

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

% *Judgment reserved on :20.07.2015.*
Judgment delivered on :27.07.2015

+ CRL.A. 605/2010

BHAGWAN DAS @ CHOKANNI Appellant

Through Ms.Anu Narula, Advocate.

versus

STATE Respondent

Through Mr.O.P.Saxena, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order on sentence dated 11.08.2009 and 18.08.2009 respectively wherein the appellant stood convicted under Sections 365/376 (2)(f) of the IPC. He had been sentenced to undergo RI for a period of five years for the offence under Section 365 of the IPC. For his second conviction under Section 376 (2)(f) of the IPC, he had been sentenced to undergo RI for a period of ten years. The sentences were to run concurrently. Benefit of Section 428 of the Cr.PC had been granted to the appellant.

2 The version of the prosecution was unfolded in the complaint made by the father of the victim namely Manikam. He was examined as PW-4. He has stated that on 27.02.2008 at about 05:30 am when he had woken up, he saw his daughter ‘P’ (aged about five years) was in a bad condition. She was complaining of pain in her private parts. He told his wife. Their daughter ‘P’ informed them that somebody had committed a “galat kaam” upon her. The matter was not reported to the police. Thereafter when PW-4 learnt that the appellant (Bhagwan Dass) had been arrested in another rape case; it dawned in the mind of the complainant that he was probably the same person who had committed “galat kaam” upon his daughter as well. Complaint was accordingly lodged.

3 The date of the incident was 27.02.2008. The complaint was lodged on 21.03.2008 pursuant to which the present proceedings were initiated. Apart from the statement of the father of the victim, the mother of the victim Aarai was examined as PW-3. She had also deposed on the same lines as her husband (PW-4). The child victim aged about 5-6 years was examined as PW-1. Her statement under Section 164 of the

Cr.PC had also been recorded. The victim was of a tamil nationality. She could not understand the local dialect i.e. either Hindi or English. Accordingly, an interpreter had been produced K. Raja (PW-5) to interpret the testimony of the child witness. This was qua her version on oath in Court as well. He was also the same interpreter who was present before the MM on 17.04.2008 at the time when the statement of the victim was recorded under Section 164 of the Cr.PC (Ex.PW-5/A).

4 In Ex.PW-5/A, she had deposed that one day when she was sleeping along with her dadi, the appellant Bhagwan Dass took her to a nala, where near the ghat he had committed a wrong act upon her; he had touched her private part. She was hurt; her underwear had been taken off. This was also the version of the victim on oath before the learned MM. She was examined in Court on 01.10.2008 i.e. after a gap of almost six months. After preliminary round of questions, she had deposed that the appellant Bhagwan Dass had done something bad with her after taking her from her house to the nala. The Court had noted the demeanour of the witness; she had started weeping. She had identified the appellant. In her cross-examination, she stated that she had seen the

appellant once; he was not a regular visitor. She had not seen blood in her private part. She denied the suggestion that she is making a false statement at the behest of her parents.

5 The medical evidence had supported the version of the prosecution. The victim was examined by Dr. Rupali Goyal (PW-11). Her MLC has been proved as Ex.PW-11/A. This revealed that the structure from the hymen to the vagina till the anus was torn. Thus the version of the prosecution that an untoward act of rape had been committed upon the victim was largely established.

6 It is also the version of the prosecution that this untoward incident had occurred on 27.02.2008. The matter had not been reported till 21.03.2008. This was after a gap of three weeks. The version of PW-4 (the complainant) on this count was that he had not reported the matter earlier and only when he learnt that the appellant (Bhagwan Dass-unknown) had been arrested in another FIR relating to a rape case in the vicinity that he had thought that this dastardly act had been committed by the appellant upon his daughter as well. This had led to the criminal law into motion.

7 It would be relevant to note that the disclosure statement of the appellant in the other FIR i.e. FIR No.62/2008 was recorded by the said investigating officer (SI Sushil Kumar) (PW-8). The appellant had made a disclosure statement therein (Ex. PW2/A) in which he had disclosed that 20 days back, he had kidnapped one girl from the jhuggi and committed rape upon her in an Ambassador Car No. DL-2C-M-0495 and thereafter the girl was left near the pulia, ganda nala. It was this disclosure statement (Ex.PW-2/A) which at the cost of repetition was relied upon by the trial Judge to initiate the prosecution against the appellant. The law on a disclosure statement is clear. A disclosure statement/confession made by an accused while he was in custody is inadmissible in evidence. The bar is clearly contained in Sections 24 & 25 of the Indian Evidence Act. To the limited extent, this ban is lifted for the limited purpose as contained in Section 27 of the said Act. Where a recovery has been effected or a discovery of the fact has been made pursuant to the disclosure statement of the accused only that part of the statement is admissible. In the instant case, there is no recovery or discovery of a fact. The disclosure statement (Ex.PW-2/A) was wrongly relied upon by the trial Judge. In the absence of this piece of

(inadmissible) evidence the prosecution in the instant case could not be initiated. Moreover, in the disclosure statement (Ex.PW-2/A), the appellant had stated that he had kidnapped the girl from the jhuggis and the act of rape had been committed upon the victim in the Ambassador car and thereafter he had left the girl near the pulia, ganda nala. This did not match the version of the victim (PW-1). PW-1 both in her statement under Section 164 of the Cr.PC as also on oath in Court had stated that when she was sleeping along with her dadi, the appellant had taken her from her jhuggi; he had taken her near the ghat where the alleged act of rape had been committed upon her. She had not whispered a word about the Ambassador car.

8 There are clear contradictions in this version of the prosecution. This Court notes with pain that the identity of the appellant has been fixed only upon the version of the victim. Admittedly, the appellant was not known to the victim. This is an admitted position. The victim was a five years old child. The incident had occurred three weeks prior to the date before it was reported; the incident having being occurred on 27.02.2008 and the report having been lodged by her father on

21.03.2008. An application for conducting TIP on 25.04.2008 had been moved by the Investigating Officer on 25.04.2008. This has come in the version of Shri Ajay Gupta, the learned MM (PW-10). The proceedings of the TIP have been proved as Ex.PW-10/C. The accused had refused to join TIP on 26.04.2008. A suggestion has been given to PW-10 that the reasons have not been explained by the accused for his refusal to join TIP. It had also been suggested to him that the accused had not appeared in the TIP as his photograph had been shown to the witness.

9 This Court also cannot overlook the fact that the child victim was of tender age of 5 years. Her testimony had to be examined with the greatest scrutiny. In this context the observations of the Supreme Court in AIR 2008 SC 1460 Nivrutti Pandurang Kokate and Others Vs. State of Maharashtra are relevant. They read as under:-

“The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that

his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness”

10 In this background, the witness who was not known to the appellant and the crime having been committed three weeks prior to the date of the registration of the FIR and the victim identifying the accused for the first time in Court (in the dock), a doubt is cast about the identity of the appellant. The testimony of the victim also did not match the version set up by the prosecution and as contained in the disclosure statement of the appellant (Ex.PW2/A).

11 The trial Judge has noted that there was no reason for the false implication of the accused. That by itself may not be sufficient to nail the accused. Rule of criminal jurisprudence being clear that it is for the prosecution to stand on its own legs and cannot take advantage of the weaknesses of the defence. This Court also notes that the child was not

familiar with the Hindi or English dialect. She was knowing only tamil. She was accompanied by an interpreter both at the time when her statement under Section 164 of the Cr.PC was recorded as also in her statement on oath in Court; the interpreter was the same on both the occasions. Both her versions also appear to be identical possibility of the tutoring of the child witness cannot be ruled out. The implication of the accused in fact starts from his disclosure statement made in another FIR (FIR No.62/2008). As noted supra, this disclosure statement without any recovery or discovery of a fact could not have been read against the appellant. That apart, what had been stated by the appellant in this disclosure statement did not match the version of the victim.

12 The conscience of this Court is not inclined to nail the appellant for an act which he may not have committed. There is no doubt that an unfortunate incident had taken place qua the victim. She has suffered an acute physical, psychological and emotional trauma which cannot be compensated but the conscience of this Court also does not permit it to sentence a man for an offence which he may not have committed. The

dents created in the version of the prosecution are glaring. Benefit of this must accrue in favour of the appellant.

13 Appeal is allowed. Appellant be released forthwith, if not required in any other case.

INDERMEET KAUR, J

JULY 27, 2015
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