

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CRL.L.P. 576/2016

Date of Decision: 06.02.2017

STATE Petitioner

Through: Mr. Varun Goswami, APP for
State.
Inspector Gajender Singh, SHO,
PS Jyoti Nagar.

versus

AZAM @ RIHAN Respondent

Through: None.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE ANU MALHOTRA

GITA MITTAL, J (Oral)

CRL.L.P. 576/2016

1. The Trial Court record has been received.
2. The State has filed the present petition seeking leave to appeal against the impugned judgment passed by the learned Additional Sessions Judge, Karkardooma, Delhi dated 19th April, 2016 in Sessions Case No. 488/16 arising out of FIR No. 381/2013, registered at PS Jyoti Nagar under Section 363/376 IPC and under Section 4 of POSCO Act, by which the respondent stood acquitted of the aforesaid charges. The case was registered on a complaint made by PW-1 Smt. Rais Bano, (mother of the 13 years old prosecutrix, who was examined as PW-2) on 17th October, 2013 regarding her daughter (hereinafter referred to as the 'victim') being missing. This resulted into registration of FIR No. 381/2013 under Section 363 of the IPC. Thereafter on the same day about

11:00 AM, the complainant had visited the police station with her daughter (the victim in the present case), and on enquiry told the police that one Rihan @ Azam had forcibly taken her along with him and had raped her.

3. During investigation, the victim was medically examined by Dr. Malay Mishra (JR) vide MLC No. B-4213/13, who was working under the supervision of Dr. Anshul, CMO (PW-9). The MLC was proved on record by Dr. Anshul (PW-9), who identified the signatures on the MLC as being those of Dr. Malay Mishra, the MLC Doctor.

4. The FSL Report No. 2013/DNA-8429 dated 21st May, 2014 under the signatures of V. Sankaranayanan, Senior Scientific Officer (Biology) is on record.

5. The respondent was arrested in this case on 20th October, 2013 and was taken to the GTB Hospital where he was medically examined by Dr. Diwakar (JR) vide MLC No. C-4261/13 (Exh. PW11/A). This MLC was proved on record by Dr. Sushma, CMO who deposed as PW-11. She identified the signatures on the MLC as being those of Dr. Diwakar, the MLC Doctor (who had since left the services of the hospital).

6. During this medical examination samples of the respondents pubic hair, blood & semen were obtained & sealed by the doctor. Alongwith the sample seal, the *pullandas* were handed over to the Constable Amit (PW-7) by the doctor and they were seized vide Seizure Memo Exh. PW7/A.

7. The seized samples & exhibits were sent to FSL through Constable Lakhan (PW-13). In the laboratory gauze cloth itself on which the semen sample of the accused had been obtained was marked as Ex.B1 and the salwar was marked as Ex.G2D. The FSL has reported that allelic data from the source of Ex.B1 i.e “ Gauze cloth piece” of the accused were accounted in the allelic data of the source of Ex. G2D i.e. *Salwar* of the victim.

8. It appears that during investigation, on 19th October, 2013 the police had also produced the victim before the Magistrate for recording the statement under Section 164 Cr.P.C. which was proved on record as Ex.PW-2/A. Thereafter Section 376 of the IPC and Section 4 of the POCSO Act were added in the case.

9. After completion of investigation, a chargesheet under Section 173 of the Cr. P.C. came to be filed against the respondent in the court of the concerned Metropolitan Magistrate, who committed the matter for trial to the Court of Sessions, in accordance with law.

10. Charges were framed on 4th March, 2013 under Sections 363/376 of the IPC and Section 4 of the POCSO Act against the respondent to which he pleaded not guilty and claimed trial.

11. The prosecution examined 14 witnesses in support of its case against the respondent who was given an opportunity to explain the incriminating circumstances under Section 313 of the Cr. P.C where he claimed innocence and false implication.

12. The Id. Trial Judge considered the entirety of the matter and by the impugned judgment dated 19th April, 2016 found that the

prosecution had failed to make out a case against the respondent and acquitted him of the charges which had been levelled against him.

13. The State has filed the present petition seeking leave to appeal against the impugned judgment contending that the trial court has gravely erred in construing the evidence brought on record and that the prosecution had established the case beyond doubt.

14. We have heard Mr. Varun Goswami, APP for the State and have given considered thought to his submissions.

15. During recording of the evidence on behalf the prosecution, neither Smt. Rais Bano PW-1, the complainant, nor her husband Rafiq Babu PW-3 identified the respondent as the person against whom the complaint was lodged or against whom the allegations of rape had been made.

16. Furthermore, the victim when examined as PW-2 also clearly stated in the witness box that the respondent shown to her in Court was not Rihan who had committed rape upon her.

17. So far as the FSL result is concerned, we may refer to Para 5 of the impugned judgment, wherein the Id. Trial Judge has encapsulated the defence of the respondent, which reads thus:

“With respect to the FSL result, accused stated that on 17.10.2013, he was lifted from his house by police and thereafter, police took him in search of real culprit Rihan as he was known to him prior to the incident since he could not get him arrested, the police took his blood and semen sample forcibly and thereafter planted the same on the clothes of the prosecutrix in order to solve their unsolved case and thus

falsely implicated him in the present case. Accused stated that his name is Mohd. Azam only and not Azam @ Rihan.”

18. In view of the categorical testimony of the victim and her parents PWs 1 to 3, the explanation of the respondent for the FSL report and identification of his samples is plausible.

19. In this background, on consideration of the totality of the evidence placed before it, the trial Court was compelled to hold as follows:

*7. Ld. counsel for the accused argued that all the three material witnesses i.e. PW2 prosecutrix and her parents PW1 Smt. Rais Bano and Sh. Rafiq Babu have failed to identify the accused as the same person who had committed charged offences with the prosecutrix. PW1 Smt. Rais Bano categorically stated that **“the accused today present in the court is not the same Rihan who had taken my daughter/prosecutrix”**. PW2 prosecutrix who is the alleged victim as per case of prosecution categorically stated that **“accused shown to her is Azam and not Rihan who had committed rape upon her”**. PW3 Rafiq Babu deposed that **he knew accused Azam who was present in the court on the day of his deposition and facing trial as he was residing in his gali and his daughter had not gone with accused Azam**. Ld. Defence counsel stated that since all the three material witnesses categorical stated that since all the three material witnesses categorical stated that accused Azam was not the person who had committed offence with the prosecutrix, therefore, prosecution has miserably failed to prove its case against the accused who is entitled for acquittal.*

In support of his contentions, ld. counsel for the applicant has relied on the following judgments:

- (a) Lokesh Mishra V. State of NCT of Delhi, Crl. Appeal No.768/2010, decided on 12.03.2014, by Delhi High Court by Hon'ble Mr.Justice Kailash Gambhir and Hon'ble Ms. Sunita Gupta.*
- (b) Radha Krishna Nagesh V. State of A.P. Crl. Appeal No.1707/2009, decided on 13.02.2012 by Hon'ble Supreme Court of India by Hon'ble Mr.Justice Swatantra Kumar and Hon'ble Ms. Justice Gyan Sudha Mishra.*
- (c) Tasleem @ Pappu Vs. State of NCT of Delhi, Crl. Appeal No.69/2007, decided on 08.03.2011 by Delhi High Court by Hon'ble Ms. Justice Hima Kohli.*
- (d) State of Punjab Vs. Hakam Singh, 2005 (3) JCC 1554.*

8. On the other hand, ld. Addl. PP for State argued that prosecutrix had fully supported the story of prosecution but for the reasons best known to her, she turned hostile on the point of identification of accused, even though, it is clear from the FSL result that it was the accused who had committed rape upon her because FSL report is in favour of the prosecution which clearly mentions that "the DNA (STR analysis) profiling performed on the source of Exhibit G2d i.e. salwar (of victim) and Exhibit B 1 i.e. gauze cloth piece (of accused) was sufficient to conclude that the allelic data of the source of Exhibit B1 i.e. gauze cloth piece (of accused) are similar to that to allelic data from the source of Exhibit G2d i.e. Salwar (of victim)". Ld. Addl. PP further states that on the basis of FSL result, the case stands successfully proved against the

accused and therefore, accused be convicted for the offences for which he has been charged with.

*9. I have carefully gone through the evidence on record, submissions made and the judgments relied upon. There are three material witnesses including the prosecutrix/victim who had been examined ad PW2. In her testimony, prosecutrix has, however, supported the prosecutions story that on 16.10.2013 at about 5.30 pm, while she was going to photo studio, Rehan met her, caught hold of her from behind and asked her to go alongwith him for roaming and forcibly took her to Lal Quila by catching hold of her hand in bus, where they took ice cream and played on swing (jhula) and she came back alongwith Rehan who took her in a Karkhana (factory) and stayed there in the night and committed rape upon her in the night. PW2 prosecutrix also proved her statement u/s 164 Cr.P.C Ex. PW2/A. Accused Azam@ Rihan was shown to the PW2 prosecutrix for identification, however, it was very surprising that she denied to identify him stating that **Azam shown to her was not Rehan who had committed rape upon her.** However, she identified the clothes (one green colour salwar, one green and purple colour frawk suit, one purple colour dupata and one white colour banyan) shown to her from sealed envelope, sealed with the seal of FSL VSN as Ex. P1 as the same which were seized by the doctor at GTB Hospital during her medical examination. PW2 prosecutrix was declared hostile and was cross-examined at length by Id. Addl. PP for State who put a specific question to her that the person who committed the offence of rape against her was the same person Azam@ Rehan who has been shown to her and not one else and that is why she was not disclosing the address of any other*

person. In her reply she stated the same to be incorrect and stated that offender Rehan was aged about 20 years. He was having fair complexion, tall with ordinary physique. She admitted that she did not make any hue and cry when he was taking her by catching hold of her hand.

In her cross-examination, **PW2 prosecutrix admitted that Azam was arrested by the police because he knew Rehan. She stated that she knew him because she had seen him standing with Rehan. She further deposed that Azam had not said anything to her any point of time. On the court question that “you have stated in the court that Azam was arrested by the police in the gali at your instance then why you did not stop the police from arresting him if any other person by name Rehan had committed rape on you?”**, she replied that she did not stop the police from arresting Azam as she had seen him with Rehan in Sunny Bazar on the occasion of Eid.

11. However, it is seen that as per FSL result DNA (STR analysis) profiling performed on the source of Exhibit G2d i.e. salwar (of victim) and Exhibit B1 i.e. gauze cloth piece (of accused) have been matched and when question in this regard was put to accused in his statement u/s 313 Cr.P.C., he replied that on 17.10.2013, he was lifted from his house by police and thereafter, police took him in search of real culprit Rehan as he was known to him prior to the incident since he could not get him arrested, the police took his blood and semen sample forcibly and thereafter planted the same on the clothes of the prosecutrix in order to solve their unsolved case and thus falsely implicated him in the present case. The said suggestion has also

been given to IO by Ld. Defence counsel. He stated that his name is Mohd. Azam only. However, in this case when all the material witnesses are totally hostile to the identification of accused, the aspect of matching of DNA profiling on the clothes of victim and of the accused has to be tested in the light of the relevant provisions of law considering the judgments relied upon by Ld. Counsel for the accused.

In case of Tasleem@ Pappu Vs. State (supra), as relied upon by Ld. Counsel for the accused, Hon'ble High Court of Delhi has held and observed that:

*“15. It was further canvassed by the Ld. Counsel for the appellant that conviction of the appellant could not be based on the serological evidence produced before the Court. Serological evidence is just one one piece of evidence, which is brought on the record but expert medical evidence cannot be treated as binding on the ocular evidence. In the case of Vishnu V. State of Maharashtra reported as AIR 2006 SC 508, the Supreme Court held that “..... **the opinion of the Medical officer is to assist the Court as he is not a witness of fact and the evidence given by the Medical officer is really of an advisory character and not binding on the witness of fact**”(para 21).”*

*Similarly, in the case of **Madan Gopal Kakkar V. Naval Dubey** reported as (1992) 3 SCC 204, the Supreme Court held as follows:-*

“34. A medical witness called in

as an expert to assist the Court is not a witness of fact and the evidence 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 material 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 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 expected, it is not the opinion of the medical officer but of the Court.” (emphasis added).

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In case of Lokesh Mishra V. State of NCT of Delhi (supra), it is held and observed by Hon'ble Delhi High Court victim is the best witness to depose the factum of rape and by whom it was committed and same has to be given utmost importance. The evidence of factum of rape of victim is entitled to great weightage.

In case of Radha Krishna Nagesh V. State of A.P. (supra), Hon'ble Supreme Court held and observed that:

“18. In order to establish a conflict between the ocular evidence and the medical evidence, there has to be specific

*and material contradictions. Merely because, some fact was not recorded or stated by the doctor at a given point of time and subsequently such fact was established by the expert report, **the FSL report, would not by itself substantiate the plea of contradiction or variation.** Absence of injuries on the body of the prosecutrix, as already explained, would not be of any advantage to the accused.*

19. In any case, to establish a conflict between the medical and the ocular evidence, the law is no more res integra and stands squarely answered by the recent judgment of this Court in the case of Dayal Singh and Ors.V. State of Uttaranchal MANU/SC/0622/2012 (2012) 7 SCALE 165.”

“29. This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The Courts, normally look at expert evidence with a greater sense of

acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of deliberate attempt to misdirect the prosecution. In Kamaljit Singh V. State of Punjab MANU/SC/0824/2003: 2004 CrLJ 28, the Court, while dealing with discrepancies between ocular and medical evidence, held, "it is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out."

30. Where the eye witness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive. The expert witness is expected to put before the court all material inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by examining 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 opinion is accepted, it is not the opinion of the medical officer but that of the court (plz. See Madan Gopal Kakad Vs. Naval Dubey and Anr. MANU/SC/0509/1992: (1992) 2 SCR 921: MANU SC 0509/1992: (1992) 3 SCC 204)."

*12. Now coming to the facts of the case, considering the testimony of all the three material witnesses who are ocular witnesses including the victim, it is very well established on record that they had failed to identify the accused to be the same person who had committed the offence. In these circumstances whenever there is conflict between expert evidence and ocular testimony normally ocular testimony should be preferred unless it belied fundamental facts as has been held by Hon'ble Supreme Court in case of **State of Punjab Vs. Hakam Singh, 2005 (3) JCC 1554**. Therefore, mere presence of semens of accused on the clothes of the victim i.e. salwar (of victim) and on gauze cloth piece (of accused) shall not be sufficient to prove the offence of rape by the accused. Moreover, it is held by Hon'ble Supreme Court in case of **Rahim Beg V. State, 1972 (3) SCC 759**, that mere presence of seminal stains on underwear of the accused or on the clothes of the victim does not connect that accused with the offence of rape. It is also seen that ld. Defence counsel has given categorical suggestion that the said semens were planted and same was repeated by the accused when his statement u/s 313 Cr.P.C was recorded.*

20. We are satisfied that given the evidence led by the prosecution during the trial, the findings of the trial Court cannot be assailed on any legally tenable grounds. We find no infirmity in the findings and conclusions of the trial Court.

21. In view thereof, the present petition seeking leave to appeal against the judgement dated 19th April, 2016 is completely without any merit and is, therefore, dismissed.

GITA MITTAL, J

ANU MALHOTRA, J

FEBRUARY 06, 2017

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