

\$~7

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

+ CRL.A. 765/2012

Judgement reserved on : 10th August, 2017
Judgement pronounced on : 25th August, 2017

SHANE ALI @ PAPPUAppellant

Through: Ms. Sahila Lamba , Advocate.

versus

STATE (GOVT. OF NCT OF DELHI)Respondent

Through: Ms. Anita Abraham, APP for the State.

CORAM:

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. The present appeal has been preferred by the appellant challenging the impugned judgment dated 20.03.2012 and order on sentence dated 27.03.2012, passed by Additional Sessions Judge (hereinafter referred to as 'ASJ'), Saket Courts, Delhi, in Session Case No. 38/2011, arising out of an FIR No. 402/10, registered at Police Station Sangam Vihar, Delhi, whereby the appellant was convicted under Section 376 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and sentenced to undergo rigorous imprisonment for 10 years with fine of Rs.10,000/-, and in default of payment of fine, to further undergo simple imprisonment for six months.

Factual Matrix

2. The factual narration of the prosecution case before the Trial Court, as observed by the ASJ, Rohini Courts, vide its judgement dated **20.03.2012**, may be stated thus:-

"On 19.12.2010 WSI Satish Bhati reached at AIIMS Hospital on the instructions of the SHO PS Sangam Vihar where SI Bhagwan Sahay and Ct. Hukum Ram along with complainant and accused Shane Ali met her. The statement of complainant Feroza was recorded by the WSI Satish Bhati Investigation Officer. In her statement complainant stated that her husband is a rickshaw puller and in the morning on 09.12.2010 her husband had gone to take milk and she was sitting in her shop of bidi-cigarette with her daughter 'X' (name withheld to keep her identity confidential) at about 8 in the morning. Accused Shane Ali came to her shop and started eating Dilbagh (Gutka). Her daughter 'X' went down for the purpose of passing urine, the accused took her in his lap. She asked the accused to leave her daughter. The accused took her daughter in his lap and thereafter while she was busy in selling goods at her shop the accused took away her daughter. One of their neighbours told them that accused was taking their daughter towards the jungle. When she along with her husband reached in the jungle at the spot they saw that their daughter was lying on the ground and accused was committing rape upon her. They brought the accused to her shop. On her statement, the case against the accused was registered. The site was inspected by the Investigation officer at the pointing out of the complainant and site plan was prepared. Accused also made his disclosure statement. He was arrested and exhibits were sent to Forensic Science Laboratory (FSL). Accused and the daughter of complainant were sent for their medical examination and after completion of the investigation, charge sheet

under Section 376 IPC was filed against the accused in the court."

3. The prosecution, to substantiate the charges levelled against the appellant, examined 8 witnesses, in all. The appellant denied the entire incriminating evidence against him and pleaded false implication. It was alleged that the appellant and his father had extended financial support to the parents of the prosecutrix and when the said amount was demanded, the appellant was falsely implicated in the present case. The appellant adduced his father as DW-1 in his defence.
4. After meticulously examining the evidence led by the parties, the Trial Court convicted the appellant and sentenced him as mentioned hereinbefore.
5. Feeling aggrieved, the present appeal has been preferred. By the appeal at hand, the appellant impugns not only his conviction but also the order on sentence.

Arguments addressed on behalf of the appellant

6. Addressing arguments on the present appeal, Ms. Sahila Lamba, counsel for the appellant submitted that the impugned judgment suffers from several infirmities and the Trial Court had gravely erred in convicting and sentencing the appellant; that there was no independent public witness and the witnesses examined by the prosecution were interested witnesses who owed money to the appellant and that they had falsely implicated the appellant with their malafide intention to escape from returning the money borrowed by them; that the above could be proved by the

unchallenged testimony of the father of the appellant/DW-1; that in the FSL report neither the presence of semen on the body of prosecutrix nor any blood of prosecutrix on the body of the appellant, had been detected, and therefore it did not support the case of the prosecution, thereby ruling out the possibility of commission of alleged offence by the appellant; that there was considerable delay in registration of the FIR which casts a serious doubt on the veracity of case of prosecution. Counsel also contended that even otherwise, the appellant is in jail for the last more than 6 years, as such, a liberal view may be taken.

Arguments raised on behalf of the State

7. Refuting the submissions of the learned counsel for the appellant, Ms. Anita Abraham, learned APP appearing for the State, submitted that the impugned judgment does not call for any interference. Counsel further submitted that the prosecution has been fully able to prove its case against the appellant, beyond any shadow of doubt, as all the witnesses have duly supported the case of the prosecution and there were no discrepancies in their statement. Besides that, the case of prosecution further finds corroboration from the medical and scientific evidence placed on record. Counsel also argued that the plea taken by the appellant that, the parents of the prosecutrix did not return the money which they borrowed from him and got him falsely implicated in this case, is an afterthought inasmuch as no such suggestion was given to the parents of the prosecutrix. Moreover, the defence witness examined by the appellant failed to produce any receipt to show

that they had given any sum of money to the parents of the prosecutrix. Under these circumstances, it was submitted that there is no merit in the appeal and the same deserves to be dismissed.

8. I have given my considerable thought to the respective submissions of learned counsel for the parties and have perused the material available on record.

The Prosecution Narrative

9. At this juncture, the appreciation of evidence brought on record requires to be appositely scrutinized to adjudge the fact whether the appellant is guilty of his culpability.
10. Admittedly, version of the prosecution was unfolded in the testimony of **PW-1**/Ms. Firoza/mother of the prosecutrix, who is the complainant in the present case. Before proceeding further, it is imperative to appreciate the evidentiary value to be attached to the testimony of PW-1 and the contentions advanced in this regard. Therefore, it would be appropriate to reproduce her testimony, deposed during her Examination-in-Chief, which reads as under:-

"My husband is a hand rickshaw(hand cart) puller and we had also installed a stall/khokha/kiosk for selling the bidi/cigarettes in our courtyard (Aangan). About eight-nine months back, the exact date I do not remember now, my husband had gone for taking milk at about 08:00 AM and I was sitting on the stall and my daughter Farhana aged about one and a half years was also with me. At that time the accused Shane Ali alias Pappu present in the court today and correctly identified as witness came to my stall and purchased milk and dilbag (gutka) and started consuming dilbag (gutka). By that time my daughter Farhana went down from the stall for the purpose of passing urine. At that

time the accused took my daughter in his lap. I was busy in selling goods at my stall/kiosk by that time the accused took my daughter. When my husband came back I told him that the accused has taken Farhana. While searching my daughter I along with my husband went to the jungle, we saw that the accused had laid down my daughter on the ground and was holding her with one his hand and blood was oozing from her vagina and the accused was trying to insert his penis into the vagina of my daughter Farhana. I with the help of my husband took my daughter from the accused and we brought my daughter and the accused to our stall/kiosk....."

This witness had further described the entire incident in the court and had also proved her statement **Ex. PW-1/A**, which was recorded by the Investigating Officer at the time of registration of FIR. She was also cross examined at length by the defence counsel but nothing material could be attributed therefrom.

11. The father of the prosecutrix was examined as **PW-5**. He had also duly supported the case of the prosecution as he was present with PW-1 when they both went to the jungle in search of their daughter and apprehended the appellant/accused.

Medical examination of the prosecutrix

12. Both the witnesses (i.e. PW-1 & PW-5) have deposed that their daughter 'X' aged about 1 ½ years was "*bleeding from her private parts*" at that time. The cross-examination of the witnesses relating to the medical examination did not make any dent in the evidence for the prosecution.
13. The prosecutrix was medically examined in the presence of PW-1

vide MLC dated 09.12.2010 (**Ex.PW-1/B**). The medical opinion of the examining medical officer/ Dr. Saloni, who is **PW-8** in the present case, is hereby reproduced as under:-

".....On examination, the child cried on local examination and was uncooperative. Per abdomen soft. On local examination, bleeding spots were seen over thigh and there were no scratch marks, genetalia was found to be injured, suggestive of recent coital attempt. Per vaginal examination (one finger) hymen was found to be ruptured and three vaginal smear slides were prepared...."

As the examining medical officer has, during the course of examination, found the prosecutrix to be exposed to recent coitus, her opinion shall well be regarded as definitive to such effect. Therefore, the MLC report (**Ex.PW-1/A**) clearly connects the appellant with the crime.

14. It is pertinent to mention here that, the appellant was also medically examined by Dr. Karthik Krishna (**PW-2**) who prepared the MLC (**Ex. PW-2/A**). In the said report of medical examination, PW-2 has affirmed the absence of any indication of incapability of the appellant in engaging in sexual intercourse. The appellant was caught at the spot and was subsequently beaten by the public persons. This fact is also evident from his MLC.
15. Now the question that arises for adjudication before this Court is, whether the testimony of PW-1 and PW-5, who are the parents of the prosecutrix 'X' aged 1 ½ years, deserves acceptance and also whether a conviction, recorded solely on their testimonies in the absence of any independent public witness, can be upheld?
16. Keeping the aforesaid aspects in view, this Court shall now

proceed to test the submission of the learned counsel for the appellant. The evidence of PW-1 and PW-5 was assailed by the appellant on the ground that except the parents of the prosecutrix, there was no other independent public witness to corroborate their version despite presence of a number of neighbours at the place of incident. The appellant further submitted that the parents of the prosecutrix were required to return the borrowed money to him and that they had falsely implicated him due to this reason.

17. The appellant in his statement under Section 313 Cr.P.C. abjured the guilt and pleaded false implication. He further adduced his father Sh. Saidullah Haq/ **DW-1** in his defence. DW-1 deposed as under:-

"The complainant who is a rickshaw puller used to take money from me and my son i.e. accused. He sometime used to return the money and sometime did not return. I was going for Haj. At that time, he assured me that he will return my Rs.5,000/- when I will come back from Haj. I came back from Haj on 07.12.2010. I had gone to meet someone and in the meanwhile I asked my wife to send the accused for bringing the money from complainant. When I was at my relative place then I received a message from my house regarding a quarrel between my son i.e. accused and the complainant for non-payment of the money. Subsequently, when I went to the police station, I told the entire facts to the police but police falsely implicated him in the present case."

18. During cross-examination, testimony of DW-1 was not challenged by the prosecution. However, no evidence has been placed on record, on the behalf of the appellant, as to the said receipt of the alleged sum of money by the parents of the prosecutrix. Also, there

is no other witness to corroborate the defence version, on the basis of which the appellant has pleaded false implication. Further DW-1 in his Chief had deposed that whole incident took place on 07.12.2010 whereas the complaint was lodged on 09.12.2010. Therefore, the Trial Court, vide impugned judgement dated 20.03.2012, held that *"this incident as narrated by DW-1, if really happened, has no relevance to the present case as in the present case incident took place on 09.12.2010"*. Further the Trial Court has also observed that, during cross examination, the complainant/PW-1, *"has clearly denied that they have borrowed money from the accused or one day prior to the incident accused had come to their place and warned them to take legal action against them. She has further denied the suggestion that the accused came to her house for taking the borrowed money and on that issue a quarrel took place and they had given beatings to the accused. Though she has admitted that accused was beaten at the spot in the present case."*

19. The Supreme Court in ***Harijana Thirupala v. Public Prosecutor, High Court of A.P.***, reported in ***AIR 2002 SC 2821*** held that:-

"11. In appreciating the evidence the approach of the court must be integrated not truncated or isolated. In other words, the impact of the evidence in totality on the prosecution case or innocence of the accused has to be kept in mind in coming to the conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities, its intrinsic value and the animus of witnesses."

20. Given the background of facts, it is observed that it was quite natural that the prosecutrix 'X' who was of tender age, could not have disclosed her ordeal. On the behalf of the prosecutrix, the complainant/ Ms. Firoza (PW-1), being an eye-witness to the alleged incident, in her comprehensive statement before the court, has implicated the appellant and attributed a specific and definite role to him while narrating the sequence of events as noted earlier. She has further proved her statement Ex.PW-1/A, giving vivid detail of the incident as to how and in what manner the appellant caught hold of her minor daughter/prosecutrix 'X' and brutally committed the alleged offence. Also the medical evidence (MLC) placed on record nails the case against the appellant leaving no room for doubt that he had committed sexual assault upon the minor prosecutrix 'X'. There is no reason before this Court to entertain any doubts as to the truthfulness of her account.
21. Moreover, the Trial Court, in the impugned judgement, has held the complainant/PW-1 to be a "*reliable witness*" as she has clearly deposed about the entire incident in her testimony. Therefore, this Court finds no valid ground to take a different view from the observations recorded by the Trial Court as the said conclusion is inescapable based on the statement of the complainant duly supported by the medical evidence on record as noted above.

Independent witness

22. Contradicting the view taken by the Trial Court, the appellant has also urged that no independent public witness, present at the time when the incident took place, was examined by the prosecution.

23. Reference is made to the judgment of the Supreme Court in *State of Himachal Pradesh vs. Gian Chand* reported in *AIR 2001 SC 2075*, wherein it was *inter alia* observed that:-

"14. Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be.....If the court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could also have been examined but were not examined."

24. It must be added here that, the Investigating Officer had no opportunity in that eventuality to associate any independent witness. Ct. Hukma Ram/PW-6, in his statement, had stated that *"the I.O had asked public person to become the witness to the arrest of the appellant, but none agreed."* But, it is a well settled principle of law that mere non-association of the independent witness itself is no ground to throw out the entire case of the prosecution.
25. Judged on the anvil of the aforesaid decisions, and in light of the facts and circumstances of the present case, this Court finds no reason to view the testimony of mother of the prosecutrix/PW-1 with doubt, disbelief or suspicion. The evidence adduced so far, by the prosecution, does persuade this court to uphold the guilt of the appellant. The medical evidence on record also lends assurance to her statement and is sufficient to satisfy the judicial conscience. This Court is therefore satisfied that, implicit reliance can be placed upon the testimony of complainant/ Ms. Firoza (PW-1) who

is the mother of the minor prosecutrix 'X' and is a reliable witness.

26. Therefore, no merit in the contention raised on behalf of the appellant is found. Seen against the facts which have been established, it is vivid that the case at hand is one where the defence has utterly failed to dislodge the creditworthiness of the testimony of the prosecutrix. Thereby, the circumstances stand conclusively proved by the unimpeachable testimonies of the prosecution witnesses. Also, it is hard to believe that the parents of the prosecutrix could have falsely implicated the appellant, by exposing their own minor daughter aged 1 ½ years, to possible social ostracization in near future. Thus, the non-joining of independent witness cannot be a ground to discredit the prosecution version.

FSL Report

27. The appellant has further questioned the case of the prosecution by contending that the FSL Report neither depicts the presence of semen on the body of the prosecutrix nor any blood stain of prosecutrix on the body of the appellant, thereby ruling out the culpability of the appellant in the instant case.
28. In this regard, observations made by the Apex Court in ***State of U.P. v. Babul Nath*** reported in ***(1994) 6 SCC 29*** is reproduced as under:-

"To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto requires 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 and 376 of IPC. That being so it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains. But in the present case before us as noticed above there is more than enough evidence positively showing that there was sexual activity on the victim and she was subjected to sexual assault without which she would not have sustained injuries of the nature found on her private part by the doctor who examined her."

29. This issue has been further dealt with by the Supreme Court in ***State of Tamil Nadu v Ravi @ Nehru*** reported in **(2006)10 SCC 534** wherein the Apex Court has quoted the opinion expressed by **Modi in Medical Jurisprudence and Toxicology** which reads as follows:-

"It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape, is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

30. Similar view has been taken by this Court in **CRL.A.No. 873/2009** titled as **Dhan Bahadur @ Raju vs. State of NCT of Delhi** decided on **25.02.2011**, wherein it was held that:-

"Explanation to Section 375 IPC envisages that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Even the slightest penetration of the vulva by penis with or without emission of semen is sufficient for the commission of offence under Section 376 IPC. In the present case penetration is evident from the MLC of the prosecutrix as hymen was found absent with blood stains."

31. In light of the above settled canon of criminal jurisprudence, this Court is of the view that the defence taken by the accused does not inspire any confidence and is thus devoid of any substance. Mere absence of semen on vaginal smear would not absolve the appellant from his liability for offence under Section 376 IPC. On the other hand, testimony of the prosecution witnesses cannot be brushed aside on the flimsy plea raised by the appellant. In view of the settled legal proposition, the testimony of the mother of the prosecutrix/PW-1 is sufficient to bring home the guilt of the accused which, in the instant case, finds corroboration from the testimony of other prosecution witnesses, medical evidence as well as the scientific evidence placed on record.

Delay in registration of FIR

32. The next question to be dealt with by this Court is whether there has been any delay in registration of FIR in the present case that is

substantial enough to cast a doubt on the veracity of the case of the prosecution.

33. Returning to the narrative, the sequence of events, leading to the registration of FIR in the present case, are hereby deduced from the statement of the Investigating Officer (I.O)/ WSI Satish Bhati/ **PW-7**. According to her statement, on 09.12.2010, upon receipt of information regarding DD No.8A registered at P.S Sangam Vihar, PW-7 took up the case for investigation and reached AIIMS Hospital, where the prosecutrix alongwith her mother was brought for medical examination. Thereafter, statement of the complainant/ PW-1 was recorded. In the meanwhile, the accused was also brought for medical examination. After collecting the samples for forensic examination from the hospital, the I.O returned to the police station and prepared rukka Mark X (**Ex.PW-7/A**). On receipt of the said rukka, ASI Krishan Kumar (**PW-3**)/Duty officer, at P.S Sangam Vihar registered the formal FIR in the present case.
34. At this juncture, from a perusal of aforementioned facts, this Court observes that no substantial delay has been caused in registering the FIR. The sequence of events is natural and in the present case, no delay can be said to have been caused in examining PW-1, the complainant. Even assuming, for the sake of arguments that there is delay, the same is in consonance with natural human conduct.
35. In ***Ram Jag and others v. State of U.P***, reported in ***AIR 1974 SC 606***, it was held that :-

"witnesses cannot be called upon to explain every hour's delay and a commonsense view has to be taken

in ascertaining whether the first information report was lodged after an undue delay so as to afford enough scope for manipulating evidence. Whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay in filing report of an occurrence can be condoned if the witnesses on whose evidence the prosecution relies have no motive for implicating the accused. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness of the version of the prosecution.”

36. Applying the ratio of the aforementioned judgement, this Court finds no hesitation in arriving at the conclusion that there was no delay in registering the FIR in the present case.

Conclusion

37. For the foregoing reasons, this Court finds no merit in the submissions made by the appellant, to the findings on facts returned by the Trial Court in the impugned judgment. As per the facts and circumstances of the present case, there is a direct link of the appellant/accused with the commission of the crime. Such conclusion can well be established by the statement of the witnesses, the recoveries made and the Medical Report of the prosecutrix on record. Therefore, conviction based upon fair appreciation of entire evidence deserves no intervention. From the material placed on record, it stands established by the prosecution that the accused is guilty of having committed the offence charged for. Overturning of a well considered and well analyzed judgment

of the Trial Court, when the case against the respondent otherwise stood established beyond reasonable doubt, is not called for.

38. It is worthy to mention here the Apex Court decision in ***State of Rajasthan vs. N.K.-The Accused*** reported in ***AIR 2000 SC 1812*** wherein it was *inter alia* observed that :-

"It is true that the golden thread which runs throughout the cob-web of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on prowl for easy preys, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women."

39. Therefore, on no count does the impugned judgment call for any interference. The Trial Court has fully appreciated the evidence placed on record by the parties. Findings of conviction cannot be said to be erroneous or perverse. Moreover the appellant, having

committed the heinous offence of rape against a minor aged 1 ½ years, deserves no leniency and for him sympathy on the ground sought for is wholly uncalled for. Therefore, he deserves to undergo the remaining part of the sentence as awarded by the Additional Sessions Judge.

40. Since the punishment is in accord with the punishment prescribed for the offence under Section 376 IPC and given the background facts wherein the prosecutrix aged 1 ½ years had been brutally subjected to rape by the appellant, this Court does not see any reason to interfere with the order on sentence passed by the Trial Court.
41. Under the circumstances, the appeal being bereft of merit is dismissed.
42. Accordingly, the appeal stands disposed of, so also pending application(s), if any.
43. Records of the Court below be sent back forthwith along with the copy of the order.
44. Copy of this order be sent to the concerned Jail Superintendent for information.

SANGITA DHINGRA SEHGAL, J.

AUGUST 25, 2017 / gr//