

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

RESERVED ON : 3rd MARCH, 2016

DECIDED ON : 24th MAY, 2016

+ CRL.A.1363/2010

RAJINDER KUMAR Appellant
Through : Mr.Vivek Sharma, Advocate.

VERSUS

THE STATE (GOVT. NCT OF DELHI) Respondent
Through : Mr.Tarang Srivastava, APP.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Present appeal is directed to challenge the legality and correctness of a judgment dated 09.11.2010 of learned Addl. Sessions Judge in Sessions Case No.114/09 arising out of FIR No.130/09 PS Karawal Nagar whereby the appellant – Rajinder Kumar was held guilty for committing offence punishable under Section 376 IPC. By an order dated 15.11.2010, he was sentenced to undergo RI for ten years with fine ₹5,000/-.

2. Briefly stated, the prosecution case as stated in the charge-sheet was that on 03.06.2009 at about 05.00 p.m. at House No.C279, Gali No.5, Panchal Vihar, Karawal Nagar, Delhi, the appellant committed rape upon the prosecutrix 'X' (changed name) aged 4 years. The occurrence was reported to the police promptly and Daily Diary (DD) No.21A (Ex.PW-11/B) came

into existence at PS Karawal Nagar at 06.45 p.m. The Investigating Officer after recording statement of victim's mother – Pinki (Ex.PW-2/A) lodged First Information Report under Section 354 IPC. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. Statements of the witnesses conversant with the facts were recorded. The accused was arrested and medically examined. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of the investigation, a charge-sheet was filed against the appellant for committing offence under Section 376 IPC read with Section 511 IPC. The Trial Court, however, proceeded against the appellant for commission of offence under Section 376 IPC. The prosecution examined eleven witnesses to prove its case. In 313 Cr.P.C. statement, the appellant denied involvement in the crime and pleaded false implication. DW-1 (Sushila), DW-2 (Harish Chand) and DW-3 (Ramesh Kumar) were examined in his defence. The trial resulted in his conviction as mentioned previously. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. Appellant's counsel urged that the Trial Court did not appreciate the evidence in its true and proper perspective. Initially, the victim's mother had not attributed any specific role to the appellant. It was categorically disclosed by her to the police that no rape had been committed upon her daughter; it was a case of sexual molestation. Subsequently, improvements were made and allegations of rape were made against the appellant for ulterior reasons. Counsel further urged that no external visible injuries were found on the victim's body including private parts; hymen was found intact. No independent witness from the locality was examined and the conviction based upon the sole testimony of the victim's mother was

unsustainable. Learned Addl. Public Prosecutor urged that the child witness aged around 4 years had no oblique motive to falsely implicate the appellant.

4. Admitted position is that the victim lived along with her parents in a rented accommodation at C-271, Gali No.5, Panchal Vihar, Karawal Nagar, Delhi. The appellant and his family lived in their neighbourhood. The occurrence took place on 03.06.2009 at around 05.00 p.m. and the incident was reported to the police without any delay resulting in recording of DD No.21A (Ex.PW-11/B) at 06.45 p.m. There is specific mention in this document that a 'small' child was sexually assaulted. The investigation was assigned to ASI Habib Ahmed who after recording victim's mother's statement lodged First Information Report. In her statement (Ex.PW-2/A), Pinki gave detailed account as to how and in what manner the appellant had sexually molested her daughter aged around 4 years in his room. Since the FIR was lodged promptly and the appellant was named to be the perpetrator of the crime, there was least possibility of the complainant to have concocted a false story in such a short period.

5. From the very inception complainant's case was that the victim was ravished by the appellant and she insisted for her medical examination. However, the Investigating Officer apparently in an attempt to dilute the commission of the offence abdicated his responsibility and lodged FIR under Section 354 IPC. He even did not bother to get the prosecutrix medically examined. On 04.06.2009 when pressure was exerted upon the Investigating Agency by the victim's family, 'X' was medically examined vide MLC (Ex.PW-6/A) at around 12.00 noon. The alleged history recorded therein states that the child was sexually assaulted on 03.06.2009 at 05.00 pm. The victim recorded her 164 Cr.P.C. statement (Ex.PW-9/A) on 04.06.2009.

Learned Presiding Officer had put various questions before recording her statement to ascertain if she was capable to understand the questions and answer them properly. After recording the satisfaction about the witness's competence to make statement, her statement was recorded without oath. 'X' gave vivid description of the incident and implicated the appellant for committing rape upon her. In the Court, she appeared as PW-9. Before examining her, the learned Presiding Officer conducted preliminary enquiry to ascertain her competence to understand the questions. The Presiding Officer was satisfied that the child witness was able to understand the questions properly. 'X' deposed that when she was playing in the street, the accused took her to his residence situated just in front of their house. Assigning specific role to the accused identified by her in the Court, she revealed that he made her to lay on a bed; put off her underwear; opened the zip of his pant and put his penis inside the place meant for urination. Thereafter, he laid over her and committed wrong act. She further deposed that she had wept and the accused had asked her to maintain silence on the allurements to provide eatables. The accused had put the TV on high volume. Her mother arrived at the spot and took her to the house. She further revealed that the accused had applied some liquid on the place of her urination. Her underwear got stained with liquid.

6. In the cross-examination, the victim disclosed that she was called by the accused in the room when she was playing with her friends in the street. She did not know the appellant's name but identified him by face. She fairly admitted that the accused did not beat her in the room. She elaborated that there was no door in the room but a curtain had been put on the gate. She further revealed that none else was present inside the room;

appellant's wife was upstairs. She further elaborated that the accused had taken the tube kept behind T.V. She denied that the statement was tutored to her by her parents.

7. On scanning the testimony of the child witness in entirety, it reveals that despite lengthy and searching cross-examination, no material infirmity could be extracted to disbelieve the version given by her. No ulterior motive was assigned to the child to falsely implicate the appellant in the heinous offence. In the absence of any prior animosity or ill-will, victim's parents were not expected to level serious allegations of sexual assault upon a neighbour to bring their tiny girl in disrepute. Nothing has come on record to show if there was any previous history of hostile relations between the two neighbourers prompting them to make false allegations. Moreover, for trivial issues, if any, the victim's parents were not imagined to use their kid to settle score. In 313 Cr.P.C. statement, the appellant admitted that the prosecutrix was with him in the room at the relevant time. He, however, denied if she was sexually assaulted by him that time. It lends credence to the victim's statement that at the relevant time, she was in the appellant's room. She reasoned that the accused had called her inside the room when she was playing in the street. Had the victim gone to the appellant's room on her own as claimed, there was no occasion for her family members to implicate the appellant for sexual assault. The witness has given detailed account of the occurrence in the cross-examination and was aware as to from where the accused had picked the tube kept behind television to apply on her private parts. No sound reasons exist to disbelieve the natural version given by the witness which is consistent throughout including 164 Cr.P.C. statement.

8. PW-2 (Pinki), victim's mother, has corroborated her version on material facts. She deposed that her daughter 'X' was playing in the street. After some time when she came out of her house, she did not find her. On hearing her cries, she went towards the appellant's house and found her in the room. He saw that the appellant had already taken off her underwear and it was smeared with semen. She enquired from the accused as to what he had done with her daughter. To which, the appellant stated that nothing was done by him. She enquired as to why her underwear was smeared with semen when none else was present inside the house, nothing was explained by the appellant. He was even thrashed and abused by the victim's mother and neighbours. She further deposed that initially the victim was not medically examined by the police despite their repeated requests. On 04.06.2009 when they impressed upon the police officials, they took 'X' for her medical examination to GTB hospital. She further explained that on her entering the appellant's room, she saw that her daughter was lying on the bed and the accused had put pillow beneath her. The front chain of the pant of the accused was open. Her daughter informed her that the accused had applied cream on her vaginal parts and had done wrong act with her. She denied that the accused was falsely implicated at the behest of one Om Prakash and other neighbours due to previous quarrel between her and accused's wife. The witness affirmatively disclosed that even at the time of her examination before the Court semen stains were there on X's underwear. She admitted that there was no injury on X's body except some reddishness on the thigh. In response to the question that the accused did not commit any wrong act with her daughter, she replied, "*koshish to Rajender ne poori*

ki thi, agar wo kamyab ho jaata, to meri ladki jo chaar saal ki thi, to mar hi jaati. Meri ladki ke sare kapde kharab to kar he diye the”.

9. Again no material discrepancies could be elicited in the cross-examination of this witness to discredit her testimony. The victim's mother had no prior ill-will against the accused to involve him for rape upon the kid.

10. The incident was reported to the police without any delay. When the prosecutrix was medically examined next day vide MLC (Ex.PW-6/A), the examining doctor did not find any injury; the hymen was intact. Learned defence counsel urged that since the victim did not sustain any injury whatsoever on her body including private parts, the prosecution was unable to establish beyond doubt that the victim was ravished. This plea inspires no confidence particularly when the victim has categorically in her statement before the Court testified that the appellant had inserted his penis inside the place of her urination. She went to say that the accused had applied some lubricant before that; she had felt pain that time.

11. Settled legal preposition is that absence of injuries on the body of the prosecutrix does not give rise to an inference that she was consenting party to coitus. Absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on her part. Absence of violence or stiff resistance may as well suggest helpless surrender to the inevitable due to sheer timidity. In the instant case, the victim was a child aged about 4 years. She was not physical capable to put up stiff resistance, the accused being aged about 46 years. The young girl became victim of lust of the accused and yielded to sexual intercourse to a man who was like her grandfather.

12. It is true that as per medical examination, hymen of the victim was found intact. Again, to constitute the offence of rape neither Section 375 IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim / prosecutrix. In other words, to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375/376 IPC. It is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. In order to constitute rape, what Section 375 IPC requires is medical evidence of penetration, and this may occur and the hymen remain intact (*Radhakrishna Nagesh vs. State of Andhra Pradesh*, 2012 (12) SCALE 506). In *Ranjit Hazarika vs. State of Assam* (1998) 8 SCC, the Apex Court has observed that merely because there were no injuries on the person of the victim and the hymen was intact, does not lead to a corollary that there was no coitus.

13. In similar circumstances, observations of Himachal Pradesh High Court in *Padam Singh vs. State of H.P.*, 2016 Cri.L.J. 643, are relevant :

“12. The defence has espoused qua the non-existence of any injury on the hymen or its having not come to be torn, belies the version of the prosecutrix corroborated by

PW-2 and PW-3 of the accused having inserted his finger smeared with spit in her vagina. However, the aforesaid espousal before this Court fails to gain any legal leverage, especially in the face of PW-11 Dr.Anuradha Sharma, who on her examining the victim issued MLC Ex.PW11/B having deposed qua the hymen of a child being highly placed and it remaining untorn besides uninjured even when a person inserts therein his spit covered finger which does not cross it.”

14. In ‘*Parminder @ Ladka Pola vs. State of Delhi*’, 2014 II AD (SC) 37, Supreme Court held :

“9. PW-15, the doctor who conducted the medical examination of the prosecutrix on 31.01.2001, however, has stated that there was no sign of injury on the prosecutrix and the hymen was found intact. The High Court has considered this evidence and has held that the non-rupture of hymen is not sufficient to dislodge the theory of rape and has relied on the following passage from Modi in Medical Jurisprudence and Toxicology (Twenty First Edition):

Thus, to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit

legally the offence of rape without producing any injury to the genital or leaving any seminal stains.

Section 375, Indian Penal Code, defines the offence of 'rape' and the Explanation to Section 375, Indian Penal Code, states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. This Court has accordingly held in Wahid Khan v. State of Madhya Pradesh : (2010) 2 SCC 9 that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. In the aforesaid case, this Court has relied on the very same passage from Modi in Medical Jurisprudence and Toxicology (Twenty Second Edition) quoted above. In the present case, even though the hymen of the prosecutrix was not ruptured the High Court has held that there was penetration which has caused bleeding in the private parts of the prosecutrix as would be evident from the fact that the underwear of the prosecutrix was stained by blood. In our considered opinion, the High Court was right in holding the Appellant guilty of the offence of rape and there is no merit in the contention of the learned Counsel for the Appellant that there was only an attempt to rape and not rape by the Appellant."

15. Indisputably, the findings of guilt in a case of rape can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix cannot be rejected on the basis of minor discrepancies or

contradictions. In the case of ‘*State of Punjab vs. Gurmit Singh and others*’, 1996 CrL.L.J. 1728, Supreme Court made the following weighty observations in respect of the evidence of the victim of sexual assault :

“The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self respecting woman would come forward in a court just to make a humiliating" statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while

appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil

formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.”

16. In ‘State vs. Saravanan and anr.’, AIR 2009 SC 152, while dealing with a similar issue, Supreme Court observed :

“....while appreciating the evidence of a witness, minor discrepancies on trivial matters without affecting the core of the prosecution case, ought not to prompt the court to reject evidence in its entirety. Further, on the general tenor of the evidence given by the witness, the trial court upon appreciation of evidence forms an opinion about the credibility thereof, in the normal circumstances the appellate court would not be justified to review it once again without justifiable reasons. It is the totality of the situation, which has to be taken note of. Difference in some minor detail, which does not otherwise affect the core of the prosecution case, even if present, that itself would not prompt the court to reject the evidence on minor variations and discrepancies.”

17. Settled law is that the testimony of a child witness cannot be rejected out-rightly. The evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and a child witness is an easy prey to tutoring. The Court has to assess as to whether the statement of the victim before the court is

voluntarily expression of the victim and that she was not under the influence of others. As observed above, there is no indication if the prosecutrix was tutored; her statement is consistent throughout. She had no extraneous motive to falsely implicate the appellant and let the real offender go scot free.

18. Minor discrepancy or infirmities in the statements of the prosecution witnesses are not material as they do not affect the core of the prosecution case. The victim was aged around four years and nothing more can be expected from such a small baby. The Trial Court has given detailed reasons to arrive at the conclusion of guilt of the appellant. The findings based upon fair appraisal and appreciation of the evidence, deserve no intervention. The Trial Court further gave elaborated reasons to disbelieve the defence version and this Court finds no valid reasons to deviate from it.

19. The Sentence Order is based on fair reasoning. The victim in this case was an innocent child aged around four years. Taking advantage of immaturity and innocence of an unsuspecting child, the accused being neighbour called the victim inside the room when her family members were away. Taking advantage of the situation, the appellant crossed all the limits and ravished the child akin to his grand-daughter.

20. The appeal lacks merit and is dismissed. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

MAY 24, 2016 / tr