.J. 1728, Supreme Court made the following weighty observations in respect of the evidence of the victim of sexual assault :

“The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self respecting woman would come forward in a court just to make a humiliating” statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to

great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.”

10. In ‘*State vs. Saravanan and anr.*’, AIR 2009 SC 152, while dealing with a similar issue, Supreme Court observed :

“....while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon appreciation of evidence forms an opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. Difference in some

minor detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies.”

11. In 313 Cr.P.C. statement, the appellant did not give plausible explanation to the incriminating circumstances appearing against him. He did not produce any evidence to show if there was any prior enmity with him prompting X's parents to falsely implicate him in the instant case. It has rather come on record that 'X' due to fear or otherwise did not even report the previous sexual assaults committed by the accused.

12. The Trial Court judgment is based upon fair appraisal of the evidence and requires no intervention. The perpetrator of crime was aged about sixty years and the victim was about eight years old. She did not understand the consequences of physical relations. The appellant exploiting her innocence ravished her on various occasions taking undue advantage of the trust reposed by the child in him at the time when her parents were away in the hospital for the treatment of their ailing child. The appellant deserves no leniency.

13. The appeal lacks merit and is dismissed.

14. The appellant shall surrender before the Trial Court on 14th May, 2015 to serve out the remaining period of sentence awarded to him.

15. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

MAY 07, 2015 / tr