

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

+ **Crl. Appeal No. 543/2005**

% Reserved on: June 01, 2010

Decided on: July 09, 2010

Sachin @ Kalu

S/o Shri Babu Lal, R/o Jhuggi No. WZ-101/49,

Fish Market, Khazan Basti,

Maya Puri, New Delhi

(at present confined in Central Jail, Tihar, New Delhi) Appellant

Through: Mr. K.B. Andley, Sr. Advocate with
Mr. M.L. Yadav and Mr. M. Shamikh,
Advocates.

versus

State of Delhi.

..... Respondent

Through: Mr. Naveen Sharma, APP.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

MUKTA GUPTA, J.

1. This is an appeal against the judgment of conviction and order on sentence in case FIR No. 228/2003 PS Maya Puri under Section 376 IPC whereby the Appellant has been convicted for the offence punishable under

Section 376 IPC and sentenced to undergo RI for 10 years and a fine of Rs. 10,000. In default of payment of fine, he has to undergo RI for one year.

2. The case of the prosecution in brief is that on 15th September, 2003 at about 3 p.m., when the prosecutrix was going to the toilet, the Appellant, who happens to be her cousin, took her to his jhuggi where he committed rape on her. The Prosecutrix came to her house and informed her mother, who noticed blood around her private parts and on the underwear. The Complainant i.e., the mother of the Prosecutrix, immediately went to the jhuggi of the Appellant where she noticed blood stains on the bed sheet and mattress. An information was sent to the Police Station and on the police reaching, both the Prosecutrix and the Appellant were medically examined. The clothes of the Prosecutrix and the accused, mattress and bed sheet were seized as exhibits. Subsequently, the statement of the Prosecutrix was also recorded under Section 164 Cr.PC.

3. Learned counsel for the Appellant challenging the judgment of conviction, contends that as per the evidence of Dr. Pankaj PW 15, it is apparent that no rape had been committed with the Prosecutrix because on medical examination of the Prosecutrix the doctor found, "Fourchette and hymen was intact. No mark of the injury seen over the body. Blood stain seen over thighs and underpants. No active bleeding seen. None of the fingers could be introduced into hymen." Thus, according to learned counsel as the hymen was intact and there was no mark of injury over the body of the Prosecutrix, the

offence of rape has not been committed as there is no evidence of penetration. It is further contended that even as per Dr. Sameer Kapoor PW1, it is opined that the possibility of rape cannot be ruled out. Thus, according to him in case of doubt, the benefit of doubt has to go to the convict/Appellant and not to the prosecution. It is stated that there is no presumption in favour of the prosecution. As per the defence the girl was stated to be little over five years of age. The Appellant was suffering from boils on his private parts and that is why there were blood stains on his clothes, bed sheet and the mattress. The Complainant being the cousin sister sat on the lap and this resulted in blood stains even on her clothes. It is stated that because of the enmity between the families, this false case has been foisted upon the Appellant.

4. Learned APP for the State on the other hand states that in view of the statement of the Prosecutrix, her mother, the CFSL Report and the report of medical examination of the accused and the Prosecutrix, the commission of offence by the Appellant punishable under Section 376 IPC has been proved beyond reasonable doubt by the Prosecution. It is stated that there is no infirmity in the judgment of the trial court and hence the present appeal deserves to be dismissed.

5. I have heard learned counsel for both the parties and gone through the record. In the present case, the Prosecutrix PW5, in her testimony has clearly narrated the sequence of events resulting in the commission of the offence by

the Appellant. In her statement she has stated that when she was going to the toilet, the Appellant took her to his house and made her lay on the takhat. He opened his pant and did wrong act with her resulting in bleeding from his penis which smeared her body parts also. She states that she felt pain when the Appellant was doing wrong act with her. She states that she informed her mother who took her to the police. This witness was cross examined at length on behalf of the Appellant, however, nothing could be elicited from her cross examination.

6. The mother of the Prosecutrix who is the complainant in the present case has fortified her statement except to the extent of seizure of the blood stained clothes from inside the jhuggi of the accused. She however admitted her signatures on the seizure memo Ex. PW6/2.

7. In this case, the testimony of PW1 Dr. Sameer Kapur who had examined the Appellant on 15th September 2003 at 5:55 pm itself, is very relevant and strongly incriminating evidence against the Appellant. He has stated that on examination of the Appellant he found fresh abrasion with bleeding of fraenum of penis. According to him, this injury is possible in case of sexual intercourse with a minor girl. This witness has not been cross examined. It is now sought to be urged by the learned counsel for the Appellant that the Appellant had boils on his private parts resulting in bleeding. No such question was either put to PW1 during his cross examination nor was such a plea taken in

the statement recorded under Sec. 313 Cr.PC. A perusal of MLC of the Appellant does not show that he was suffering from any boils on his penis resulting into bleeding. Thus this defence sought to be raised has no basis.

8. PW2 Dr. Pooja Bhasin has also opined that on local examination of the Prosecutrix, she found blood over her external genital area. This witness has also not been cross examined by the defence.

9. As per the CFSL Report, there were blood stains on the underwear of the Prosecutrix as well as that of the accused. Though the blood grouping from the underwear of the Prosecutrix was inconclusive, however the blood was of human origin. Blood of group 'A' was also found on the bed sheet and piece of quilt recovered from the house of the Appellant. In fact the presence of the blood of the accused on the body and underwear of the Prosecutrix has not been disputed by the defence during the trial.

10. Heavy reliance of counsel for the Appellant on the testimony of PW 15 Dr. Pankaj is of no consequence in view of evidence of PW1 Dr. Sameer Kapur, who on examination of the Appellant found fresh abrasion with bleeding and of fraenum of penis and opined that the injury was possible in case of sexual intercourse with a minor girl. As per PW2 Dr. Pooja Bhasin, who examined the Prosecutrix on 15th September, 2003, on local examination she found blood over external genital area. Even PW15, Dr. Pankaj found blood stains over the thighs, under thighs and underwear of the Prosecutrix. It may be noted that

PW1 and PW2 have not been cross-examined. Even PW15, has not been cross examined on the aspect of the presence of the blood on the private parts and underwear of the Prosecutrix. The hymen being intact of the Prosecutrix or there being no injuries on her private parts, does not lead to the conclusion that no rape has been committed on her. The anatomical characteristic of each human being is different. The shape, texture and flexibility of the hymen is variable, in some females it may be less firm, elastic and get stretched easily whereas in others it may not be so.

11. The offence of rape in its simplest term is 'the ravishment of a woman, without her consent, by force, fear or fraud', or "the carnal knowledge of a woman by force against her will". In the crime of rape, "carnal knowledge" means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation (Stephens Criminal Law, 9th Ed., p.262). In *Halsbury's Statutes of England and Wales* (4th Edn.) Vol. 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation, with violence, of the private person of a woman, an outrage by all means. By the very nature of the offence it is an obnoxious act of the high order. Parikh in "Text book of Medical Jurisprudence and Toxicology has defined, "sexual intercourse" as:-

"Sexual intercourse.- In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to

commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains.”

12. At this stage it will be apt to quote the opinion expressed by Modi in “Medical Jurisprudence and Toxicology” (22nd Edn. at page 495):

“Thus, to constitute the offence of rape, it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. 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 a 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 to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.”

13. I do not find any merit in the contention of the learned counsel for the Appellant. For the commission of an offence punishable under Sec. 376 PPC, it is not essential that there should be complete penetration. Suffice it is that vulval penetration has been made which is evident from the MLC of the Appellant wherein injuries on his penis resulting in bleeding is recorded, the same being a consequence of forced penetration.

14. It is settled law that the Prosecutrix complaining of an offence of rape is not to be treated as an accomplice of the offence. The conviction can be based safely even on her testimony. In the present case the credible testimony of the Prosecutrix and her mother/complainant is duly corroborated by the testimony of PW2, PW15 and the CFSL Report showing human blood on the private parts and underwear of the Prosecutrix and the opinion of PW1 rendered on the medical examination of the Appellant depicting the injury on his penis and bleeding which was possible in case of sexual intercourse with a minor girl.

15. I also do not find any merit in the defence of false implication due to enmity, taken by the Appellant's counsel. The Appellant had examined defence witnesses. However all the defence witnesses produced have categorically stated that the aggression by the Prosecutrix's father and her family members at the shop of Appellant's father took place only after the Appellant was arrested i.e., after the alleged offence was committed. This was thus out of anger and not a reason for false implication.

16. I also do not find force in the contention of learned counsel for the Appellant that since the doctor has only stated that possibility of rape cannot be ruled out, the benefit of doubt should enure to the accused. Opinion of an expert under Section 45 of the Indian Evidence Act, 1972 is only an evidence of his opinion on the subject. It is ultimately for the Court to form an opinion and

come to conclusion on the basis of entire evidence on record and return its own finding.

17. I do not find any infirmity in the impugned judgment of conviction and order on sentence. Hence the appeal is dismissed.

(MUKTA GUPTA)
JUDGE

JULY 09, 2010
'Raj'