

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment Reserved on: 17.09.2019
Judgment Pronounced on: 23.12.2019

CRL.A. 79/2009

STATE THROUGH NCT OF DELHI

.... Appellant

Versus

SURENDER KUMAR @PAPPEY & ORS

.... Respondents

Advocates who appeared in this case:

For the Appellant : Mr. Ravi Nayak, APP

For the Respondents : Mr. Ravin Rao, Advocate for R-1.

Mr. M.K Sharma, Advocate with Mr. Abhinav Sharma,
Advocate for R-2.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE I.S. MEHTA

J U D G M E N T

SIDDHARTH MRIDUL, J

1. The present appeal under Section 378 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') assails the impugned judgment and order dated 01.02.2006, rendered by the learned Trial Court in Sessions Case No.178/97, arising out of FIR No.95/97, under Sections 363/376/506/34 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC'), Police Station- Alipur,

whereby Surender Kumar *alias* Pappey, respondent No.1 (hereinafter referred to as 'accused No.1') and Ravinder *alias* Kalia, respondent No.2 (hereinafter referred to as 'accused No.2') were acquitted.

2. By way of the order dated 15.10.1998, the charge for the commission of the offences punishable under sections 376 and 506 IPC were framed against accused No.1 and; accused No.2 was duly charged for the commission of the offences punishable under section 376 read with section 109 IPC, by the learned trial court.

3. The facts, as elaborated by the trial court are extracted in extenso, as follows: -

“2. Case of the prosecution, in brief, is that the victim female child, student of 8th class left her house in the company of her younger brother Satbir to case herself. While the victim child has just sat behind Shiv Mandir of the same village, both the accused persons came thereof. Ravinder @ Kalia accused is alleged to have caught hold of Satbir whereas his co-accused forcibly picked up the victim child, took her to a nearby vacant plot, threw her inside the school building alongside its wall and thereafter himself scaled over the wall. The victim child raised alarm but Surender accused pressed her mouth, threatened her with death and dragged her inside the school. Thereafter, Surender accused is alleged to have committed rape on the victim child under the trees by the side of wall of the school. The victim child cried, but Surender accused did not leave her. After committing rape, Surender accused brought the victim child back adopting the same passage and left her in the vacant plot weeping. Surender accused then threatened the victim child with death in case she narrated the occurrence

to anyone. The victim child remained in the vacant plot. When her father arrived there in her search she narrated the occurrence. The father of the victim child then took her to the house and then informed the police.

3. Case of prosecution goes that on receiving information about some quarrel. SI Ram Krishan accompanied by Ct. Om Prakash of Delhi Home Guard reached village Sindhu where prosecutrix and her parents met them. The victim child then made statement before the S.I, who appended endorsement thereto and sent rukka to the police station which led to registration of the case.”
4. The prosecution examined 15 witnesses in all to establish their case against the accused persons.
5. The statement of the accused under section 313 of Cr.P.C, were recorded thereafter, wherein they denied the case of the prosecution and stated that they were falsely implicated in the case.
6. Whereas, the accused No. 1 in the statement under Section 313 Cr.P.C stated that he has been falsely implicated by the complainant with the motive to extract money from him; the accused No.2 took the *alibi* that he was on his duty at the time of the commission of the offence, and came to know about the incident subsequently when he returned home later in the evening. However, both the accused opted not to lead any evidence in their respective defence.
7. The trial court after hearing learned counsel for the parties and upon examination of the evidence on record, acquitted the accused of

the charges framed against them and came to the following conclusion: -

“17. Question arises whether any of the accused was involved in commission of the sexual assault? As noticed above, rukka Ex. PW 13/1 is stated to have been sent from village Sindhu to the police station through Constable Om Prakash. But according to victim child (PW8), her statement was recorded at the police station. There is nothing in the statement of PW10 Sh. Madan Lal, father of the victim child that statement of their daughter was recorded by the police in village Sindhu. Therefore, from the material available on record, appears that Ex.PW8/1 came to be recorded at police station and not in village Sindhu as the prosecution wants the Court to believe. Keeping in view all this, statements of the witnesses have to be carefully scrutinized, and I have so scrutinized their statements made in court.

18. As per version available in statement Ex. PW8/1 made by the victim child before the police, two boys had come behind Shiv Temple of their village just when she sat there to ease herself. As regards their identity, **in Ex.PW8/1, the victim child stated that one of the two boys was known as Kalia who was running a ration shop and the other boy used to roam in the company of said Kalia.**

19. In Ex.PW8/1, the victim child did not name companion of Kalia but while appearing in court as PW8, the victim child, at noticed above, named the two boys as Kalia and Pappey. Pappey was not named as one of the culprits in Ex. PW8/1 made before the police.

20. Case of the prosecution is that Ravinder is known as Kalia and he runs a ration shop in this respect, prosecution should have brought sufficient evidence on record by examining anyone from the village particularly when neither PW8, the victim child nor her parents deposed that Ravinder is known as Kalia and that he runs a ration shop in

their village. Furthermore, no step was taken during investigation to collect evidence in this respect.

21. Similarly there is nothing in the statement of PW8, the victim child or her parents (PW9 and PW10) that Surender Kumar accused is known as Pappey. According to PW9 Mohar Patti, mother of the victim child, her daughter disclosed to her that she was caught hold of by Pappey, accused present in court, that pappey had taken her to school where he committed "Galat Kaam"(rape) with her after removing her clothes. It may be mentioned here that PW9 nowhere stated name of companion of Pappey or that her daughter had disclosed to her name of companion of Pappey. In her cross-examination PW9 admitted that her statement was recorded by the police at the police station. She further admitted to have not mentioned even name of Pappey in her statement made before the police.

22. Similarly PW10 Sh. Madan Lal, father of the victim child deposed that on 28.03.97 on reaching his house he left in search of his daughter and on reaching behind the school, he found her daughter weeping there while she was wearing only a shirt. He further deposed that as told by his daughter, when she had gone to ease herself, two boys belonging to fair price shop had come there and that out of them, the one who was fair price shopkeeper, committed rape on her. PW10 further deposed that his daughter disclosed name of the person who committed rape on her as Pappey.

It may be mentioned here that PW10 Sh. Madan Lal did not state in court that his daughter had disclosed to him name of companion of Pappey. In his cross examination, he admitted to have made statement before the police at police station. He further admitted that his daughter had disclosed to him name of Pappey and he accordingly stated name of Pappey in his statement made before the police. The witness was confronted with his statement Ex.PW10/D1 made before the police where it was not so recorded. This shows that PW10 made improvement on this aspect while making statement in court.

23. Fact remains that PW9 Smt. Mohar Patti and PW10 Sh. Madan Lal nowhere named Kalia as one of the culprits involved in commission of the crime. Had any person by the

name of Kalia been involved in the occurrence. She must have disclosed his name to her parents soon after the occurrence. Since her parents did not depose that their daughter had disclosure about involvement of Kalia, participation of Kalia@ Ravinder in commission of crime become doubtful.

24. As noticed above, the victim child named Kalia as one of the culprits while making statement before the police but did not name his co-accused and while appearing in court she named the accused persons as Kalia and Pappey. Therefore, PW8, the victim child has also made improvement regarding participation of Pappey in commission of crime. According to the victim child. "There he had committed galat kam with me. The accused removed my salwar and made me lie on the floor and he also lied upon me and then he had committed galat kam with me. The accused had shut my mouth by his hand. After committing galat kam, accused brought me back to the place from where he had lifted me. Meanwhile my father reached there and accused run away from the spot." The victim child did not explain word "he" by pointing out towards the accused persons present in court as to who "he" was, meaning thereby as to whether sexual assault was committed by Surender Kumar @ Pappey or Ravinder@ Kalia. There is nothing in the statement of PW8 the victim as to which of the accused had caught hold of her younger brother Satbir. Prosecution has not examined Satbir in this case to support this part of prosecution story that one of the accused had abetted commission of rape.

25. Case of the prosecution is that both the accused were arrested by the police at the pointing out of victim child while her parents were also accompanying the police. According to PW13 SI Ram Krishan while he alongwith Constable Karambir were in search of the accused persons, the victim child and her parents accompanied them and on pointing out of the victim child, Surender accused was arrested and his personal search memo Ex.PW11/C was prepared. The SI further deposed that thereafter they went to the house of Ravinder accused and arrested him on the identification of the prosecutrix and prepared personal search memo Ex.PW11/B.

However, PW9 Smt. Mohar Patti nowhere stated in her examination in chief that any of the accused was arrested by the police in her presence or at the pointing out of her daughter in her cross examination, she denied to have ever accompanied the police except at the time of medico legal examination in the hospital. She further denied to have visited the house of Surender @ Pappey accused.

Similarly, PW10 Sh. Madan Lal nowhere deposed in examination in chief that any of the accused was arrested in his presence or at the pointing out of his daughter. What is available in his examination in chief in this respect is that police had brought both the accused persons to the police station. In his cross examination, he too denied to have gone to the house of accused persons with the police.

PW8, the victim child also nowhere stated in her examination in chief about the arrest of any of the accused person at her pointing out.

When PW8 to PW10 have not supported the case of prosecution regarding arrest of the accused persons by the police. In their presence or at the pointing out of victim child, the prosecution version in this respect become further doubtful. In the given circumstances, when identity of the accused persons was not sufficiently described by the victim child in her statement made before the police, it was the duty of the IO to arrange for Test Identification Proceedings. But, in this case the IO did not take any step in this direction, which adversely affects the case of prosecution regarding involvement of accused in commission of the crime. Therefore, simply because the victim child stated in court for the first time that accused were present in court, does not help the prosecution. In this respect, reference has been rightly made to the decision in Prahlad Singh v. State of Madhya Pradesh, 1997 (4) RCR (Cr.) 181.

26. Case of prosecution is that Surender accused was got medico legally examined at Hindu Rao Hospital, Delhi, on 29.03.97. Occurrence is alleged to have taken place on 27.03.97 at about 8.30 PM. As per MLC Ex PW1/A Surender@ Pappey accused was brought to Hindu Rao Hospital on 28.03.97 at 13.25 hours. Had he indulged in any such act with the victim child, the doctor who medico legally examined him would have noticed recent external injury on the genital of the accused. Dr C.B Dabas (PW1), who

medico legally examined Surender, proved MLC Ex. PW1/A and his opinion that there was nothing to suggest that person was not capable of doing sexual act. But MLC reveals that no mark of recent external injury was noticed on the genital of Surender accused. Therefore, medical evidence available on record also does not held prosecution in establishing identity of Surender @ Pappey. As one of the culprits or in connecting him with present crime.

27. Case of prosecution is that after medico legal examination of Surender @ Pappey accused, sample of his blood was prepared and the sealed parcel bearing sample of blood and sample seal were seized by the police vide memo Ex.PW 13/3. The blood sample was then sent to FSL for analysis and ultimately the report Ex. PW13/4 was received.

It is also case of the prosecution that the victim child was medico examined at Hindu Rao Hospital on 28.03.97 and after her medico legal examination, medical exhibits were handed over to the police in turn sent the same to FSL, Malviya nagar for analysis.

Report Ex. PW13/4 would reveal that four sealed cloth parcels were deposited at FSL, Malviya Nagar for analysis. On analysis, human semen was detected on Ex. 1/a, 1/b, 2 and 4 and blood was detected on Ex.3. As per report of Assistant Director (Biology), on analysis semen stains on underwear and salwar were found to be of AB group. As regards blood stains no opinion could be given by the Assistant Director (Biology) as sample was found purified.

28. As per prosecution version one salwar was seized by the police. Investigation officer S.I Ram Krishan did not specify as to from where it was seized. It was not seized at the pointing out of victim child or her parents Sh. Madan Lal (PW10) father of the victim child was confronted with his previous statement made before the police on the point of the clothes which her daughter was found wearing at the time he located her. It does not find mentioned in Ex. PW10/D1 that his daughter was found there without salwar or that he had given his clothes to his daughter for wearing at that time. The victim child deposed that her salwar got misplaced. It is in her statement that her salwar was removed and thrown away in a plot even before rape was committed. It is not her

case that salwar was thrown away in the school building after commission of rape on her. Therefore, report of FSL about stains on the salwar does not help the prosecution to establish identity of culprit.”

8. Mr. Ravi Nayak, learned APP appearing on behalf of the State, whilst assailing the judgment of the trial court, urged before us that the minor victim PW-8 was a student of VIIIth class, aged about 13 years, on the date of incident and same was duly proved by them by way of the school certificate exhibited as Ex.PW-10/1.

9. Further the learned APP appearing on behalf of the State would urge that despite the consistent, clear, cogent and reliable testimony of the minor victim, which is definitively corroborated by the medical evidence on record, the learned trial court arrived at an erroneous conclusion and granted misplaced benefit of doubt to both the accused. It was also urged by the learned APP that the testimony of the minor victim unerringly established both, the commission of rape upon her, as well as the identification of the accused persons as the perpetrators of the crime, which testimony is further corroborated by the testimony of her parents, namely, Ms. Mohar Patti PW-9 (mother) and Mr. Madan Lal PW-10 (father), respectively.

10. In this backdrop, it was urged that the learned trial court founded on minor contradictions or insignificant discrepancies in the

testimony of the minor victim, embarked on an unnecessary and pedantic examination of the same to return the finding that the prosecution has failed to establish its case against any of the accused.

11. *Per contra*, learned counsels appearing on behalf of the accused, whilst supporting the impugned judgment in the entirety, would urge that the same does not call for any interference; and further contended that there were major contradictions and discrepancies in the case of the prosecution, and in particular, the testimony of the minor victim, which did not support the case of the prosecution, but rather acts as the fatal lynchpin, in demolishing the same.

12. In this behalf, learned counsel appearing on behalf of the accused would contend as follows:-

- i) That the first information received regarding the incident, recorded as DD No.42B dated 27.03.1997 at Police Station- Alipur, Delhi was about the occurrence of quarrel/dispute near Ram Mandir in village Sindhu and not in respect of commission of rape on the minor victim;
- ii) That although, as per the rukka Ex.PW.8/1 and Ex.PW.13/1, the same was stated to have been sent from

village Sindhu to the concerned police station through Constable Om Prakash PW-12, neither the statement of the minor victim PW-8 nor those of her mother PW-9 and father PW-10 mention that her statement was recorded at village Sindhu;

- iii) That as per prosecution, the incident occurred at 08:30 p.m. on 27.03.1997; the minor victim in her cross-examination deposed that she did not remember the date of incident;
- iv) Although, the minor victim PW-8 clearly named the accused No.2, in her contemporaneous statement before the police, but she failed to name accused No.1 in that statement and made a vast improvement by mentioning him in her testimony before the court.
- v) That Satbir, aged 5 years, who is the younger brother of the minor victim PW-8 and is stated to have accompanied her on the fateful day, was not examined as a witness before the trial court;
- vi) That no Test Identification Parade of the accused persons was conducted by the prosecution;

- vii) That although, the prosecution's case was that the accused persons were arrested at the pointing out of the minor victim, the same was controverted by her, as well as her parents PW-9 and PW-10 during their examination in Court;
- viii) That the MLC of accused No.1 Ex.PW.1/A, it is evident that "*no mark of genital injury on genital*", was opined; thereby ruling out the commission of forcible sexual assault by him upon the minor victim. Further, the blood sample of the said accused, in terms of the report of the FSL Ex.PW.13/3, could not be opined upon since the same was found putrefied.
- ix) Lastly, SI Ram Kishan PW-13, the Investigating Officer could not specify qua the location from where the Salwar of the minor victim was seized and in view of the latter's testimony that it was taken off before the commission of the rape, the finding of semen upon the same is indicative of tampering by the police.

13. In order to buttress his submissions, learned counsel appearing on behalf of accused Nos.1 and 2 respectively, placed reliance on the

following decisions: -

- a) *Dana Yadav @ Dahu & Ors vs. State of Bihar*,
reported as AIR 2002 SC 3325;
- b) *Prahlad Singh vs. State of Madhya Pradesh*,
reported as AIR 1997 SC 3447;
- c) *State (NCT OF DELHI) vs. Jitender Sharma*,
CRL.L. P - 580/2018, decided on 29.04.2019.

14. In view of the foregoing submissions and the evidence on record, the issues that arise for consideration in the present appeal are:-

- (i) Whether the minor victim was subjected to rape on 27.03.1997?
- (ii) Whether the prosecution had established the guilt of the accused persons for the commission of the offence rape of the minor victim, beyond reasonable doubt?

15. Insofar as the first issue is concerned, it would be necessary for us to examine and appreciate the initial statement of the minor victim (rukka) Ex.PW.8/1 recorded on the night intervening 27/28.03.1997 at 12.30 a.m. and Ex.PW.13/1. The same are reproduced in extenso as follows:-

“बयान अजाने कुमारी दुर्गा D/o श्री मदन लाल, r/o मो नो 37, गांव सिंधु, दिल्ली, उम्र 13 साल

बयान किया की मैं पता उपरोक्त पर अपने माँ बाप के साथ श्री रणजीत सिंह के मकान पर किराये पर रहती हूँ और सिंधु स्कूल में ही आठवीं कक्षा में पढ़ती हूँ मेरा बड़ा भाई राकेश और तीनों छोटे भाई घर पर थे और माँ बाप सब्जी बेचने गांव में गए हुए थे समय करीब 8 बजे रात का होगा की मैं अपने छोटे भाई सतबीर को साथ लेकर टट्टी होने के लिए शिव मंदिर के पीछे गयी थी और बैठी ही थी तभी गांव में रहने वाले दो लड़के जिन मे वो एक को **कालिया** कहते हैं और जिनकी राशन की दूकान है और दूसरा लड़का जो कालिया के साथ घूमता रहता है वहाँ आ गए । **कालिया ने मेरे छोटे भाई को पकड़ लिया और दूसरा लड़का जो मुझे जबरदस्ती वहां पर उठा कर वो साथ के खाली प्लाट में ले गया तभी उसने मेरी पहनी हुयी सलवार खींच कर उतारी और वहीं पर फेंक दी फिर उसने मुझे उठा कर स्कूल की दिवार के अंदर फेंक दिया और खुद भी दिवार कूद कर आ गया और मैं चिल्लाई तो मेरा मुंह दबा लिया और जान से मारने की धमकी दी और मुझे खींचता हुआ साथ वाले लड़कों के स्कूल में ले गया जहां दिवार के साथ पेड़ों के बीच ज़मीन पर मेरे साथ गलत काम किया मैं चिल्लाई और रोइ लेकिन उसने मुझे नहीं छोड़ा और इसके बाद मुझे उसी रास्ते पे उस खाली प्लाट में छोड़ दिया मैं रो रही थी और वह लड़का मुझे किसी से कुछ नहीं कहने और नहीं तो जान से मारने की धमकी देकर चला गया । मैं वही पर बैठ गयी कुछ देर बाद मेरे पापा मुझे ढूंढते हुए आये और जिन्हें मैंने यह बात बतलाई जो मुझे लेकर यहां घर आये और**

पुलिस को फ़ोन कराया इन लड़कों के खिलाफ कानूनी कार्यवाही की जाए। श्री मान D/o महावीर, थाना अलीपुर दिल्ली निवेदन है की DD No. 42-B मिलने पर मन ASI पद का० और प्रकाश DHG No. 511/DHG बाबत झगड़ा प्राप्त होने पर गांव सिंधु मकान अजाने रणजीत पहुंचा वहीं पर PCR स्टाफ भी मुलाकी हुआ वहीं पर श्री मदन लाल ने बतलाया की उसकी लड़की के साथ गांव के लड़के पप्पे ने बलात्कार किया है जिसके साथ गांव का ही दूसरा लड़का कालिया भी शामिल रहा है मदन लाल की लड़की जिसके साथ यह घटना घटी से पूछताछ की गयी और जिसका बयान पुस्त बाला हासिल किया जो बयान से सरहस्त सूरत जुर्म 363/76/506/34 का सल्द होना पाया जाता है जो तहरीर हजा बगरज कायदी मुकदमा बदस्त का० ओम प्रकाश न० 511/DHG अजान थाना है मुकदमा दर्ज करके नंबर मुकदमा से इत्तला दी जाए मन ASI मौका पर मदरूफ का तख्तीश हूँ ।

ता० वक्रत बकुआ पहुंचा 27.03.1997 dt. About 8:30PM जाय बकुआ (लड़कों का स्कूल) प्राइमरी विद्यालय, सिंधु गांव
ता० वक्रत बकुआ रवानगी तहरीर 28.03.1997 at 12:30AM

ASI Ram Kishan
PS Alipur, Delhi
28.03.1997 "

16. At this stage, it would also be relevant to observe that the minor victim was immediately got medico legally examined at the Hindu

Rao Hospital on 28.03.1997 at 04.30 a.m. vide MLC Ex.PW.15/A. Pursuant to the medico legal examination of the minor victim Dr. Alka Mathur submitted the report Ex.PW.3/A, wherein it was recorded that fresh abrasions were present on the left ankle, as well as over the right leg of the minor victim. Further, it is critical to notice that Dr. Rekha, CMO, (Gynaecology and Obstetrics), Hindu Rao Hospital deposed that on P/V examination she had observed as under:-

“On P/V examination recently torn congested hymen was found and it could admit one finger easily.”

17. A bare scrutiny of the above extracted statement and the medical evidence on record, leaves no manner of doubt that the minor victim had been recently subjected to sexual assault. The Trial Court arrived at the same conclusion.

18. Coming now to the second issue, whether the prosecution had established the guilt of the accused for the commission of the rape of the minor victim, beyond reasonable doubt is concerned; it would be relevant at the outset to reiterate the settled position of law, that in cases of sexual assault, the sole testimony of the prosecutrix, if it inspires confidence and is found creditworthy and reliable, is by itself legally sufficient to return a verdict of guilt for the commission of rape.

19. Further, there no gainsaying the established principle of jurisprudence that in the Indian setting, refusal to act on the testimony of a victim of a sexual assault, in the absence of corroboration as a rule, is adding insult to injury.

20. The Hon'ble Supreme Court, in State of Rajasthan v. Om Prakash, reported as (2002) 5 SCC 745, dealing with a similar question in the case of a child rape, while upholding the conviction of the appellant therein and reversing the decision of the High Court in that behalf, relied upon earlier decisions and made the following observations:

“13. The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well-settled proposition. In *State of Punjab v. Gurmit Singh* [(1996) 2 SCC384], referring to *State of Maharashtra v. Chandra Prakash Kewalchand Jain* [(1990) 1 SCC 550] **this Court held that it must not be overlooked 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.** It has also been observed in the said decision by Dr Justice A.S. Anand (as His Lordship then was), speaking for the Court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. **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.

14. In *State of H.P. v. Gian Chand* [(2001) 6 SCC] Justice Lahoti speaking for the Bench observed that the court has first to assess the trustworthy intention of the evidence adduced and available on record. **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 have been examined but were not examined.”**

21. In *Gagan Bihari Samal vs. State of Orissa*, reported as (1991) 3 SCC 562, the Hon’ble Supreme Court of India, whilst observing that the corroboration is not the *sine qua non* for conviction in a rape case, held as follows:-

“Corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.”

22. In this backdrop, we consider it imperative to extract the statement made by the minor victim under Section 164 Cr.P.C. Ex.PW.14/A before the concerned Magistrate on 31.03.1997 and the same is reproduced for the sake of completeness and scrutiny as

follows:-

“Statement u/s 164 Cr.P.C

An application for recording statement u/s 164 Cr.P.C. of ‘minor victim’ (sic) d/o Madan Lal has been marked to me by learned Link MM Sh. Rakesh Kumar.

‘Minor victim’ (sic) has been identified by IO ASI Ram Kishan.

IO has now been sent out of the Chamber and there is none else besides the prosecutrix in the Chamber.

Q. What is your name?

Ans. ‘Minor Victim’ (sic)

Q. How many brothers sisters are you?

Ans. पाँच। चार भाई और मैं।

Q. पिता का नाम और वो क्या करते हैं ?

Ans. Madan Lal। वह एक scent factory में काम करते हैं ।

Q. आज किसके साथ यहाँ आयी हो और क्यों ?

Ans. हम केस लड़ रहे हैं। मैं अपने मम्मी पापा के साथ आयी हूँ।

Q. क्या तुम्हे पता है कि मैं कौन हूँ और यहाँ क्यों आयी हूँ।

Ans. आप जज हैं और बयान देने आयी हूँ।

Q. तुम्हारी उम्र क्या है ?

Ans. 13 वर्ष

Q. हमें सच बोलना है या झूठ

Ans. सच। न बोलने पर सजा मिलती है

After asking series of such like questions I am satisfied that the witness is capable of understanding such questions put to her and to give rational answer thereof. She also understands the sanctity of oath. Let her statement be recorded.

Statement of ‘Minor Victim’ (sic) d/o Madan Lal, Age 13 years, Student, R/o 37 Village Sindhu, Delhi.
On SA.

27.03.97 को करीब 8/8.30 p.m. पर जब मैं अपने छोटे भाई Satbir के साथ लैट्रिन जा रही थी और शिव मंदिर के पीछे की तरफ गयी थी। इसी बीच दो लड़के कालिया व पप्पे जिनमे से कालिया की राशन की दुकान गाँव में ही है वहां आये। कालिया ने मेरे भाई को पकड़ लिया व पप्पे ने मेरा मुँह दबाकर व मुझे गोदी में उठाकर पास ही लड़कियों के स्कूल में दिवार पर से उठाकर अंदर फेंक दिया। उसने मुझे धमकाया भी कि अगर चिल्लाई तो चाकू मार दूंगा। वहां से मुझे लड़कों के स्कूल में बगल में ले गया। वहां जाकर उसने मेरी सलवार निकालकर फेंक दी। उसके बाद मेरी कमीज निकाल कर जमीन पर बिछा दी। उसके बाद उसने मेरे साथ गलत काम किया। उसके बाद वो मुझे दुबारा उठाकर वापिस जहाँ मेरा भाई था वहां ले आया। इसी बीच मेरे पापा वहां आ गए परन्तु वो दोनों वहां से भाग गए। वहां से मैं अपने पापा के साथ घर चली गयी और वहां से पुलिस में रपट की।

Sd/-
RO&AC

Sd/-
MM/31.03.97

Certified that the above is the true and correct record of the statement made by the prosecutrix and that it was voluntary made.

Sd/-
MM/31.03.97”

23. In this regard it is also incumbent upon us to scrutinize the testimony of the minor victim before the trial court. The relevant portion of her deposition is reproduced is as follows:-

“ PW8

XXXX.....XXXX.....XXXX.....XXXX

On SA

On 28.03.1997, I was residing in the house of ranjeet as tenant and I was student of 8th class. On

that day, at about 6 p.m I went back side of the temple which was situated outside of the village to ease myself. I went there alongwith my brother Satbir, aged about 5 yrs. Two persons came there out of them one person caught hold my brother and other person lifted me as to school. **The name of those person were Kalia and Pappey. Both the accd. Persons are present in the court. There he had committed galat kam with me. The accd. removed my salwar and made me lie on the floor and he also lied upon me and then he had committed galat kaam with me. The accused had shut my mouth by his hand. After committing galat kam, accd. brought me back to the place from where he had lifted me. Meanwhile my father reached there and accd. run away from the spot. I narrated the entire incident to my father and my father took me to the house from there I was taken to police station there I made my statement Ex.PW8/1 on which I put my signature at point A.**

The police also took me to hospital there I was medically examined but my clothes were not seized by the police or by the doctor. The accused Pappe present in the court had committed galat kam with me. At the time of incident. I was 13 years old. My date of birth is 1.3.84. (At this stage ld.A.P. requests to put a leading question. Heard allowed.

I do not remember if the date of incident was 27.03.97 or 28.03.97. (At this stage ld.A.P.P wants to declare the witness hostile as she is resiling her statement regarding case property. Heard allowed.

xxxxxx By ld.A.P.P

I do not remember if my salwar was seized by the police but I can identify if shown to me. At this stage parcel no.4 sealed with seal of VKG/FSL is allowed to open and took out one salwar of printed colour and shown to witness who identify the same which was seized by police. Salwar is Ex.P1. The

salwar was misplaced as the accd. throw away and it was not seized in my presence so. I could not tell whether it was seized by the police or not.

Xxxxx By Sh. D.N Joshi Adv. For accd. Surrender

My statement was recorded by the police. I also mentioned the name of Pappey to the police at this time of my statement. Confronted with statement ex.pw8/1 where it is not so recorded. **My statement was recorded by police at p.s. Thereafter police never came to me nor I went to the police to tell anything or for any enquiry.** It is correct that from my house up to the temple there are residential vicinity. It is also correct that from the temple up to the school, there are several houses in between. I also told to police in my statement that my salwar was misplaced. Confronted with ex. pw8/1 where it is not so recorded. **It is correct that after this incident. I never met Pappey. It is also correct that police never took me before Pappey.** It is also correct that police never come to me with my salwar. It is incorrect to suggest that no person pass from the temple to the school. I could not raise alarm as accd. shut my mouth. The height of the wall of the school was 4 ½ 5 ft. A person could not see outside from the school boundary. I did not raise alarm when accd. run away as my father came. I was threatened by the accd. if I will cry Kalia will kill me. It is correct that I belongs to poor family. It is correct that the accd. Surrender is Jamindar. It is wrong to suggest that Surrender was wrongly implicated in this case only in order to grab money from the accd. I was wearing full suit I mean all clothes. Again said I was not wearing Salwar at that time. We lodged the report at P.S on the same night. It is incorrect that I am deposing falsely. It is correct that my statement was readover to me today before deposing. It is incorrect to suggest that I was threatened by the police to deposed against the accd. otherwise they will taken action against me.

(At this stage Id. APP request for further examination of the witness. Heard. Allowed.)

My statement was recorded by magistrate on which I put my signature. At this stage one sealed envelope sealed with seal of B.P is allowed to open and took out proceeding u/s 164 Cr.P.C. and shown to witness. witness identify her signature at point A. Statement is Ex. PW8/2.

xxxxxBy Sh.D.N Joshi Adv. For accd. Surrender.

I cannot remember after how many days my statement u/s 164 Cr.P.C. was recorded. It is correct that I remained at my house during the period of incident and giving statement in the court u/s 164 Cr.P.C. I was accompanied with my parents to the court when I came for deposing in the court u/s 164 Cr.P.C. Police official was also with us and that police official make me understand what I have to depose before magistrate. It is correct that I deposed whatever I was advised by the police. It is incorrect that I gave my statement before magistrate falsely.

xxxxxBy Sh.D.N Joshi Adv. For accd. Surrender.

It is wrong to suggest that Ravinder is not know as Kalia and Surrender is not know as Kappe. It is further wrong to suggest that Ravinder was not present at the place of alleged incident.”

24. On 05.12.2001 the minor victim PW-8 was recalled for the cross-examination and therein she deposed as hereinbelow: -

“ PW8 . ‘Minor Victim’ (sic) recalled for cross examination,

On SA

XXXXX By Sh. M.K SHARMA: ADV. FOR ACCUSED RAVINDER

It is wrong to suggest that Ravinder is not know as Kalia and Surrender is not known as

Kappe. It is further wrong to suggest that Ravinder was not present at the place of alleged incident.”

25. From a conjoint appreciation and analysis of the above evidence, we are of the considered view that, the minor victim was consistent, clear and credible right from the time of the recording her initial statement (rukka) Ex.PW-8/1 and PW-13/1 on 28.03.1997 — contemporaneously with the commission of the offence – through her statement under Section 164 CR.P.C. recorded on 31.03.1997 Ex.PW.14/A; and in her examination in court dated 07.09.2000, in her narration in relation to the minute details of the occurrence of the unfortunate incident.

26. The core of the deposition in its material aspects clearly establishes that the minor victim and her younger brother were forcibly picked up by the accused persons, when she had gone to answer the call of nature behind Shiv Mandir at around 8:30 p.m., on 27.03.1997 and while accused No.2 physically restrained her younger brother, who was 5 year old; accused No.1 forcibly lifted the minor victim and took her to an empty plot adjacent to the Shiv Mandir and committed rape upon her whilst pressing her mouth and threatening to kill her, if she raised an alarm.

27. The minor victim further deposed that after committing “Galat Kaam” accused No.1 brought her back to the place from where he had forcibly lifted her and she continued to sit at that spot till her father Madan Lal PW-10 arrived a little later, looking for the children, at which stage she narrated the entire incident to her father. The father of the minor victim Madan Lal PW-10 then took her to the police station, where she made her initial statement that lead to the registration of the case.

28. It is also relevant to observe that the minor victim identified both the accused persons before the trial court.

29. It is further germane to observe that the medical evidence on record, which is contemporaneous with the occurrence of the commission of crime, opines that “*on P/V examination recently torn congested hymen was found and it could admit one finger easily*”, and the same a fortiori supports and corroborates the clear and unequivocal testimony of the minor victim. The MLC Ex.PW.3/A further records that the minor victim had fresh abrasions on her left ankle, as well as over her right leg, which unquestionably supports and corroborates her testimony on all fours.

30. Although, as aforementioned, the testimony of the minor victim

of rape, does not require any corroboration, since her deposition in law is axiomatically more reliable than that of other witnesses; we, however, consider it necessary and appropriate to appreciate the statement and testimony of the father and mother of the minor victim, who deposed as PW-10 and PW-9 respectively, before the trial court.

31. The deposition of Mr. Madan Lal PW-10, the minor victim's father is extracted as follows:-

"Pw 10

Madan Lal s/o Pradeep Majhi , age 35 yrs r/o house no. not know, vill. Sindhu, Delhi.

On SA

On 28.03.1997 my daughter 'Minor Victim' (sic) alongwith her younger brother went to latrine behind temple which is situated outside the village. **At the time I went to sell vegetables. When I came back to house and tried to trace my daughter 'Minor Victim' (sic) and reached behind school there my daughter 'Minor Victim' (sic) was found naked and she was weeping but she was wearing shirt at the time.**

On this, I gave my own clothes to her and brought her back to the house. My daughter told me that when she went for latrine that two boys belongs to fair price shop came there and out of them one person who was son of fair price shopkeeper and committed rape with her. My daughter disclosed name of Pappe who had committed rape with her. On this police came there and we lodged the report. The police brought both the accd. persons to the P.S and also regd. a case. At the time of incident, my daughter was 12 yrs old and was student of 8th class. I do not know her date of birth. I identify my signature at point a on memo ex. Pw10/1. I did not register date of birth of my daughter at MCD or any other authority.

At this stage Id. A.P.P requests to put a leading question. Heard. Allowed.

I do not remember if incident took place on 27.03.97 and not on 28.03.97.

xxxxBy Sh. D.N Joshi Adv. for accd. Surender.

My statement was recorded by police at P.S. It is correct that my daughter disclosed name of pappey and I also disclosed the same in my statement. Confronted with statement Ex.PW10/D1 where it is not so recorded. I also told to police that I gave my clothes to my daughter to wear. Confronted with ex.pw10/D1 where it is not so recorded. It is correct that when my statement was recorded both the accd. were present. I did not go to the house of accd. Persons with the police. It is correct that Pappey is not having any fair price shop. It is wrong to suggest that I am deposing falsely and implicated that accd. Person falsely. Mandir is situated in vilage but at the time of incident there was no house. It is wrong that I am deposing falsely.

XXXXXX Sh. M.K Sharma Adv. for accd. Ravinder

It is wrong to suggest that I am deposing falsely. It is wrong to suggest that accd. Ravinder is not also known by the name of kalia.”

32. From the testimony of Ms. Mohar Patti PW-9, the mother of the minor victim, it is observed that, she deposed that her daughter had at the time of the commission of the offence itself, disclosed to her that accused No.1 Surender Kumar *alias* Pappey had done “Galat Kaam, I mean Balatkaar/Rape with her”. PW-9 had further categorically denied the suggestion given to her by counsel for accused No.1 by stating that “It is wrong to suggest that I want to extract money from the accused, so I implicated him falsely”.

33. From the entire evidence reproduced hereinabove, we are of the considered view that not only was the testimony of the minor victim creditworthy and reliable but the same is corroborated on all material aspects and particulars by the medical evidence on record, appreciated in conjunction with the uncontroverted testimony of PW-9 and PW-10, her parents.

34. In this regard, it is also relevant to observe that the accused persons did not lead any evidence in defence to establish their assertion that they were falsely implicated by the complainant Mr. Madan Lal PW-10, father of the minor victim, with the motive to extract money, as asseverated by accused No.1; and the alibi that he was on duty at the time of commission of the offence, as suggested by accused No.2.

35. It is in this background, that we have no hesitation in coming to the conclusion that the trial court misdirected and misapplied itself in extrapolating the minor contradictions and insignificant discrepancies in the deposition of the minor victim PW-8 and her parents PW-9 (mother) and PW-10 (father), to arrive at the conclusion that the prosecution had failed to establish its case against the accused persons.

36. A careful, minute, considered and informed scrutiny of the

decision of the trial court, as highlighted by the counsel appearing on behalf of the accused in the present appeal, would reflect that the findings conjectured the opinion that the minor victim had made improvements qua the participation of accused No.1 Surender Kumar *alias* Pappey in the commission of the crime.

37. In this behalf, it was further posited by the trial court that the minor victim did not explain the word “he” by pointing out towards the accused persons, present in the court, at the time of her deposition, as to who “he” was, meaning thereby that she failed to state clearly whether the sexual assault was committed by accused No.1 Surender Kumar *alias* Pappey or accused No.2 Ravinder *alias* Kalia. Furthermore, the trial court drew an adverse inference against the prosecution on account of the latter’s alleged “failure” to examine Satbir, the younger brother of the minor victim, who was stated to have been present at the time of their forcible ‘lifting’.

38. Having regard to the totality of the circumstances, appearing on the record to the case, we are constrained to observe that the trial court ignored the cardinal tenets of appreciation of evidence, including the weight to be attached to the testimony of the minor victim, since the accused had evidently been identified immediately and arrested

contemporaneously. The trial court also failed to consider the circumstance that, no dispute, as to identify, was raised at the relevant stage, nor was it brought to the notice of the higher authorities of the police or the trial court at the relevant point in time.

39. Furthermore, it is essential to observe that in the instant case, the minor victim PW-8, as is apparent from her testimony, gave a vivid and indubitable recount of what she had been subjected, to by the accused, at the time.

40. The impugned judgment is thus, a total negation in the quest for search of truth and overlooks the cardinal principle that the duty of a judge presiding over a criminal trial is not merely to see that no innocent person is punished but also to see that the guilty person does not escape and that both the public duties are equally important.

41. As laid down by the Hon'ble Supreme Court in **Smt. Shamin vs. State (GNCT of Delhi)**, in **Criminal Appeal No.56/2018**, decided on **19.09.2018**, small/ trivial omissions in testimony of witnesses do not justify a finding by the Court that the testimony of the witnesses cannot be relied upon and that minor discrepancies on trivial matters not touching the core of the case with a hypertechnical approach by taking sentences torn out of context here or there from the evidence,

attaching importance to some technical errors without going to the root of the matter does not permit ordinarily the rejection of the evidence as a whole and rather what is to be considered is whether those inconsistencies go to the root of the matter or whether they pertain to insignificant aspects and that though, the defence may be justified in seeking advantage of incongruities obtaining in the evidence if they relate to the root of the matter, where they relate to insignificant aspects, no benefit of doubt is available in relation thereto.

CONCLUSION

42. In the facts and circumstances elaborated in the foregoing paragraphs, we find that the acquittal of the accused persons herein, in relation to the commission of the offences punishable under Sections 363/376/506/34 IPC suffers from the vice of perversity resulting in grave miscarriage of justice and the same is thus set aside.

43. The accused No.1 Surender Kumar *alias* Pappey is convicted for the proved commission of the offences punishable under Sections 376/506 IPC and the accused No.2 Ravinder *alias* Kalia is convicted for the offences punishable under Sections 376/109 IPC, respectively and are directed to be taken into custody, forthwith. The bail bonds

and surety bonds furnished on behalf of both the convicts stand cancelled.

44. The appeal is accordingly allowed and disposed of. A copy of this judgment be provided to both the convicts, in accordance with law.

**SIDDHARTH MRIDUL
(JUDGE)**

**I.S. MEHTA
(JUDGE)**

DECEMBER 23, 2019

dn/ad/rs/di



सत्यमेव जयते