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

% *Judgment reserved on :29.07.2015*
Judgment delivered on : 04.08.2015

+ CRL.A. 842/2012

VIPIN ALIAS BIPIN SINGH Appellant
Through Mr.Pramod Kumar Dubey,
Ms.Pinky Dubey, Mr.Shiv
Chopra, Ms.Megha Chopra and
Mohd.Imran, Advocates.

versus

STATE Respondent
Through Mr.O.P.Saxena, APP.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order on sentence dated 28.02.2012 and 19.03.2012 respectively wherein the appellant stood convicted under Sections 363/366/376 (2)(g) of the IPC. For his first conviction, he had been sentenced to undergo RI for a period of four years and to pay a fine of Rs.2,000/- and in default of payment of fine to undergo SI for a period of two months. For his second conviction, he had been sentenced to undergo RI for a period of 7 years and to pay a fine of Rs.2,000/- and in default of payment of fine

to undergo SI for 2 months. For his conviction under Section 376(2)(g) of the IPC, he had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.2,000/- and in default of payment of fine to undergo SI for a period of two months. He had also been convicted for the offence under Section 506 of the IPC for which a sentence of RI one year had been imposed. 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 Akeel Ahmad the father of the victim (PW-9). He had lodged a missing report on 07.05.2009 at PS Ambedkar Nagar which was to the effect that two of his minor daughters were missing from the house. On inquiry, it was learnt that the accused along with his brother-in-law and another had taken his daughters to Khanpur and then to Farukhabad. The girls were recovered from Farukhabad on 09.05.2009. Their statements under Section 164 of the Cr.PC were recorded by the learned MM on 12.05.2009. The statement of the elder victim aged around 14 years 'R' (PW-11) revealed that in the afternoon of 06.05.2009 when she was in the company of her younger sister 'F' (PW-12), the accused Vipin pushed them into an Alto car; their mouth was closed. He was

accompanied by another boy i.e. his brother-in-law. They were taken in a bus to Farukhabad. They kept them confined in a room on the ground floor. Her sister was given an intoxicating substance in a glass of water. At night three persons i.e. the accused, his brother-in-law and his younger brother (whom she could recognize) committed rape upon her.

3 On the same day, the statement of her younger sister (Ex.PW-4/B) was also recorded by the learned MM which was largely on the same lines. Both the minor girls were medically examined by Dr. Mukta Aggarwal (PW-1). The MLC of the elder victim was proved as Ex.PW-1/C. Hymen of the victim was ruptured. It was noted that there was positive evidence of sexual contact. The MLC of the younger sister (PW-12) was proved as Ex.PW-1/A. Her hymen was also found ruptured. The accused was medically examined by Dr. Manish Goel (PW-8) who had opined that there was nothing to suggest that the accused was not capable of performing the sexual act.

4 SI Liyakat Ali (PW-6) had recorded the missing report of the two minor daughters of Akeel Ahmad which had been proved as Ex.PW-14/A. Investigation was carried out by ASI Shri Krishan (PW-13). He had gone to Farukhabad from where the girls were recovered and where

the accused Vipin was also found present.

5 On the basis of the aforementioned evidence collected by the prosecution, the accused was nailed and sentenced as aforementioned.

6 On behalf of the appellant it is pointed out by the learned amicus-curiae that there were inherent contradictions in the version of the prosecution. The contradictions qua the version of the victims in their statements recorded under Section 164 of the Cr.PC qua their versions on oath have been highlighted. It is pointed out that there was no injury noted upon either of the victims. The doctor in the MLC had noted that the patient had changed her undergarments and as such the opinion given by the doctor could not be relied upon. The statements of the prosecutrix's were recorded on 12.05.2009 whereas the FIR had been registered on 10.05.2009. There were improvements in this version. The time of arrest in the arrest memo of the accused has not been mentioned. The non-examination of the neighbor of the locality where the accused was living also creates a doubt in the version of the prosecution. Semen was also not detected in the FSL report. All these factors entitle the appellant to a benefit of doubt. To support this submission, learned counsel for the appellant has placed reliance upon the judgment reported

as (2011) 7 SCC 130 Krishan Kumar Malik Vs. State of Haryana.

Submission being that where there are serious contradictions in the version of the victim, benefit of doubt must accrue to the accused. It is pointed out that after the incorporation of Section 53-A of the Cr.PC which is w.e.f 23.06.2006 in all cases of gang rape (as is in the present case), a DNA test is a mandate and in the absence of which, it cannot be said that the prosecution has been able to prove its case. On all counts, benefit of doubt must accrue in favour of the appellant.

7 Needless to state that these arguments have been refuted. It is pointed out that the version of the prosecution is fully contained; the testimony of PW-11 and PW-12 is cogent and credible; the medical evidence also supports the stand of the prosecution that PW-11 had been subjected to rape. The accused was also known to the victims. There was no reason for false implication of the accused.

8 Arguments have been heard. Record has been perused.

9 The complaint was lodged by PW-9, the father of the two victims namely PW-11 and PW-12. He had lodged a missing report on 07.05.2009 which was to the effect that his daughters were missing from the house. This was vide DD No. 6-A. His daughters were minors. The

elder one was aged 14-15 years and younger one between the age bracket of 8-9 years. On inquiry from the locality, it was learnt that Vipin (the accused), his brother-in-law and his brother had taken his daughters to Khanpur and thereafter to Farukhabad. The police party was informed. On reaching Farukhabad, his daughters were recovered. They were in the company of Vipin.

10 In his cross-examination, he had stuck to his stand. He admitted that the accused was known to them and the police party had brought his daughters to Delhi; the accused was present at that time. He denied the suggestion that he is making a false statement.

11 The elder daughter of PW-9 was examined as PW-11. She was aged 15 years. She correctly identified the accused Vipin as the person who had taken her along with her sister. They were first taken to Khanpur where they were made to drink something in a glass of water and thereafter she was taken to Anand Vihar bus stop and then to Farukhabad. They were kept in the house of the mausi of the accused. The accused had compelled her to marry him but she had refused. She was served some stupefying substance. Her younger sister was sent outside. Thereafter, the accused, his brother-in-law and his brother had

committed rape upon her forcefully one by one. She had made noise. Police party came to Farukhabad along with her father. Initially she did not narrate the incident to anyone out of fear but thereafter she disclosed the incident to the Magistrate. Her statement was recorded before the learned MM which was proved as Ex.PW-2/A.

12 In her cross-examination, she admitted that she is illiterate and has studied up to 1st or the 2nd standard. The accused Vipin used to ply a tempo in their neighbourhood. Her sister was kept in a separate room in Farukhabad. She denied the suggestion that the accused had not taken her and her sister to Anand Vihar and then to Farukhabad. She denied the suggestion that the accused did not commit rape upon her along with his brother and brother-in-law.

13 The statement of the younger sister of PW-11 was also recorded in the Court. However oath was not administered to her as she was a young child. She was examined as PW-12. She has reiterated the version given by her sister. She along with her elder sister had gone to market on 06.05.2009 when the accused Vipin asked them to sit in a TSR and were taken to Khanpur and then to Farukhabad. Vipin compelled her sister to marry him but she had refused. Her sister told her that the three

persons had committed rape upon her.

14 In her cross-examination, she clarified that the alarm could not be raised as there was no person nearby at that point of time. She denied the suggestion that she and her sister had not been served any intoxicants pursuant to which rape had been committed upon her sister. She denied the suggestion that she is deposing falsely.

15 Apart from this ocular testimony, the medical evidence which has surfaced was the MLC of both the victim. PW-1 had examined PW-11 vide MLC Ex.PW-1/C. The hymen of the girl was ruptured and there was evidence of sexual assault. The history given by the victim as narrated to PW-1 was that the victim has been abducted and taken to Farukhabad. The victim had changed her undergarments.

16 Learned counsel for the appellant has drawn attention of this Court to the alleged contradictions made by PW-11 and PW-12 on oath in Court qua their version recorded under Section 164 of the Cr.PC. There is no doubt that in the statement of PW-11 recorded under Section 164 of the Cr.PC, she had stated that she was taken in an Alto car wherein in Court, she had mentioned that it was a TSR. On oath PW-11 had stated that the accused was pressing her to marry and she was made

to wear a sari at Farukhabad. This did not find mention in her statement recorded under Section 164 of the Cr.PC. However, this Court notes that this is not a contradiction but on oath in Court this was only an elaboration/detailed version given by the victim of the incident and in the manner in which it had occurred.

17 No contradiction qua the version of PW-12 has been highlighted by the learned defence counsel.

18 This Court notes with pain that the lives of two unfortunate minor girls have been effected. There was no enmity that their father had with any of the accused or their family. This is also not the defence of the accused. There was no reason whatsoever for the victims and their father to have implicated the accused. That apart, the versions of PW-11 and PW-12 are cogent and credible.

19 They have detailed the incident in the manner in which it had occurred. PW-11 and PW-12 had both been taken forcibly by Vipin in his vehicle to Khanpur and from where they were taken to Anand Vihar bus stop where PW-11 was made to wear a sari and then they were taken to Farukhabad where they were kept in the house of the mausi of the accused. They were accompanied by the brother-in-law and brother of

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the accused. The victim had refused to marry the accused. At night, the accused as also his brother and brother-in-law had committed rape upon PW-11. This has been the categorical version of PW-11 both in her statement recorded under Section 164 of the Cr.PC as also on oath in Court.

20 The gist of the evidence has clearly established this offence of gang rape. It is also unfortunate that two of the other accomplices i.e. the brother-in-law and brother of Vipin could not be traced and they were not arrested but the offence of gang rape as defined under Section 376 (2)(g) is clearly made out from this coherent version of PW-11. PW-11 has also explained that initially out of fear and shame, she did not disclose the incident to anyone but her MLC was recorded (11.05.2009) and thereafter when her statement under Section 164 of the Cr.PC was recorded by the learned MM (12.05.2009), the entire incident was disclosed. This is evident from the aforementioned documents.

21 The medical evidence also supports the version of the prosecution. The hymen of the victim was ruptured. She has had sexual contact. She was recovered from the house of Mausii of the accused at Farukhabad where the accused was also found present.

22 All the offences for which the accused has been convicted i.e. offence under Sections 363/366/376 (2)(g) and 506 of the IPC are clearly made out. It was under a criminal intimidation that the accused had kidnapped the minor victims and abducted them with the intention to commit a wrong upon them which he had done. The accused has no defence. In the entire cross-examination of the witnesses, the only suggestion given to the prosecution witnesses was that the accused has been falsely implicated at the behest of the Investigating Officer. What was the interest of the Investigating Officer has not been explained by the accused. Even in the statement of the accused recorded under Section 313 of the Cr.PC, he has not been able to project any defence. It is obviously for the reason that he has no defence.

23 The law of the testimony of a child witness is well settled. If upon the scrutiny of such a testimony, it is found to be cogent and credible, there is no rule of law which prohibits the Court from relying upon such a version. It must be a voluntary expression of what has transpired and the accurate impression of the same. Only as a matter of prudence and caution, the Court may require corroboration.

24 The Apex Court in this context in AIR 2010 SC 3071 State of
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U.P. v. Krishna Master and Ors., made the following observations which are relevant:-

“there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate the facts in his memory. A child is always receptive to abnormal events which take place in his life and would never forget those events for the rest of his life. The child may be able to recapitulate carefully and exactly when asked about the same in the future. In case the child explains the relevant events of the crime without improvements or embellishments, and the same inspire confidence of the Court, his deposition does not require any corroboration whatsoever. The child at a tender age is incapable of having any malice or ill will against any person. Therefore, there must be something on record to satisfy the Court that something had gone wrong between the date of incident and recording evidence of the child witness due to which the witness wanted to implicate the accused falsely in a case of a serious nature.”

25 In the instant case, testimonies of PW-11 and PW-12 coupled with the medical evidence collected by the prosecution establishes the fact that the accused is guilty of the offences for which he stands convicted. The minimum punishment prescribed for the offence of gang rape is 10 years. He has been awarded the minimum. This Court cannot interfere even in the sentence.

26 The judgment relied upon by the learned counsel for the appellant is wholly inapplicable. Section 53-A of the Cr.P C prescribes a DNA test as a facilitation for the prosecution to prove its case. In this case, the

Apex Court had observed that the testimony of the victim was full of contradictions; her medico legal evidence also did not support the prosecution; the absence of resort to the provisions of Section 53-A was considered in that context.

27 The impugned judgment in no manner calls for any interference. Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

AUGUST 04 , 2015

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