

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

% *Judgment Reserved On :May 19, 2016*
Judgment Delivered On :May 24, 2016

+ **CRL.A. 55/2015**

BEERBALI Appellant
Represented by: Mr.Azhar Qayum Butt, Advocate

versus

STATE Respondent
Represented by: Mr.Varun Goswami, APP
ASI Azad Kumar, PS Adarsh Nagar,
New Delhi

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

PRADEEP NANDRAJOG, J.

1. Not to disclose the identity of the victim, I shall be referring to her as : 'Sacred'. Accompanied by her mother Shakuntla PW-9, and W/Ct.Rekha PW-6, Sacred was brought to the casualty of Babu Jagjeevan Ram Memorial Hospital at 4.45 P.M. on July 29, 2012 where she was examined by Dr.Neha Bansal who wrote on the MLC Ex.PW-1/A that there was no injury on Sacred's body. She found everything normal. Nothing suggestive of a sexual assault or intercourse is recorded therein.
2. Sacred was referred for a gynaecological examination and Dr.Latika, Sr.Gynaecologist examined Sacred. On the MLC she recorded the following:-

"Per abdominal examination – Soft, non tender

Breast tanner stage 4.
Local examination – External genitalia healthy.
Public hair – tanner stage 4.
Introitus gaping.
Whitish mucoid discharge present
Per speculum examination – Mucoid discharge present.
Perineal erosion present.
Per vaginal examination – Uterine size not made out.”

3. W/Ct.Rekha was deputed to take Sacred to the hospital because Sacred's mother Shakuntla had made a call at the Police Control Room informing that the appellant had raped her daughter, which fact her daughter disclosed when she returned home.
4. Investigation was entrusted to SI Upkar Kaur PW-10 who went to Shakuntla's jhuggi accompanied by W/Ct.Rekha and entrusted Sacred's custody to W/Ct.Rekha for she to be medically examining in the presence of her mother Shakuntla. At the hospital SI Upkar Kaur took the clothes handed over by the doctor which Sacred was wearing when she was medically examined as also her blood sample and vaginal swab as recorded in the seizure memo Ex.PW-6/A. Sacred refused to make any statement to her. Shakuntla also refused to make any statement on the pretext that till father of Sacred returned home they would not make any statement.
5. The next day Sacred's statement Ex.PW-8/A was recorded and based thereon FIR Ex.PW-3/A for an offence of rape was registered with the appellant named as an accused.
6. Named as the accused, the appellant was arrested. His blood sample was taken. He was medically examined. MLC Ex.PX-5 records that there is nothing to suggest that the appellant is not capable of performing sex. The blood sample of the appellant, clothes of Sacred, her vaginal swab and her

blood sample was sent for forensic examination. Report Ex.PX is to the effect that no male DNA could be detected because of either inhibitors or samples degrading. The allelic data comparing the alleles generated from DNA of Beerbali and those from Ex.1a(i) and Ex.1m, which are the underwear and blood sample of Sacred, are recorded in the report as under:-

LOCI	1 (Prosecutrix) Exhibit '1a(i)' Allele Data		2 (Prosecutrix) Exhibit '1m(i)' Allele Data		3 (Accused) Exhibit '4' Allele Data	
D8S1179	10	13	11	15	10	13
D21S11	--	31.2	28.	28	--	31.2
D7S820	--	--	12	12	--	--
CSFIPO	--	--	11	11	--	--
D3S1358	15	16	16	16	15	16
THO1	6	7	8	9	6	7
D13S317	--	--	11	12	--	--
D16S539	--	--	11	11	--	--
D2S1338	--	--	21	25	--	--
D19S433	14	15	13	14.2	14	15
vWA	16	17	16	16	16	17
TPOX	--	--	8	11	--	--
D18S51	--	--	16	19	--	--
D5S818	12	12	10	13	12	12
FGA	--	--	20	23	--	--
AMELOG ENIN	X	Y	X	X	X	Y

7. Sacred was produced before a learned MM on July 31, 2012 who recorded her statement under Section 164 Cr.P.C.

8. In her deposition in Court Sacred maintained that she was raped by Beerbali. Being relevant for deciding Beerbali's fate statement of Sacred concerning the events which took place in her jhuggi are noted by me verbatim. The testimony reads as:-

“On 29th day of and month I do not remember, about one year before, I was present in our tenanted room. Accused Beerbali, who is present in the court today (correctly identified by the witness) came inside my room by kicking the door of the room and when I tried to raise alarm he had tied my hand and mouth with chunni and thereafter he had committed rape with me. Rape, I mean he had put off my clothes and put his urinating part in my urinating part. I could not raise loud voice as my mouth was tied down. Some uncle had listen my whispering and knocked the door. I do not know the name of the said uncle. On listening the knock of the door, accused put on his clothes and opened my hands and mouth and put on my clothes then Birbal had opened the door and said uncle came inside the room. I had narrated the entire incident to him (uncle) and said uncle had narrated the whole story to my mother, when she returned from her work place at about 1/1.30 P.M. My mother made a call to the police and police arrived there. Police has recorded my statement, same is Ex.PW8/A, and put my right thumb impression at point A. Police had also got conducted my medical examination from BJRM Hospital. Concerned doctor had also seized my underwear and sameej.”

9. Being relevant I also note her answers during cross-examination. They read:-

“My other brothers and sister used to go to school at the time of incident. My mother was in the business of

packaging in pettis different articles with some person, who is his employer. My father was residing far from us. It is correct that there were 7/8 other rooms adjoining to our room and residing other families in those rooms. When accused had kicked me at the time of incident, I raised alarm as “Bachao – Bachao”. Vol- thereafter accused had tied my mouth with chunni. My hands were tied with rope. Accused had run away with said chunni. Accused had opened my mouth after two hours, when one uncle came and opened the door. I did not raise noise when my mouth was opened, as I was not in complete consciousness. The said uncle tried to caught hold the accused but he ran away. When my mother arrived the said uncle was already present there. The said uncle was also present when police officials came there. My mouth and hands were tied very tightly and I was having pain in my hands and mouth. I received injuries on my mouth and hands and marks of tying came on my hands and mouth.”

10. She denied that she knew the accused who used to visit her house. She denied that on the day of the incident her mother caught the two talking and the case was false.

11. Shakuntla who appeared as PW-9 deposed that when she returned home at around 12.30 noon she saw her daughter crying and told that Beerbali had raped her. Therefore she informed the police. She deposed:-

“My daughter has stated about one uncle knocked the door immediately after the incident of rape and she can identify him, but she does not know his name of the said uncle. The said uncle was residing in the same premises, but he was not available after the incident, as he had gone to Bihar. My statement was also recorded in this regard by the police.”

12. During cross-examination she deposed:-

“ It is correct that, younger children were remained at home and they were taken care by my elder daughter in my

absence. It is correct that there are six/seven were also occupied by other persons. Accused used to have talking terms with us and he generally talk from outside our rooms. Only my daughter had narrated the whole incident, when I returned to my home. My daughter had shown me the clothes/rope like cloth to me, by which her hands were tied at the time of incident, when I returned to home and I handed over the same to the police. I have narrated the commission of rape of my daughter when I made a call to the police at number 100. My daughter was having injury marks over her hand, where rope was tied by accused. Doctor had made inquiries about the incident. I have also stated to the doctor that, accused Beerbali had committed the offence with my daughter. Police arrived within five minutes after my call. It is correct that, accused Beerbali belongs to different community.”

13. Believing the testimony of Sacred and finding corroboration thereto from the testimony of her mother, the learned Trial Judge has discussed the arguments advanced by Beerbali in paragraphs 17 to 19 as under:-

“17. At the time of arguments Shri Rajeneesh Antil, ld.counsel for the accused has pointed out certain contradictions in the statement of victim. He has argued that in the deposition before the court, victim ‘P’ has deposed that accused came inside her room by kicking the door of the room whereas she did not say this in her statement to the police Ex.PW-8/A. Rather in Ex.PW8/A, she stated that while she was sitting in her room, accused kicked her at her back and bolted the door of the room from inside. It is further pointed out that in the testimony before the Court, she has stated that after offence, she was rescued by an uncle who knocked the door of the room, whereas she did not mention about any uncle in her statement Ex.PW8/A. Ld.Addl.PP for the State has controverted the same. In my view, the contradictions pointed out by ld.Counsel for the accused are not substantial in nature. The Supreme Court of India had dealt with as to what are the normal discrepancies and what

*are material discrepancies in the case reported as **State of Rajasthan vs. Kalki 1981 Crl.L.J. 1012**, which is extracted as under:*

“.....normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental deposition such as shock and horror at the time of occurrence and those are always there, however, honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of normal person. Courts have to label the category to which a discrepancy may be categorized.”

In my view the contradictions pointed out by ld.counsel for accused are not of such magnitude that they may materially affect the trial. It has been held above that the testimony of the prosecutrix is trustworthy. Minor contradictions, inconsistencies, embellishments or improvement on trivial matters without affecting the case of the prosecution, should not be made a ground to reject the evidence in its entirety.

18. It is further argued by ld.counsel for accused that the victim in her testimony before the court has deposed that on hearing her voice, some uncle knocked the door and saved her from the clutches of the accused and she told this even to her mother, who has also corroborated her on that aspect. But the said uncle has not been cited as a defence by the prosecution. It is further stated that IO/WSI Upkar Kaur is completely silent about the said uncle as to who said person was and it appears that she did not make any inquiry about him and there is nothing on record as to why he has not been cited as a witness. Hence, it is argued that prosecution case is tainted. Ld.Addl.PP for the State has controverted the same. In my view, there is no merit in this contention of the defence as well. Although, it is correct that there is no

*investigation about the said person and the said person has not been cited as a witness but that in itself should not be a ground to throw case of the prosecution. It has been held in a number of cases that benefit of the defect in the investigation of the case should not be given to the accused unless and until it is of this nature that it would prejudice the accused. Moreover, it is noticed that members of public are reluctant to join the investigation and come forward and depose, especially in criminal trial for various reasons. In the case of **State of A.P. vs. S.Rayappa & Ors. (2006) 4 SCC 512** Hon'ble Supreme Court commented upon the reason for reluctance of public persons to join as witness in criminal cases. In para No.7 of the report, it was observed as under:-*

“On the contrary it is now almost become a fashion that the public is reluctant to appear and depose before the Court especially in criminal cases because varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed a lot. They are being threatened, intimidating and at the top of all they subjected to lengthy cross examination.”

Hence, non-investigation on the aspect of the said person and the fact that he has not been cited as a witness does not go to the root of the matter and the same does not much affect the case of the prosecution.

19. It is further argued by ld.counsel for accused that the victim were five brothers and two sisters and they were not school going then the question arises as to where were they at the time of commission of offence. Ld.Addl.PP for the State has controverted the same also. Answer to this question has been given by victim 'P' in her cross examination. She has stated that her other brothers and sisters had gone to school at the time of incident. Although her mother Smt.Shakuntla had stated in her cross

examination that younger children remained at home and they were taken care of by her elder daughter 'P' in her absence, but that in itself should not be a ground for the defence to allege that the siblings of victim 'P' were not going to school or that they always remain at home. When Smt.Shakuntala (PW9) stated that, younger children remain at home, she did not say this in the sense that the other children did not use to go to school. What she only meant was that they generally remained at home and they were being taken care of by her elder daughter 'P' in her absence."

14. The FSL data has been discussed by the learned Trial Judge, in paragraph 23 of the impugned decision as under:-

"23. Lastly it is argued by ld.counsel for accused that Senior Scientific Officer, FSL, Rohini could develop only seven markers out of fifteen markers as far as Allelic Data is concerned on the under wear of the prosecutrix and the gauze cloth piece of the accused and the rest of the markers could not be developed and hence, this partial DNA profiling of the said exhibits does not conclusively proved the case of the prosecution. Ld.Addl.PP for the State has controverted the same. Here also, I disagree with the ld.Counsel for the defence. This partial DNA profiling developed on the material found on the underwear of the prosecutrix and gauze cloth piece of the accused does not conclusively establish that semen found on the underwear of the victim was that of accused, but as stated above when we see this in the context of trustworthy and reliable testimony of the prosecutrix, even the partial DNA Profiling becomes very important because all the even markers which were developed were found matching with each other."

15. Concerning DNA profiling, the view taken by the learned Trial Judge is absolutely incorrect because the theory of causation does not embrace principles of probability as understood in the subject of statistics. The

belief in the truth of facts at issue is not statistical based probability. Human genomes have a large amount of similarity and therefore if 7 out of 15 markers concerning the allelic data matched, the report had to be treated as inconclusive and excluded as incriminating evidence.

16. Concerning the testimony of Sacred, the view taken by the learned Trial Judge that the contradictions are of not such a magnitude that they materially affect the trial I find is without even noting what the contradictions are.

17. The contradictions are not between what Sacred said in her statement to the investigating officer or before the learned Metropolitan Magistrate and what she deposed in court. The contradictions are in the nature of an inherent fallacy in what she said viz-a-viz her conduct and what her mother claimed as having been told by her.

18. In her statements, including the deposition in Court, she claimed that when she was being raped she could not shout because her mouth was tied. But said that some uncle must have heard her whimpers and came inside. She said that thereafter Beerbali put on his clothes, untied her and made her wear her clothes and left. She claimed in cross examination that Beerbali ran away with her chunni, used by him to tie her. She said that Beerbali remained in her room for over two hours. She claimed having received injuries on her hands in the shape of marks of tying. But her MLC notes none. This is just not believable. If an uncle came inside and saw Beerbali lying on top of Sacred or besides her and both being nude and Sacred was gagged and tied to the bed, he would have surely summoned help and apprehended Beerbali at the spot. In her deposition Shakuntla said that her daughter told her that one uncle had come inside but failed to disclose the

name of the uncle because she did not know the name. In the next breath she said that the said uncle was residing in the same premises but was not available after the incident as he had gone to Bihar. In her cross examination Shakuntla admitted that Beerbali was on talking terms with their family and used to talk with them. She claimed that her daughter was having injury marks on her hand where rope was tied. Now, no rope has been recovered.

19. The fantastical theory of the uncle who Shakuntla admits was a resident of the same building is actually not a fantastical story, but brings out the truth.

20. Further, there is a serious contradictions between what Sacred said regarding her being alone in her house and what her mother said. As per Sacred her brothers and sister had gone to school, but as per the mother the younger children were at home and were taken care of by her eldest daughter. Sacred was obviously not alone in the house, in the sense somebody knew that because her siblings would be in school, she would be alone and therefore a pray. The entry in the room was by consent when in all probability Sacred lured her siblings outside to play.

21. The truth is that Beerbali and Sacred were having co-sensual sex and in all probability were exploring each other's body when the unnamed uncle saw the two. He told said fact to Shakuntla. Sacred was compelled to cook up a story. Sacred has disclosed her age as 16 years when she deposed in Court on September 04, 2013. Report Ex.PW12/A proved by Dr.Shipra Rampal PW-12, Specialist Radiology at BJRM Hospital establishes that on December 07, 2012, when Sacred was examined, she was between the age of 17 to 18 years.

22. Thus, Beerbali is entitled to be acquitted.
23. The appeal is allowed.
24. Impugned judgment dated July 30, 2014 is set aside. So is the order on sentence dated July 31, 2014. Beerbali is directed to be set free forthwith if not required in some other case.
25. TCR be returned.
26. Copy of this order be supplied to the Superintendent Jail Tihar for updation of his record and for being supplied to the appellant.

(PRADEEP NANDRAJOG)
JUDGE

MAY 24, 2016

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