

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

% *Judgment Reserved on: May 23, 2016*
Judgment Delivered on: May 26, 2016

+ **CRL.A 877/2014**

PRADEEP GOYAL Appellant

Represented by: Mr.Anwesh Madhukar,
Advocate. (DHCLSC)

versus

STATE Respondent

Represented by: Mr.Ravi Nayak, APP for the
State with SI Mukesh Yadav,
PS Jagatpuri.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
MUKTA GUPTA, J.

1. By the instant appeal, Pradeep Goyal challenges the impugned judgment dated 20th May, 2014 whereby he has been convicted for the offences punishable under Sections 342/367/377/506 IPC in FIR No.145/2012 registered at PS Jagat Puri and the order on sentence dated 26th May, 2014 directing him to undergo rigorous imprisonment for a period of six years and to pay a fine of ₹1,000/- in default to undergo simple imprisonment for one month for offence punishable under Section 377 IPC, rigorous imprisonment for a period of five years and to pay a fine of ₹1,000/- in default to undergo simple imprisonment for one month for offence punishable under Section 367 IPC, rigorous imprisonment for a period of one year and to pay a fine of ₹500/- in default to undergo simple

imprisonment for fifteen days for offence punishable under Section 342 IPC and rigorous imprisonment for a period of three years and to pay a fine of Rs. 500/- in default to undergo simple imprisonment for fifteen days for offence punishable under Section 506 IPC.

2. Brief facts of the prosecution case are that on April 13, 2012 the complainant/victim (PW-1) with his father Mukesh Sharma (PW-2) went to police station and got recorded the statement by SI Dinesh Kumar (PW-8). In the complaint, it was stated that the appellant Pradeep Goyal, who was residing in his neighbourhood, enticed the complainant and took him to bus no. DK-1PB-8821 opposite Scope Minar, Laxmi Nagar and did carnal intercourse with him in the bus. On the basis of the statement of PW-1 FIR (Ex. PW-7/A) was registered under Sections 342/377/506 IPC. After investigation, the police filed chargesheet against the Pradeep Goyal under Sections 342/367/377/506 IPC.

3. Learned counsel for the appellant contends that the learned Trial Court failed to appreciate the contradictions in the testimony of the complainant (PW-1). Version of the complainant (PW-1) is not corroborated by his father Mukesh Kumar (PW-2) with respect to the number of times the complainant was subjected to carnal intercourse by the appellant. No complaint was lodged by PW-2 regarding missing of his son and the FIR was lodged belatedly. It was further contended that the learned Trial Court failed to appreciate the opinion of Dr. Vinay Kumar Singh (PW-4) in the MLC Ex. PW-4/B which opinion was not specific and categorical. It was impossible to commit carnal intercourse on the roof of the bus where high rise buildings were situated. Even as per the MLC, there being no fissures etc., the possibility of carnal intercourse was ruled out. The

appellant led defence evidence by examining DW-1 H.C. Suresh Kumar PS Jagat Puri to belie the version of the father of the victim that he lodged a missing complaint. The defence of the appellant was that the uncle of the victim was living in the adjoining house who wanted to extend the area and was forcing the appellant to deliver his house measuring 33 sq.yds which he refused. Thus at the instance of the uncle of the victim, a false case was registered against the appellant. Further a plea of alibi was raised that on the night of April 7-8, 2012 the appellant was at a Jagran up to 11.00 PM or 12.00 midnight which fact is proved by his wife Smt.Roshini Goel DW-2 which defense has not been considered by the Trial Court. Challenging the MLC Ex.PA-1 and report regarding the sexual potency of the appellant Ex.PA-2 it is contended that the doctor who prepared the report has not been examined.

4. Learned APP for the State on the other hand contends that in view of the statement of appellant recorded under Section 294 Cr.P.C. wherein he admitted the MLC Ex.PA-1 and the report Ex.PA-2, no further proof of the documents by examining the concerned doctors was required. The MLC and the report of proctoscopy and internal examination of the victim Ex.PW-4/B and PW-4/A respectively have been proved by Dr.Vinay Kumar Singh PW-4. The victim being of tender age did not reveal to his parents immediately about the facts and thus his testimony cannot be thrown out merely on account of delay. The delay in lodging the FIR is explained by the father Mukesh Sharma PW-2. The plea of alibi raised by the appellant is unsubstantiated.

5. After satisfying that the victim PW-1, who was aged about 14 years at the time of incident, was capable and competent to depose correctly about

the incident, the learned Trial Court recorded his statement. PW-1 stated that the appellant Pradeep Goyal was the father of his friend Rohit Goyal who studied in the same school but different section. The appellant lived in front of his house. He further stated that in March, 2012 at around 7-8 p.m., the appellant met him on the street and asked him to accompany for an outing to Laxmi Nagar. He did not refuse because the appellant was his friend's father. He accompanied the appellant in a bus and reached Scope Minar, Laxmi Nagar. A bus bearing no. DL-1PB-8821 of white colour make Tata was parked there. The appellant was the driver of that bus. The appellant took him inside the bus. There were curtains on the windows inside the bus. They sat in the bus for 10-15 minutes whereafter he returned back to his house. After one month, the appellant again met PW-1 near the Nala in front of his house and asked him to accompany to Scope Minar, Laxmi Nagar. When PW-1 refused, the appellant threatened him to kill if he did not accompany him. Because of the threat, PW-1 accompanied him. The bus was parked at Scope Minar. The appellant took him inside the bus and locked the door from inside. The appellant gave him beatings, removed his pant, made him lie down on the seat and did "Galat Kaam" with him. On being asked to explain "Galat Kaam", PW-1 stated that the appellant had put his penis inside the anus of PW-1. After that, the appellant dropped him at his house at around 8-9 P.M. and threatened him not to disclose about it to anyone otherwise he will kill him. On 07th May, 2012 the appellant met PW-1 on the street. The appellant asked him to accompany him to Scope Minar but he refused to go with him. PW-1 tried to slip away from there but the appellant caught his hand and after beating forcibly took him to Scope Minar. The same bus was parked there and he did "galat kaam" with him.

PW-1 was detained by the appellant throughout the night in the bus. The appellant allowed him to go around 1:00 PM on the next day (i.e. 08th April, 2012). When PW-1 returned home, his parents asked him where he was throughout the night but he did not tell them anything about the incident because of shame. Then his father Mukesh Kumar (PW-2) told him not to be afraid whereafter he told his father about the incident. Thereafter, his father took him to PS Janak Puri.

6. During cross examination PW-1 stated that when the appellant was doing 'galat kaam' with him, he cried but the appellant had put his hand on his mouth and he was unable to cry. He further stated that he was taken for the third time on 07th April, 2012 and not 07th May, 2012. On 07th April, 2012, he was present in the Jagran and met the appellant when he came out from the Jagran. He remained in the Jagran from 8:00 PM to 10:00/10:30 PM. He further stated that on 09th April, 2012 at about 12:00 noon, he had visited the spot along with his brother Sunny to show him the bus.

7. Mukesh Sharma, PW-2 the father of the victim PW-1 deposed that on 07th April, 2012 around 6:00 to 7:00 PM when he returned home, he found his son was missing. He searched for him but could not find him. On 08th April, 2012 at about 3:00 to 4:00 PM, his son came back home. When he enquired from his son where he was during that time, PW-1 did not tell him anything. He further stated that PW-1 was scared for 3-4 days. On 13th April, 2012 (inadvertently written as 2011) when he again asked him why he was scared, he started crying and told him that the appellant had taken him to a bus in Scope Minar, Laxmi Nagar about one month ago and did carnal intercourse with him and thereafter dropped him back. After one week of the incident, the appellant took him again to the bus and did the same.

Lastly on 07th April, 2012 the appellant took him to same place at about 8:00 to 9:00 PM and committed carnal intercourse with him in the same manner.

8. During cross examination, PW-2 stated that on the day of incident i.e. 07th April, 2012 he had returned home at about 8:00-9:00 PM. After that he searched for his son till 12:00 midnight to 1:00 AM and thereafter kept waiting for him to return. He did not approach the police since it was night time and he thought that his son might have gone to the Jagran. He further stated that on the next day i.e. 08th April, 2012 he went to Police Station at about 10:00-11:00 AM, police recorded his report and started searching his missing son. However, the victim PW-1 returned home at about 4:00 to 5:00 PM on the same day and he informed the police about it. He did not have the copy of information lodged or any DD number. He also denied that he threatened the appellant to falsely implicate him in a case if the appellant did not sell his house to the brother of PW-2.

9. Dr. S P Jangpangi, (PW-3) examined the victim PW-1 and prepared the MLC Ex. PW-3/A. Dr. Vinay Kumar Singh, PW-4 who conducted the proctoscopy of the victim opined that no definite opinion could be given, however, possibility of anal intercourse/ sodomy by erect adult penis or any structure resembling it cannot be ruled out.

10. Jugal Kishore PW-5 runs the business of Tour and Travels and was the owner of vehicle no. DL-1PB-8821. PW-5 deposed that he used to park the vehicle on the roadside in front of Scope Minar, Laxmi Nagar. The appellant was working as a driver for PW-5 since 1½ month prior to the incident and during this period the key of the vehicle was with the appellant till 08th April 2012. He further stated that the appellant used to live in the said vehicle.

11. The contradictions pointed out in the testimony of the victim are with regard to the time of incident. Whereas the victim states that the incident took place at around 8.00-8.30 PM, he also states that from 8.00-10.30 PM he was in the Jagran. In his examination in chief the victim says that on May 07, 2012 which he later corrected to be April 07, 2012 appellant asked him to accompany to Scope Minar which he refused, when he tried to slip away the appellant caught hold of his hand and forcibly took him after beating to the bus which was parked in front of Scope Minar and did “Galat Kam” with him. He was detained by the appellant throughout night in the bus and was allowed to go next day at about 1.00 PM. Minor variations in the time when the victim was taken by the appellant will not discredit the version of the victim who was a boy of tender age.

12. It is further highlighted by the learned counsel for the appellant that despite victim saying that he was in the Jagran till 10.00 PM the father could not trace him. PW-2 has stated that his son was taken by accused at around 8.00-9.00 PM, however since this evidence is hearsay the same is not admissible. In cross-examination the father further states that he returned home at around 8.00-9.00 PM and thereafter searched the victim till 12.00 midnight to 1.00 AM. He has also gone to the Jagran. Thus from the cross-examination it has not been clearly brought out that he searched his son in the Jagran near Sita Ram Mandir before 10.00-10.30 PM.

13. As noted above the appellant has admitted his MLC and virility report both in his statements under Section 294 IPC and under Section 313 Cr.P.C. Regarding the contention that the opinion of Dr.Vinay Kumar Singh is not specific it may be noted that a medical opinion which completely rules out and contradicts the statement of the eye-witness/victim demolishes the case

of the party but if the opinion gives the possibility of the offence committed, the same corroborates the version of the victim/ eye-witness. Testimony of Dr.Vinay Kumar Singh PW-4 is specific when he says that possibility of anal intercourse/ sodomy by erect adult penis or any structure resembling it cannot be ruled out. This is further fortified by the proctoscopy report Ex.PW-4/A which notes sphincter Tone (Anal sphincter) decreased. Anal sphincter is a subcutaneous fat around anus and decreased sphincter muscle tone is a symptom of sexual abuse which has been noted in the report.

14. It is well settled that the opinion of an expert under Section 45 of the Indian Evidence Act 1972 is only an evidence of his opinion on the subject and not the statement of fact. It is ultimately for the Court to form the opinion and come to the conclusion on the basis of entire evidence on record and return its own finding. Further the opinion of medical science cannot be exact as various possibilities cannot be ruled out. Supreme Court in the decision reported as (1977) 3 SCC 41 Pratap Misra & Ors. Vs. State of Orissa held –

“.....[I]t is well-settled that the medical jurisprudence is not an exact science and it is indeed difficult for any Doctor to say with precision and exactitude as to when a particular injury was caused and in the instant case as to the exact time when the appellants may have had sexual intercourse with the prosecutrix.”

15. Further in the decision reported as (1992) 3 SCC 204 Madan Gopal Kakkad Vs. Naval Dubey & Anr. Supreme Court also held-

“34. A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected

to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.”

16. Minor variations in the testimony of the victim or the delay in lodging the FIR would not belie the testimony of the victim which is duly corroborated by the medical evidence. The plea of alibi raised by the appellant is that he was present in the Jagran for which he examined his wife. Despite there being number of persons, no independent witness has been examined by the appellant. The plea of alibi was required to be probalised by the appellant which he failed to do. The prosecution has been able to prove beyond reasonable doubt the offence committed by the appellant. The impugned judgment of conviction and order on sentence are upheld.

17. The appeal is dismissed.

18. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

19. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 26, 2016
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