

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

**RESERVED ON : 5th APRIL, 2016
DECIDED ON : 29th APRIL, 2016**

+ CRL.A.1579/2013

BHAVESH @ SAMEER Appellant

Through : Mr.S.K.Sethi, Advocate with
Ms.Dolly Sharma, Advocate.

versus

THE STATE (NCT OF DELHI) Respondent

Through : Ms.Meenakshi Dahiya, APP.

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

S.P.GARG, J.

1. The appellant – Bhavesh @ Sameer challenges the legality and correctness of a judgment dated 09.07.2013 of learned Addl. Sessions Judge in Sessions Case No.154/10 arising out of FIR No.120/10 PS Govind Puri by which he was convicted under Sections 363/366/376(2)(g)/506 IPC read with Section 34 IPC. By an order dated 18.07.2013, he was awarded various prison terms with fine. All the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 06.04.2010 at about 02.00 a.m. at jhuggi near Kuan Mohalla, Village Gughalkabad, New Delhi, the appellant kidnapped the prosecutrix 'X' (changed name) aged around 7 years from the lawful guardianship of her maternal grandparents and took her to the forest near Kuan Mohalla where

he and his associates – Manan @ Manna and Sakil @ Sakir (facing trial before Juvenile Justice Board) were present. The appellant committed rape upon the prosecutrix in their presence after criminally intimidating her. Incident was reported at 06.25 a.m. vide Daily Diary (DD) No.4A recorded at Police Station Govind Puri. The investigation was assigned to SI Hans Raj Bainsla who along with Const. Dharampal went to the spot. After recording victim's statement (Ex.PW-4/A), the Investigating Officer lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. The accused persons were arrested. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the assailants. Two of them are facing trial before the Juvenile Justice Board. In order to establish its case, the prosecution examined fourteen witnesses. In 313 Cr.P.C. statement, the appellant denied his complicity in the crime and pleaded false implication due to enmity. The trial resulted in his conviction as aforesaid. 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 and committed grave error to base conviction on the uncorroborated testimony of the prosecutrix and her family members. The story presented by the prosecutrix is highly improbable. It is unbelievable that the prosecutrix could be lifted by the appellant in his lap in the presence of her 'Nani' and would take her to the forest to commit sexual assault. No independent public witness was associated at any stage of the investigation. Material discrepancies /

contradictions emerging in the statements of the prosecution witnesses have been overlooked by the Trial Court. Learned Addl. Public Prosecutor urged that no sound reasons exist to disbelieve the statement of the prosecutrix who has implicated the appellant without any ulterior motive.

4. The occurrence took place on the night intervening 05/06.04.2010 at around 02.00 a.m. The victim aged around seven years was sleeping at her Nani's jhuggi. The incident was reported to the police promptly vide DD No.4A recorded at 06.25 a.m. at PS Govindpuri. The Investigating Officer after recording victim's statement and getting her medically examined lodged FIR at 03.00 p.m. In the complaint (Ex.PW-4/A), the prosecutrix gave vivid detail as to how and in what manner she was taken to the forest by the appellant when she was sleeping at the jhuggi of her maternal grand-mother. When she got up, she found that the appellant was taking her towards the forest and had gagged her mouth. At the place of occurrence Manan @ Manna and Sakil @ Sakir to whom she knew before were present. The appellant committed rape upon her; she was criminally intimidated. After the occurrence, she came to the jhuggi and apprised her maternal grand-mother.

Since the occurrence was reported to the police without any delay and the appellant was named to be the perpetrator of the crime, there was least possibility of the prosecutrix to concoct a false story in such a short period.

5. In her 164 Cr.P.C. statement (Ex.PW-6/B) recorded on 07.04.2010 the victim reiterated her version and implicated the appellant to have committed rape upon her in the forest. She informed about the

presence of Manan @ Manna and Sakil @ Sakir but categorically denied to have been sexually assaulted by them.

6. The prosecutrix appeared in the Court as PW-4. Before recording her statement, the learned Presiding Officer put number of preliminary questions to ascertain if she was able to understand the questions and give rationale answers. It emerged that the prosecutrix could answer the questions in Bangla language. Accordingly, services of interpreter Ms. Sunandita Dasgupta, Assistant Director of Information, Govt. of West Bengal, were procured to translate the true version of the prosecutrix from Bengali to English or Hindi. After recording her satisfaction that the statement being given by the prosecutrix was voluntarily and she was not under any fear or pressure and was able to give answers in appropriate manner, her statement was recorded without administering oath.

7. In the Court statement, the prosecutrix deposed that she used to stay at the jhuggi of her maternal grand-mother; her mother used to stay elsewhere. On the night in question, her maternal grand-father had gone to work and her grand-mother was present in the jhuggi. When she wake up, she found that the appellant was taking her on his shoulders towards a 'jungle'. Manan @ Manna and Sakil @ Sakir were already present there. The appellant showed her a knife and intimidated her; he also gagged her mouth. He laid her on the ground and removed her underwear and committed rape upon her in the presence of Manan @ Manna and Sakil @ Sakir. When she cried, she was intimidated not to reveal the incident to anybody or else she would be killed. Thereafter, the assailants left her and went away. After returning to home, she revealed the incident to her maternal grand-mother. She further disclosed that the assailants were

known to her as they used to roam in the area and intimidate the inhabitants. Her statement (Ex.PW-4/A) was recorded and she was medically examined. In the cross-examination, she disclosed that she had gone to bed at 09.00 p.m. The 'forest' where she was taken was across the road from her jhuggi. She knew the names of the assailants. She denied the suggestion that their names were revealed to her by her grand-mother. She denied the suggestion that the accused did not commit rape upon her and she had given a false statement at the instance of the police.

8. On perusal of the version recorded during investigation and trial, it reveals that the prosecutrix, the child witness aged around 7 years, is consistent throughout. No material infirmity has been extracted in her cross-examination to disbelieve her version. No ulterior motive was assigned to the child to make a false statement. In the absence of prior enmity or hostile relations, the victim was not expected to level serious allegations of rape against the appellant to put her honour at stake.

9. PW-7 (Faryan Bibi @ Khairun Bibi), victim's maternal grand-mother, has fully supported her version. She disclosed that at about 02.00 a.m. in the night when she woke up and did not find 'X' at the place of sleeping, she made efforts to search her but to no effect. At about 04.00 a.m. 'X' returned home. She was bleeding from her private parts. On an enquiry, she told that the appellant had taken her to the forest when she was in sleep and had committed rape upon her in the presence of Manan @ Manna and Sakil @ Sakir. The police was called. She and her grand-daughter were taken to hospital for medical examination. She had handed over banyan (Ex.P2) and underwear (Ex.P3) to the police. In the cross-examination, she elaborated that her daughter – Sharmil had remarried about

four years back. On that night they had gone to bed at around 08.00 p.m. Her husband had gone to collect scraps at about 03.00 p.m., the previous evening. She denied that a quarrel had taken place with her husband and the appellant on many occasions over collection of scrap. The prosecution also examined PW-5 (Sharmil) - victim's mother and she informed that her daughter 'X' was staying with her mother at the time of occurrence. Both these witnesses had no reasons / motive to falsely implicate the appellant.

10. Ocular testimony of the prosecutrix is in consonance with medical evidence. Soon after the occurrence, she was medically examined by PW-1 (Dr.Apurva Gupta) vide MLC (Ex.PW-1/A). On gynaecological examination, blood stains were seen over her labia. Hymen was congested - torn from 4 O'clock to 8 O'clock position. There is, thus, no conflict between the ocular and medical evidence. Clinching evidence is that of DNA Finger Printing Report (Ex.PW-14/A). As per it, the DNA Finger Printing Test performed on the exhibits was sufficient to conclude that source of Ex.'5' (Blood in gauze of Bhavesh @ Sameer), Ex.'4' (Blood in gauze of Shakeel @ Sakir) and source of Ex.'6' (Blood in gauze of Manan @ Manna) could not be excluded for being responsible for biological stains i.e. seminal stains present on the source of Ex.'1' (underwear of prosecutrix), Ex.'2a' (vaginal smear of prosecutrix), Ex.'2b' (vaginal smear of prosecutrix), Ex.'2c' (vaginal smear of prosecutrix), Ex.'3a' (underwear) & Ex.'3b' (banyan).

11. In 313 Cr.P.C. statement, the appellant did not give plausible explanation to the incriminating circumstances proved against him. He claimed that a dispute had arisen between him and victim's maternal grandfather on account of apportionment of proceeds of selling of scrap on

03/04.04.2010. On the next day when he was sleeping in the house, he was arrested and implicated in this case. This defence deserves outright rejection as no material has come on record to infer if any such quarrel had taken place between the appellant or the victim's maternal grand-father on any specific issue. No such complaint about any such quarrel was made to the police. No independent witness has been examined in defence by the appellant to substantiate his contention. Moreover, for a petty quarrel (if any) between the appellant and victim's relatives over distribution of petty amount, it is unbelievable that a little child aged around 7 years would be used to settle score to bring her in disrepute. Minor discrepancies highlighted by the appellant's counsel are of no consequence as they do not affect the core of the prosecution case. It is settled law that the testimony of the prosecutrix, if believed can be the sole basis of conviction in rape cases. No rule of law or practice requires corroboration before her testimony can be accepted and acted upon. Merely because the victim is a child aged around seven years her testimony cannot be rejected per se.

12. 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.

13. The judgment based upon proper appreciation of the evidence warrants no intervention.

14. 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

APRIL 29, 2016 / *tr*

