

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

% *Judgment reserved on : 16.07.2015.*
Judgment delivered on : 21.07.2015.

+ CRL.A. 677/2011

DINESH YADAV

..... Appellant

Through Ms.Anu Narula, Advocate.

versus

STATE (NCT OF DELHI)

..... Respondent

Through Ms.Kusum Dhalla, 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 of sentence dated 21.04.2011 and 30.04.2011 respectively wherein the appellant stood convicted under Sections 376 (2)(f)/506-II read with Section 109/34 of the IPC. He had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.25,000/- for the offence under

Section 376 (2)(f) read with Section 506-II of the IPC and in default of payment of fine to undergo SI for a period of three months. For the offence under Section 354 of the IPC, he had been sentenced to undergo RI for a period of two 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 is that the victim Kumari Á'(PW-6) was raped by her step father i.e. the appellant Dinesh Yadav. This was on the intervening night of 12-13/06/2009. Prior to this incident also, her father had on 2-3 occasions committed rape upon her. She had complained about the same to her mother Bhagwati Devi. When Bhagwati Devi accosted her husband, he beat her and threatened to kill her other siblings. On the fateful night, when the mother of the prosecutrix was away, the appellant again committed this dastardly act upon her. FIR was registered on the complaint made by the complainant.

3 The prosecution in support of its case has examined 15 witnesses of whom the victim was examined as PW-6. Her neighbor Harish Chander was examined as PW-13. The medical evidence evidencing that the hymen of the victim was torn was on the basis of the MLC of the victim conducted by Dr. Meenu Vashisht (PW-7). It was proved as

Ex.PW-4/B. The seized exhibits which included the vaginal smear of the victim had been sent for an analysis. The CFSL report Ex PW-8/A was proved through Dr. Rajendra Kumar, Assistant Director of the CFSL (PW-8). The age of the victim was proved through the Principal of Government Girls Senior Secondary School Dr. Anita Vats (PW-5) who had brought the relevant record evidencing that the victim was born on 02.02.1994 meaning thereby that on the date of the offence, she was approximately 15 years and 10 months old. The Investigating Officer WSI Susheela was examined as PW-12. The second Investigating Officer SI Daya Nand through whom the challan was filed was examined as PW-15.

4 Apart from the appellant, the mother of the victim Bhagwati Devi was also made an accused.

5 In the statement of the appellant recorded under Section 313 of the Cr.PC, he had pleaded innocence. He stated that the prosecutrix was in love with Harish (PW-13) and on the fateful night, he had seen both of them together and this was the reason for his false implication.

6 The second accused namely Bhagwati Devi has since been acquitted.

7 No evidence was led in defence.

8 On behalf of the appellant, arguments have been addressed in detail by Ms. Anu Narula, the learned amicus-curiae. It is pointed out that the rule of criminal jurisprudence is clear. The prosecution has to stand on its own legs to prove its case to the hilt. It must be proved beyond reasonable doubt. On the other hand, the accused to get the benefit of doubt from the Court has to merely create a dent in the version of the prosecution. He does not have to follow the strict rule of proof beyond reasonable doubt. If the appellant is able to show that the version of the prosecution is suspicious and suffers from infirmities, that by itself would be sufficient to entitle the accused to a benefit of doubt.

9 This proposition of law is undisputed. We shall test the version of the witnesses of the prosecution and the arguments propounded by the respective parties on the anvil of this proposition.

10 The star witness of the prosecution was the prosecutrix herself. She was examined as PW-6. She has deposed that she was born on 02.02.1994. At the time of incident, she was studying in the 10th class in the MCD school, K-Block, Jahangir Puri. The appellant is her step father. Bhagwati Devi is her real mother. Her father had expired when

she was 4-5 years old and her mother got remarried to Dinesh Yadav. She has four step sisters and one step brother from the marriage of her mother with her step father. PW-6 has further deposed that ever since she was 10-12 years old, her father used to forcibly make physical relations with her despite her opposition and against her consent. He had made physical relations with her on 2-3 occasions prior to this incident. PW-6 had informed her mother about the same. When her mother accosted her father, her step father beat her mother and threatened to kill her other siblings. On one occasion, the appellant had broken the hand of her mother. The appellant had committed rape upon the victim in June, 2009. She told her mother about this. Her mother was beaten and threatened. Her mother left for her mama's house in the village. Her father also went to the village. After one week, when her father returned on the intervening night of 12-13.06.2009 at about 12:00-12:30 PM, the victim prepared food for her father and when she was going to sleep, her father pulled her chunni and 'zabardasti' committed rape upon her. She raised alarm. Her brother and sisters who were sleeping in the same room woke up. Neighbours also woke up. She called one of her neighbours whom she called Harish bhai (PW-13). She narrated the

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incident to him. She was advised to go to the police station. In the evening, an aunty by the name of Sangeeta and Harish bhai took her to the police station where the present case was registered. Her statement under Section 161 of the Cr.PC was recorded. She was medically examined. In her cross-examination, she admitted that whenever she told her mother about the acts of her father, her mother used to object; her father used to beat her mother; her father used to do the business of thekedari; her father often used to take alcohol. Her mother had opened a tea stall and she was running the household from the earning of the tea stall. She did not know how much money her father has deposited in her account or how many Indira Vikas Patras, he had taken in her name. She admitted that Harish bhai was living in the same vicinity and her father was working in vegetable mandi. The house of Harish is in the gali next to her gali. On the fateful night, Harish was present at his house. On hearing her cries, several persons came out and collected. There are eight rooms in the same building which are occupied by the different tenants and everybody had come out. She does not remember the name of the persons who had collected but aunty Sangeeta was there. She admitted that her father had come to the room, her brother and sisters

were also present there. She admitted that Harish used to come to the house even in the absence of her parents; he was her muhn bola bhai. She denied the suggestion that she was having physical relations with Harish which was objected by him and on the date of the incident, her father had seen her with Harish and had objected pursuant to which this false case has been registered.

11 No other public witness (except one) has been examined. Auntie Sangeeta was not a witness of the prosecution. The mother of the victim was arrayed as an accused.

12 The other public witness who was examined was Harish Chander. He was examined as PW-13. He has deposed that he knew the victim and that she used to reside in the neighbourhood with her parents since the last three years. She used to tie rakhi to him and he regarded her as his sister. He recognized Dinesh Yadav but he did not know that he was the step father of the victim. He admitted that on the fateful day, he was present at his house and in the late night, he had seen 2-3 persons were passing. He met the victim (PW-6) who told her that a quarrel had taken place with the neighbours. She was advised to sleep. Next evening, he took PW-6 to the police station. Since his mother was ill in the village,

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after leaving the victim in the police station, he returned back. He was permitted to be cross-examined by the learned public prosecutor as he was not spelling out his version correctly. In his cross-examination, he admitted that on the fateful day at about 12:00-12:30 pm, when she saw the crowd outside the house of PW-6, he went there; he found PW-6 present there and she told him that her step father had reached home at late night and had committed rape upon her. PW-13 had tried to console PW-6. PW-6 told him that even 10-15 days prior to the date of incident, the accused had committed rape upon her. She had told her mother but her mother was threatened by the accused and fed up with this situation, she had gone to the village. He admitted that the appellant had also left and was not available in the area and it was only in the intervening night of 12-13.06.2009 that he had returned.

13 In his cross-examination, he stated that when he had seen PW-6, she was not perturbed or scared. She appeared to be normal. He admitted that prior to this incident, the victim had never told about any objectionable act by her step father. PW-6 had no problem with her mother. He admitted that there was a distance of about 300 square yards from his house to that of the victim. He heard the alarm raised from the

house of the victim which was visible from his house. He denied the suggestion that he was having an affair with PW-6 and when the appellant had seen him with the prosecutrix, these false allegations have been made.

14 A scrutiny and perusal of the testimonies of these two witnesses i.e. PW-6 & PW-13 shows that there are clear contradictions between them. PW-13 was vacillating. He was blowing hot and cold. He did not even know that the appellant was the step father of the victim when admittedly he was living in the house just 300 square yards from the house of the victim since the last three years. In one part of his deposition, he stated that the victim had told him that 10-15 days prior to the date of the incident, the appellant committed rape upon her but in the later part of his deposition, he had stated that prior to this incident, the victim had never told to him about any objectionable act on the part of her father. She had no problem with her mother. PW-13 also admitted that the mother of the victim was not in the house at that time; she had gone to the village. The appellant had also gone to the village and it was only on the fateful night that he had returned. He had denied the suggestion that he was having a love affair with PW-6 and when the

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appellant had seen them on the fateful day together, because of this he has been falsely implicated.

15 Testimony of PW-6 has also been perused. As per her version, her mother had got married to the appellant sometime in the year 1999. This incident is of 2009 meaning thereby that the appellant was married to the mother of the victim since the last 10 years. She had four step sisters and one step father. They were all sleeping in the same room when the incident had occurred. This has been categorically admitted by PW-6 who had stated that when the offence of rape was committed upon her, her brother and sisters were sleeping in the same room. It would be difficult to imagine that five other children sleeping in the room and the appellant was trying to commit an untoward act in such a scenario. That apart, the victim in one part of her version had stated that prior to this incident, on 2-3 occasions earlier also, the appellant had committed rape upon her. She had not spelt out those dates. She had however complained to her mother and her mother was beaten by her father when she accosted him of the same. Her further version is that there are eight rooms in the same building and on hearing her cries, all the neighbours had gathered there. Harish had also come there on hearing her cries.

Matter was thereafter reported to the police. The incident had occurred at 12:00-12:30 midnight. Incident had been reported on the following day at 04:45 pm. Harish had accompanied her to the police station for making a complaint. Her mother was not in the house at the time when complaint was made. Harish was admittedly a person who used to frequent visit the house of PW-6. He even used to come to her room in the absence of her parents.

16 This Court notes that the victim is at the age of puberty i.e. almost 16 years on the date of the incident. Harish was about 18 years on the date of the incident. Admittedly both, the victim and Harish were known to each other. The fact that they were on friendly term is fortified by the admission of PW-6 who admits that Harish who was her immediate neighbor used to come to her house frequently and sometime in the absence of her parents, he used to visit her room.

17 The defence of the appellant all along has been that he has been falsely implicated because he had seen his daughter and Harish in an intimate position on the fateful night, he has been falsely embroiled for this reason and this is at the behest of Harish. This line of defence has been adopted by the accused right from its inception. It is not an

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afterthought. The learned defence counsel has given suggestions to both PW-6 and PW-13 on this count. Even in the statement of the appellant recorded under Section 313 of the Cr.PC, this is the same line of defence.

18 The mother of the victim was arrayed as an accused. She was Bhagwati Devi. In her statement recorded under Section 313 of the Cr.PC, on one point, she had stated that her daughter used to tell her about the illegal acts of her husband and when she accosted him she was beaten. However in the last question put to Bhagwati Devi, she had stated that the victim had never told her about any untoward act committed upon her by her father. Bhagwati Devi was in the village at the time of the incident. She had left her house around one week ago. The incident had occurred at the intervening night of 12-13.06.2009 and as per the prosecution, Bhagwati Devi had gone to her village sometime in the first week of June. Her husband had also followed her to the village. This is also an admitted fact. It is also an admitted fact that the appellant had returned to the house only on the fateful day.

19 The defence of the accused that he had seen Harish (PW-13) and his daughter (PW-6) together on the fateful night which had sparked out

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of this incident cannot wholly be ruled out. Had it been true that the appellant had committed such act upon the victim on the earlier occasions also, the victim would have made a complaint. On this score, the mother is also vacillating. In one part of her statement recorded under Section 313 of the Cr.PC, she had stated that her daughter had not disclosed to her at any point of time prior to this incident about untoward act by her father whereas in another part of her statement, she had stated that her daughter had disclosed her and when she accosted, her husband had beaten her. Testimony of PW-13 on this score has also been discussed supra. At one point of time, PW-6 had disclosed to him that prior also, her father used to commit untoward act upon her but in the later part of his deposition, no such narration had been given by PW-6 to him.

20 It is also difficult to believe that PW-6 who had remained in the same house for the last 10 years and if rape was being committed upon her, three years prior to the date of the incident (which is her version in her statement recorded under Section 164 of the Cr.PC and which is not in her deposition on oath in Court) in June, 2009 even in the absence of her mother, on her own, she reported the incident to the police. If she

had courage to do so in June, 2009, even when these incidents were continuous for three years prior in time, she could have reported the matter earlier also. Moreover, the version of PW-6 in her statement under Section 161 of the Cr.PC that three years ago also, her father had committed rape upon her was not a part of her version on oath in Court. PW-6 was making vital improvements. It is again difficult to believe that this act of rape was committed by her father upon her while her four other siblings were sleeping in the same room. On her raising alarm, several neighbours who had come there on hearing her cries but none of them have been examined. Only Harish (PW-13) was examined. He was wholly confused in the beginning and only after he was cross-examined by the public prosecutor, he had come out with truth. However his version in his examination-in-chief was contrary to his version in his cross. There was conflicting statements as to whether the prosecutrix had told him about the earlier incident of rape having been committed upon her by her father or not.

21 The accumulation of this evidence creates a suspicion in the mind of the Court.

22 On this score, the medical evidence is also relevant. PW-6's MLC

has disclosed no injury. Hymen was torn. In the history chart, the patient had disclosed that there was sexual assault upon her since the last four years by her step father. As discussed supra, in her statement recorded under Section 164 of the Cr.PC, she had stated that this was going on since the last three years. On oath, this was not the version. It was that on earlier dates also, 2-3 times the appellant had committed wrong act upon her. She had disclosed it to her mother and also to Harish. In another part of her evidence, PW-6 has stated that she had not disclosed these facts to her mother. The mother who was arrayed as an accused had also given different versions in her explanation under Section 313 of the Cr.PC.

23 Testimony of PW-6 does not inspire confidence. It would be difficult for the conscience of this Court to endorse the conviction of the accused on this version of the prosecutrix which is wholly contrary to the testimony of PW-13 and the explanation tendered by her mother.

24 It is no doubt true that in such heinous offences, the evidence of the prosecutrix has to be predominantly considered and if cogent and credible without any other evidence, it may be sufficient to convict an accused. However, each case has to be dealt with in its own factual

matrix.

25 The Apex Court in (2009) 15 SCC 566 Tameesuddin @ Tammu Vs. State of NCT of Delhi, in this context had observed as under:-

“It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that story is indeed improbable”

26 The prosecution in this case has failed to prove its case to the hilt. Defence has been able to dent the version of the prosecution and the possibility that the appellant having found his step daughter in an uncomfortable position with Harish had led her to implicate him is a large probability which cannot be ruled out.

27 Accused is entitled to a benefit of doubt. He is accordingly acquitted. He be released forthwith, if not required in any other case.

28 Appeal is allowed.

INDERMEET KAUR, J

JULY 21, 2015

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