

#6

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 4th April, 2019

CRL. A. 815/2017

OM PRAKASH

..... Appellant

versus

STATE

.... Respondent

Advocates who appeared in this case:

For the Appellant : Ms. Inderjeet Sidu, (DHCLSC), Advocate along with appellant from J.C.

For the Respondent :Mr. Ravi Nayak, APP for State.
Inspector Bineet Kr. Pandey, P.S. Gokulpuri.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

J U D G M E N T

SIDDHARTH MRIDUL, J (OPEN COURT)

1. The present appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.PC'), assails the judgment and order of conviction dated 21st October, 2016 and Order on sentence dated 22nd October, 2016, passed by the Additional Sessions Judge-01 (North-East), Karkardooma Courts, Delhi, in Sessions Case No. 44914/2016, arising out of FIR No. 197/2012, registered under Sections

376/354/506 and 34 of the Indian Penal Code, 1860, (hereinafter referred to as the 'IPC'), at Police Station Gokulpuri, in case titled as "*State vs. Om Prakash & Anr*"; whereby, the appellant, Om Prakash, who is the father of the minor prosecutrix (hereinafter referred to as 'PW-2'), was convicted for the offence of rape under Section 376 IPC and sentenced to undergo rigorous imprisonment for life, along with a payment of fine of Rs. 5,000/-. In default of the payment of fine, the appellant has been sentenced to undergo simple imprisonment for a period of one month. Further, for the offence punishable under the provision of Section 506 (II) IPC, the appellant has been convicted and sentenced to undergo rigorous imprisonment for a period of three years, along with the payment of fine of Rs.2,000/-. In default of the payment of fine, the appellant has been sentenced to undergo simple imprisonment for a period of 15 days.

2. The case of the prosecution as elaborated by the learned trial court, is encapsulated as follows:-

"On 01.06.2012, on receipt of DD No. 21-A, the IO reached GTB Hospital where the victim –aged about 14 years, was found admitted and on her MLC her alleged history was given as multiple times sexual intercourse by

her father Om Prakash Sharma at her home since she was 11 years old and she tested positive for the pregnancy.”

Her statement was recorded by the IO wherein she stated that she has studied up to Class 6 and was residing along with her parents and that she used to stay at the house. She further stated that her father/accused Om Prakash had for the first time committed sexual intercourse with her about four years ago in the absence of her mother and had threatened to kill her if she disclosed his acts to anyone. She did not disclose his acts out of fear to anyone. Thereafter, her father continued committed sexual intercourse with her under threat, once or twice in a month. She alleged that about 20-25 days ago, in the absence of her mother, he again committed sexual intercourse with her and now he had been calling other persons to home. She stated that on 31.05.2012, at about 12 noon accused Bhagwan Chand came with her father to her house when no one else was present. Her father asked her to bring water and thereafter accused Bhagwan Chand made her to sit with him and started teasing her. However, she got herself released from him and came out of the house and returned only after Bhagwan Chand left her house. At about 03:00 pm, her father again sexually abused her under influence of liquor. Her mother returned after two hours but she could not disclose anything to her. On the next day, i.e. 01.06.2012, her mother took the victim to Loni, Ghaziabad, to the house of her maternal uncle and then the victim disclosed all the facts to her mother and then her mother Smt. Sunita brought her to the PS and got the present case registered.”

3. A perusal of the record reflects that, during the course of investigation, PW-2 was got medically examined and her samples were collected and sent to the Forensic Science Laboratory (hereinafter referred to as ‘the FSL’). The statement of PW-2 was recorded under the

provisions of Section 164 Cr.PC. The samples of her father, the appellant, were also collected and sent to the FSL.

4. Upon completion of investigation, charge-sheet was filed against the appellant for the offences punishable under Sections 376/377/354/506 and 34 IPC and charges were framed against him under Sections 376/377/354/506 and 313 IPC. The appellant stands convicted as aforestated for the charges framed against him for the offences punishable under Sections 376 and 506 (II) IPC, while he has been acquitted for the charges framed under Sections 377/354/313 IPC. The co-accused Bhagwan Dass, however, stands acquitted for the solitary charge framed against him, under Section 354 IPC.

5. In order to bring home the guilt of the accused, the prosecution examined 17 witnesses at the trial. But the trial court has primarily and substantially relied upon the sterling testimony of PW-2, who was aged about 11 years old; corroborated by the testimony of her mother, namely, Ms. Sunita (hereinafter referred to as 'PW-1'); in conjunction with the medical evidence including the DNA result proved before the trial court.

6. In order to effectively adjudicate the present appeal, it would be incumbent upon us to extract the statement made by PW-2, before the Magistrate on 8th June, 2012, *in extenso*.

“On oath,

मैं अपने माता पिता के साथ घर पर रहती हूँ। मेरे पापा काम पर नहीं जाते। पिछले छः महीने से वो काम पर नहीं जाते और घर पर बेकार पड़े रहते हैं और जय भगवानदास (जो हमारे घर पर आता है और हमारा पड़ोसी है और जिसे मेरे पापा ने शराब और अपनी अय्याशी के लिए हमारा घर बेच दिया है), के साथ घर पर शाम को रोज़ शराब, सिगरेट, स्मैक पीते हैं और नशे में गन्दी हरकत करते हैं। मेरे पापा ने जब मैं दस साल की थी तो रात को सोते समय मुझे उठाया और मेरी सलवार निकालकर मेरे Private Parts को छेड़ते हुए खेलने लगे। मेरे पापा हमेशा हमारी पिटाई करते रहते हैं। मेरे मना करने पर उन्होंने मुझे मारा। मैंने डर कर कुछ नहीं कहा। लेकिन धीरे-2 उनकी गलत हरकतें बढ़ने लगी। जब मैं 11 साल की थी तो उन्होंने मेरे साथ जबरदस्ती Sex किया। पापा ये सब गलत काम और जबरदस्ती Sex मम्मी के गैर हाजिरी में करते थे। और मुझे डांटकर और डराकर कहते थे कि अगर मम्मी या किसी को भी बताया तो जान से मार दूँगा। पापा मुझे नंगा कर चमड़े की बैल्ट से मारते थे। फिर उसके बाद पापा ने हर दूसरे-तीसरे दिन मेरे साथ जबरदस्ती Sex करने लगे। Sex करने के बाद वो मेरी बिना कपड़ों के photo लेते रहते थे और उन नंगी photo को अपने मोबाइल में रखते थे। और देखते थे। कुछ साल पहले जब पापा ने मेरे साथ जबरदस्ती गलत काम (Sex) किया तो

मैं महीने से नहीं हुई | पापा ने पेशाब से कुछ टेस्ट किया और मुझे कुछ गोलियां खिलाई | गोलियां खाने के बाद मुझे खून आया और फिर मांस के टुकड़े निकले | उसके बाद भी मेरे पापा मेरे साथ हर दूसरे-तीसरे दिन Sex करते थे | जब वो अपनी पेशाब वाली चीज़ (लिंग) को मेरे पेशाब वाली जगह के नीचे जोर-2 से घुसाकर दबाते थे तो मैं हाथ पाँव चलाकर छुटाती थी लेकिन वो कोहनी मार मेरे साथ फिर भी करते रहते | वो मुझे कभी भी बाहर नहीं सोने देते | 20-25 दिन पहले पापा ने मम्मी की गैर हाजिरी में फिर से अपना लिंग मेरे पेशाब वाली जगह के नीचे वाली जागह में डालकर जोर-2 से दबाया | पापा ने मुझे कहा कि भगवान दास जिसे लोग जय भगवान कहते हैं, ने कहा है कि अगर मैं जय भगवान के साथ Sex कर लूँ तो वो पापा को 1-2 लाख देगा | पापा ने कहा है कि अगर मैं जय भगवान के साथ Sex कर लूँ मैंने मना किया | 20-25 दिन पहले जब भगवान दास जो रोज की तरह शाम को घर पर पापा के साथ शराब पी कर बैठा था, ने मुझसे पानी मांगा जब मैंने पानी दिया तो पीछे से मेरी छाती पकड़ ली और मुझसे Sex करने को कहने लगा | मैं छुड़वाकर आ गई | उस दिन 3 बजे पापा ने फिर मेरे साथ Sex किया | मां ने मुझे परेशान देखा तो बार-2 पूछने पर मैंने सच बता दिया | पापा कई सालों से मेरे साथ Sex जबरदस्ती कर रहे हैं | कुछ साल से (2011) से तो पापा ने जबरदस्ती sex मम्मी की हाजिरी में भी करना शुरू कर दिया | वो जब मैं महीने से होती थी तो भी मुझसे Rape करते थे | मुझे कुछ और नहीं कहना है |”

7. In order to appreciate the width of the submissions made on behalf of the appellant, assailing the findings arrived at by the trial court on the

predicate ground of improvements and embellishments in the testimony of PW-2, it would also be necessary and appropriate for us to extract her testimony before the trial court:-

“On S.A.

I have studied upto 6th standard. My father, accused Om Prakash, was a car driver. We are three brother and sister.

When I was ten years old, accused Om Prakash used to touch my private parts. When, I was in 11th year accused Om Prakash had committed rape with me in the absence of my mother. I had not told this fact to my mother on her arrival because my father had beaten me with belt and threatened. He had threatened me that if I disclose this fact to anyone either he would kill me or that he would expel me. Accused Om Prakash used to commit rape with me at the interval of 20-25 days in the absence of my mother.

On 31.05.2012, at noon time, accused Bhagwan Chand had come at my house and at that time my mother was outside the home to bring the ration. Accused Om Prakash and accused Bhagwan Chand had consumed liquor and when my father, accused Om Prakash, had gone to bring water accused Bhagwan Chand had caught hold me and he laid upon me and committed rape. I had told this fact to accused Om Prakash when he came with water and he told me that it is normal and nothing by saying that he had taken money from him. I cannot say why accused Om Prakash had taken money from accused Bhagwan Chand. At that time no one else was present in my house except me and accused persons. I can identify the accused.

At this stage, one accused produced through video conferencing before this witness and on seeing him witness

identifies him as Bhagwan Dass. Accused states that his name is Bhagwan Chand.

Accused Bhagwan Dass used to come regularly to my house to consume liquor and used to stare at me.”

Further examination-in-chief is deferred being lunchtime.”

“PW-2 (recalled for further examination-in-chief in continuation of 18.05.2013).

On 31.05.2012, accused Bhagwan Dass had committed sex with me without my consent at my home. On the same day, at about 03:00 pm. Accused Om Prakash had also committed sex with me without my consent. Thereafter, I became nervous and my father had gone to sleep and when my mother came at home at about 05:00 pm, I had told her about the acts committed by the accused persons.

In the morning hours at about 05:00 am, we had gone to her house of my maternal uncle and when he returned back his home from his work place at about 09:00 am, I and my mother along with my maternal uncle went to P.S. there, my mother and maternal uncle had told the facts to police and one lady police official took me to GTB Hospital for my medical examination, where, doctor had examined me, vide MLC already Mark X bearing my signature at point B, and doctors had opined that I was pregnant for about one and half month. I was admitted there. Police had come there and recorded my statement in the hospital. I was under fear at that time, hence, I could not disclose the entire facts of the incident. I remained in the hospital for about eight days. After eight days, police had produced me before the Ld. MM in Karkardooma Courts, where my statement u/s 164 Cr.P.C was recorded. I had put my signature thereon.

At this stage, one sealed envelope with the seal of BS available on judicial record, is taken out and opened. It is

containing statement u/s 164 Cr.PC along with two applications.

At this stage statement, Ex.PW-2/A, is sent to this witness in child witness court room. On seeing the same witness admits her signatures at points A, B and C. Applications are Ex.PA and Ex.PB respectively.

On 31.05.2012, accused Bhagwan Dass and Om Prakash had committed vaginal and anal sex with me without my consent.

Accused Bhagwan Chand used to take my obscene photographs by a mobile phone.

Police had not recorded my complete statement.

Police had prepared site plan at my instance and I had put my signature thereon.

At this stage, site plan already Ex.PW-1/A, is sent to this witness as she is suppressing some material fact. Heard. Allowed.”

8. We also consider it relevant to reproduce her cross-examination on behalf of the appellant, before the trial court, which is as follows:-

“PW-2 Victim (called for cross-examination in continuation of 01.06.2013).

On S.A.

“XXXX by Sh. K.P.S. Chauhan, Ld. Amicus Curiae for accused Om Prakash and counsel for accused Bhagwan Chand.

I am sixth standard pass. On the instruction of my father I had to give up my education after sixth standard. My mother had asked me to keep continue my education but

I had refused to continue the same. I was not having any friend in my locality. It is correct that one tenant also used to reside along with my grandfather in my house.

It is wrong to suggest that when my mother used to go to her work place my brother and sister used to live with me at house. Vol. My mother was not a working woman. It is correct that my mother used to live with me at my house. It is further correct that I used to tell the problem to my mother which I used to face. When my father used to leave for his work my mother used to live with me at my house and my grandfather was playing cards player and was also a drunkard. My father used to go to his work at about 08:00 am and used to come back at about 06:00 pm. It is correct that my all family member used to present at house when my father used to return from his daily work. I could not disclose the facts of incident to my mother due to fear. I had disclosed the facts of incident to my mother one day before informing the police. I had not disclosed my mother about the incidents which had happened with me in my house either by my father or any other person prior to the registration of this case. I had not reported the facts of incident to any police official prior to the registration of this case.

My statement was recorded once before the police and once before the magistrate. It is wrong to suggest I had made my statement to police at the instance of my mother. I had made my statement before the magistrate, in full of my consciousness and voluntarily.

Further XXXX examination deferred as no time left.

RO&AC”

“PW-2 (recalled for further cross-examination in continuation of dated 06.07.2013.

On S.A.

XXX by Sh. K.P.S. Chauhan, Ld. Counsel for accused Bhagwan Chand and Amicus Curiae for accused Om Prakash.

I had not told each and every fact of the case in my statement to Ld. MM, some facts were left. It is correct that I had stated in my statement to Ld. MM in full consciousness and without any pressure. It is correct that I had not stated anything to Ld. MM in my statement against accused Bhagwan Chand. Police had not recorded statement of any other person except both the accused persons on that day in my presence.

Both the accused persons had taken my nude photographs and accused Bhagwan Chand used to delete those photographs after seeing it. It is correct that I had not stated to police in my statement that accused Bhagwan Chand had also taken my nude photographs. I had stated to police in my statement that both the accused persons used to rape with me against my consent but police had not mentioned the same in my statement.

It is wrong to suggest that accused Bhagwan Chand had been implicated in this case as he had made advance payment of Rs.2.5 lacs against the purchase of the house of accused Om Prakash or that accused Om Prakash had been implicated in this case in order to avoid his liability from payment of Rs.2.5 lacs to accused Bhagwan Chand or that same has been used by my mother and maternal uncle hence, in order to avoid their liabilities I in connivance of my mother and maternal uncle implicated both the accused persons in the present case.

RO & AC”

9. Ms. Inderjeet Sidhu, learned counsel appearing on behalf of the appellant, firstly urged that, in view of the acquittal of the co-accused,

Bhagwan Dass, by the trial court, for an offence under Section 354 IPC, the testimony of PW-2 cannot be considered as trustworthy and reliable and consequently, the same could not have resulted in his conviction. It would then be urged on behalf of the appellant that the credibility of the testimony of PW-2, in juxtaposition with the testimony of PW-1, is completely eroded by the inconsistencies and contradictions existing therein.

10. In other words, it is urged that, since Bhagwan Dass, was found to have been falsely implicated, it would a fortiori strengthen the case of the appellant that, he too has been falsely implicated by PW-2 and her mother.

11. It is then urged that the appellant was acquitted for the charge under Section 313 IPC, on the ground that the allegations of miscarriage had been leveled against him, for the first time, by PW-2, only in her statement under Section 164 Cr.PC, whereas, his conviction under Section 376 and 506 (II) IPC, is founded on the very same unreliable testimony.

12. It was lastly urged on behalf of Ms. Inderjeet Sidhu that, a perusal of the medical evidence on record would reflect that, no injuries were found on the private parts of PW-2; which circumstance completely negates the latter's assertion that, she was being continuously raped over a period of four years.

13. On the contrary, Mr. Ravi Nayak, learned Additional Public Prosecutor appearing on behalf of the State, would support the impugned judgment in its entirety and urge as follows:-

(i) That the testimony of PW-2 has been consistent throughout. In the DD No.21A, dated 1st June, 2012, Ex.PW-8/A, which was recorded on the basis of the information given by PW-1, categorical allegations were made against the appellant.

(ii) Later on the very same day, in the complaint Ex.PW-2/B given to the police, PW-2 gave a detailed account of the acts of the accused, positing clearly therein that, the latter had committed rape upon her since she was 11 years of age. Further, in her statement before the Magistrate, under Section 164 Cr.PC, i.e. Ex.PW-2/A,

PW-2 once again gave a detailed account of the atrocities committed upon her by the accused, including her rape by him since she was 11 years of age, and over the period of the last four years.

(iii) Further, in the MLC of PW-2, dated 1st June, 2012, Ex.PW-11/A, it was categorically opined that the Urine Pregnancy Test conducted upon the minor was found positive, merely a day after the alleged last incident of rape on 31st May, 2012, when PW-2 was less than 12 years of age; her date of birth admittedly being 18th December, 1999. This finding of fact, which is unrebutted shows that, the prosecutrix was raped at a time and consequentially pregnant at a time that she was below 12 years of age.

(iv) Further, as per the FSL report, Ex.PW-17-B and Ex.PW-17-C, the results of the examination were conclusively opined as under:-

“The alleles from the source of exhibits ‘1f’, ‘1gl’, ‘1g2’ & ‘1g3’ (samples of victim) are accounted in the alleles from the source of exhibit ‘3’ (blood in gauze cloth piece with cotton of accused)”

and it was concluded in the same FSL report that:

“the DNA fingerprinting performed on the source of exhibits ‘1f’, ‘1g1’, ‘1g2’ and ‘1g3’ & ‘111’ (samples of victim) & ‘3’ (blood in gauze cloth piece with cotton of accused) provided is sufficient to conclude that the stains i.e. seminal stains present on the source of exhibits ‘1f’, ‘1g1’, ‘1g2’ and ‘1g3’ (samples of victim) and blood stains on the source of exhibit ‘3’ (blood in gauze cloth piece with cotton of accused) are from the same source.”

14. Having heard learned counsel appearing on behalf of the parties and examined the evidence on record, we are of the considered view that the testimony of PW-2 is creditworthy and reliable and deserves acceptance. In this behalf, it would be apposite to observe that the first occasion on which the allegations were made by PW-1 against the appellant, was vide DD No. 21A, Ex.PW-8/A. On 1st June, 2012, at 10:45 a.m. on the very same day, in the complaint, Ex.PW-2/B, the prosecutrix gave a detailed account of the acts of the appellant and the repeated commission of the offence of rape upon her since she was about 11 years of age.

15. On the 8th June, 2012, PW-2 recorded her statement under Section 164 Cr.PC elaborating therein, a detailed account of the unsavory acts committed upon her by the appellant for a period of four years, prior to the statement. In this statement, PW-2 also alleged that, she had become

impregnated earlier as well by the sexual assaults perpetrated by the appellant, which pregnancy had been forcibly terminated by the latter. The deposition of PW-2 in Court is along similar lines *albeit* with some minor elucidations. The testimony of the minor prosecutrix which inspires confidence, has remained unshattered despite sustained cross examination.

16. Though, a perusal of the testimony of PW-2 read in conjunction with the testimony of her mother (PW-1) contains some minor inconsistencies, as found by the trial court, the testimony of PW-1 was largely hearsay testimony and the testimony of PW-2 cannot be discarded merely as a consequence thereof. Insofar as, the cross-examination of PW-2 is concerned, although the same was conducted at length, it did not result in impeaching her testimony, which remain unshattered. In this behalf, it is necessary to observe that the factum of pregnancy of PW-2 and the DNA report establishing the appellant as the father of the unborn child, leaves no manner of doubt about the credibility or reliability of testimony of PW-2. This circumstance when put to the appellant under Section 313 Cr.PC, evoked a bare denial, which inevitably leads us to a

finding of his guilt since the same forms an additional link in the chain of circumstances. Further, although the appellant entered the witness box in his own defence, there was not even a whisper on his behalf denying the allegations of rape leveled against him by PW-2, despite an opportunity so to do.

17. In view of the foregoing, we find the testimony of PW-2 reliable and creditworthy. There is no gainsaying legal position that the testimony of PW-2 by itself is sufficient to establish the case of the prosecution. In the present case, her testimony is completely and demonstrably corroborated by the medical/DNA evidence on record. Therefore, we have no hesitation in arriving at a conclusion that the evidence on record leads to but one inescapable conclusion, the guilt of the appellant.

18. The appeal, therefore, is devoid of merit and is accordingly dismissed.

19. Before we part with the order, it would be relevant to observe that the present is a case of rape by the appellant on his own minor daughter, who was admittedly of tender years, at the time of the commission of the

offence of rape repeatedly upon her person. Nothing can be more heinous than a crime committed on the person of a child by her father, the one who is duty-bound to provide her unflinching protection from all harm.

20. It is trite to state that it is necessary for the Courts to have a sensitive approach when dealing with cases of child rape. The effect of such a crime on the mind of the child is likely to be lifelong. A special safeguard has been provided for children in Article 39 of the Constitution of India which, *inter alia*, stipulates that the State shall, in particular, direct its policy towards securing that the tender age of the children is not abused and that children are given environment opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity; and that childhood and youth are protected against exploitation and against moral and material abandonment. [Ref: *State of Rajasthan v. Om Prakash*, (2002) 5 SCC 745].

21. In our view therefore, the sentence awarded to the appellant by the trial court, who has shown no remorse for his abominable conduct, does not warrant any modification. Therefore, the judgment and order on

conviction dated 21st October, 2016 and the order on sentence dated 22nd October, 2016, are both hereby upheld.

22. Accordingly, the present appeal fails and the same is dismissed.

23. Copy of the judgment be communicated to the appellant through the Superintendent, Tihar Jail and also be sent for updation of the records.

SIDDHARTH MRIDUL
(JUDGE)

MANOJ KUMAR OHRI
(JUDGE)

APRIL 04, 2019
RS