

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

% *Judgment Reserved on: 3rd May, 2010*
Judgment Pronounced on: 5th May, 2010

+ **CRL.APPEAL No.423/2010**

PAPPU Appellant
Through: Mr.Sumeet Verma, Advocate

versus

STATE NCT OF DELHI Respondent
Through: Ms.Richa Kapoor, A.P.P.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MR. JUSTICE SURESH KAIT

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

PRADEEP NANDRAJOG, J.

1. In yet another prolix judgment dated 30.10.2009, of the kind we find being penned in abundance by the learned Trial Judges, the appellant has been convicted for the offence of having raped an infant girl child aged 1½ years on the date when the crime was committed.

2. Vide order dated 31.10.2009 the appellant has been sentenced to undergo imprisonment for life and pay fine in sum of Rs.50,000/-.

3. In a decision which sways all over; noting the testimonies of the witnesses; the arguments advanced pertaining to the credibility of the witnesses; copiously copying extracts from various decisions; but without dealing with the submissions urged; recording in a cryptic manner that discrepant details vis-à-vis the earlier and the current statements would not discredit a witness, finding of guilt has been returned.

4. An impression is given that the learned Judge simply picked up the file and went about narrating the testimony of the witnesses by making the stenographer sit in front and one by one re-narrating the deposition of the witnesses; an exercise which has consumed the first 25 pages of the prolix decision. Thereafter extracts from as many as 17 decisions has been extracted; inter spaced in between are the submissions and in this manner the next 25 pages have been consumed. The reasons span only 3 pages. With a little more effort, probably consuming the same time, but requiring the Judge to be focussed, a short decision, in our opinion not spanning 20 pages i.e. in approximately 1/3rd the number of pages consumed, the learned Judge could have better expressed herself.

5. The charge-sheet filed shows that the prosecution alleged against the appellant that pursuant to DD No.29-A being recorded on 19.11.2008 at P.S. Nangloi SI Pradeep Kumar PW-9, accompanied by Const.Ved Prakash PW-2, reached A-115 Veena Enclave and met Smt.Savitri Devi PW-5 and saw her crying with her daughter Kumari 'P' in her hand with blood oozing from her private parts and the appellant held on to by the people with a sound beating given. SI Pradeep Kumar and Const.Ved Prakash took Kumari 'P' and her mother as well as the appellant to Sanjay Gandhi Memorial Hospital where Dr.Sangeeta Kumari PW-3 examined Kumari 'P' and prepared her MLC Ex.PW-3/A which evidenced that Kumari 'P' was raped. Dr.Meenakshi PW-4 examined the appellant and prepared the MLC Ex.PW-4/A recording therein that the appellant had periorbital odema i.e. swelling on the face, generally occasioned by beating with slaps. At the hospital, the statement Ex.PW-5/A of Savitri Devi PW-5 was recorded as per which she told that her daughter was playing outside the room. Appellant who knew her and her daughter took her daughter for playing to his room. She heard the cry of her daughter from the room of the appellant and on pushing the door and accessing the room of the appellant was horrified to see her daughter beneath the appellant who was in a crouching position with his pant and underwear lowered and

his penis placed upon the private part of her daughter. She raised an alarm. Appellant attempted to flee. Umesh PW-6 and other persons in the neighbourhood heard her cries and hence apprehended the appellant and gave him a beating.

6. It is apparent that the case of the prosecution rested on the testimony of Savitri PW-5 and Umesh PW-6 as also the testimony of SI Pradeep PW-9 and Const.Ved Prakash PW-2 pertaining to appellant being apprehended on the cries of Savitri and the testimony of Savitri as to what she saw. Further, the MLC of Kumari 'P' had to be looked into for the reason when subjected to forensic examination neither blood nor semen could be detected on the vaginal swabs taken on a slide by Dr.Sangeeta Kumari PW-3.

7. We do not find any discussion by the learned Trial Judge on the issues which were urged before us as also before the learned Trial Judge; the issue being whether DD No.29-A and the FIR were ante timed and for this reason, since the said argument had to be dealt with, the testimony of the witnesses who deposed about DD No.29-A being recorded, the rukka being prepared and sent as also FIR being registered needed to be noted and then evaluated.

8. Thus, we note the relevant evidence and firstly note the evidence relating to the involvement of the police officers

from the stage DD No.29-A was recorded in the DD register till FIR was registered.

9. The scribe of DD No.29-A has not been examined and the same has been proved by SI Pradeep Kumar PW-9 who deposed that on 19.11.2008 he was on emergency duty at PS Nangloi from 8:00 AM to 8:00 PM and received DD No.29-A, Ex.PW-9/A and on basis of said DD, accompanied by Const.Ved Prakash PW-2, reached A-115 Veena Enclave and saw a crowd. Savitri Devi PW-5 met him and made a statement which he reduced into writing and she produced her 1½ years old daughter Kumari 'P'. Accused was produced. He took Kumari 'P' and the accused to the hospital and got the prosecutrix medially examined and thereafter made an endorsement Ex.PW-9/B beneath the statement of Smt.Savitri Devi and handed over the rukka to Const.Ved Prakash who went to the police station and got the FIR registered. The doctor handed him over 4 sealed parcels relating to the prosecutrix which he seized vide memo Ex.PW-2/D. He arrested the accused as recorded in the memo Ex.PW-2/C and thereafter deposited the various exhibits in the FSL Rohini and after completion of investigation sent the file to the Court.

10. On being cross-examined he stated that he received DD No.29-A at 4:45 PM and reached the spot at 5:15

PM where he remained for 15-20 minutes and then went to the hospital and that he handed over the rukka to Const.Ved Prakash in the hospital at 5:45 PM after he recorded Savitri's statement in the hospital.

11. Const.Ved Prakash PW-2 deposed in sync with SI Pradeep Kumar. He did not depose as to where the statement of Savitri was recorded but stated that he took the rukka after the prosecutrix and the appellant were medically examined, meaning thereby deposed, though not in exact words, that Savitri's statement was recorded in the hospital.

12. On being cross-examined he stated that they reached the spot at around 5:15 PM or 5:20 PM.

13. HC Suresh Kumar PW-1 has deposed that he was the duty officer from 5:00 PM to 1:00 AM on 19.11.2008 and that he received the rukka on which he made the endorsement Ex.PW-1/A and registered the FIR Ex.PW-1/B.

14. HC Suresh Kumar has not been cross-examined.

15. Endorsement Ex.PW-1/A records that as entered in DD No.32-A, FIR was registered at 7:05 PM on 19.11.2008 upon receipt of the rukka from SI Pradeep sent through Const.Ved Prakash. The endorsement Ex.PW-9/B beneath Savitri's statement Ex.PW-5/A records the time of incident at 4:45 PM and dispatch of the rukka at 6:45 PM. The

endorsement Ex.PW-9/B records that after DD No.29-A was handed over to him and upon reaching A-115 Veena Enclave, SI Pradeep met Savitri who produced Kumari 'P' as also Pappu, both of whom were taken to the hospital where MLC No.14850 of Kumari 'P' and MLC No.14722 of Pappu were handed over to him and that in view of the MLC of Kumari 'P', FIR for an offence punishable under Section 376 IPC was made out.

16. DD No.29-A, Ex.PW-9/A, records that information was received at 5:31 PM on 19.11.2008 from the police control room that a girl has been raped in a house behind Nangloi Sonia Hospital.

17. Let us deal with the first argument advanced during hearing of the appeal. It was urged that DD No.29-A being registered at 5:31 PM, where was the question of SI Pradeep and Const.Ved Prakash leaving the police station at 4:45 PM as claimed by them and having reached the place of the crime by 5:15 PM. There from, it was urged that it was apparent that everything was ante timed and in the interregnum Savitri PW-5 was given time to cook up a version to falsely implicate the appellant for the reason Savitri's husband had a fight with the appellant in the evening.

18. Now, MLC Ex.PW-13/A records that Kumari 'P' was brought to the hospital at 6:20 PM. The author of the MLC

Dr.Sangeeta Kumari PW-3 has proved the MLC and no suggestion has been given to her that the time recorded therein is incorrect. The MLC Ex.PW-4/A of the appellant records his being brought to the hospital at 6:10 PM. The author of the MLC Dr.Meenakshi PW-4 has not even been suggested that the time therein is incorrectly recorded. Both MLCs record that Const.Ved Prakash (PW-2) had brought Kumari 'P' and the appellant to the hospital. The authors of the two MLCs have not been suggested that said recording is incorrect. Indeed, Const.Ved Prakash PW-2 has stated that he and SI Pradeep took Kumari 'P' and the appellant to the hospital and so did SI Pradeep PW-9 deposed to. Thus, we have 2 documents of unimpeachable character to show that the appellant was in the custody of police well before 6:10 PM and by said time was got medically examined. Obviously, SI Pradeep and Const.Ved Prakash had with them the information pertaining to Kumari 'P' being raped and this information had to be the first DD entry recorded in the police station. Const.Ved Prakash PW-2 on cross-examination has disclosed that the distance between the police station and Veena Enclave was about 2.25 kilometres and that he and SI Pradeep went from the police station to Veena Enclave on his private motorcycle. SI Pradeep Kumar has stated that before proceeding to the hospital he remained at the spot for 15-20

minutes. Working the time backwards from 6:10 PM by which time the appellant was admittedly brought to the hospital, going back 15-20 minutes we reach 5:50 PM – 5:55 PM. Excluding about 5 minutes time to reach the hospital from the spot it takes us back to 5:45 PM – 5:50 PM. It would take about 4 to 5 minutes to cover a distance of 2.25 kilometres i.e. the distance between the police station and Veena Enclave and proceeding backwards it would mean that the two police officers left the police station at around 5:40 – 5:45 PM. DD No.29-A records the time 5:31 PM. Giving some time for its copy to be prepared, a police officer available to be spotted and his departure entered in the DD Register, we find documentary web of circumstances proving that DD No.29-A was indeed recorded at 5:31 PM. The stray statement of Const.Ved Prakash as also SI Pradeep that they left the police station at 4:45 PM when DD No.29-A was recorded is obviously an error and the possible source of the error is the time of incident recorded in the rukka being; 4:45 PM. It appears that the two police officers refreshed their memory before entering the Court by looking at the shadow file and in the process the time 4:45 PM got fixed in their memory as the time when they left the police station. Further, we find no serious challenge to the time recorded on the endorsement Ex.PW-9/B of the rukka being dispatched from the hospital at 7:05 PM which would

conform to the time consumed at the hospital for Kumari 'P' and the appellant to be examined, their MLCs prepared and in the meanwhile when the doctors were examining the two, statement Ex.PW-5/A of Savitri PW-5 being recorded. We find reinforcement from the fact that PW-1 has deposed to the time when he entered the FIR in the register and the further fact that PW-1 has not even been cross-examined.

19. It was urged that the admission of SI Pradeep that he recorded the statement of Savitri PW-5 at the spot is also indicative of the FIR being ante timed, is repelled for the simple reason on being cross-examined SI Pradeep corrected himself by stating that he recorded Savitri's statement in the hospital. Even Savitri PW-5 has categorically said that her statement was recorded in the hospital. The question of SI Pradeep recording Savitri's statement and dispatching the rukka from the spot does not arise inasmuch as the endorsement Ex.PW-9/B beneath the statement Ex.PW-5/A makes a mention of the number of both MLCs Ex.PW-3/A pertaining to the prosecutrix and the MLC Ex.PW-4/A pertaining to the appellant.

20. For the benefit of the learned Trial Judges, this is the manner in which an incorrect statement whether by way of a memory lapse or a blemish attributable to a witness has to

be dealt with, when good and sound documentary material is available to establish the same. It is no use to note 8 judgments of the superior Courts where such trivial variations have been held liable to be ignored. What we intend to convey is that sound reasons are not copious reproductions of extracts from judicial pronouncements, but analysis of the oral depositions and documentary evidence. It is this process of reflection of the judicial process which lends credit to the fact that the learned Trial Judge has applied her judicial mind and the judicial process has been followed.

21. Savitri PW-5 has deposed in complete sync with her statement Ex.PW-5/A. Indeed, during cross-examination she was not confronted with any part of her statement Ex.PW-5/A. Nothing has been shown to us by way of any improvement or contradiction whatsoever made by Savitri when she deposed in Court vis-a-vis her statement Ex.PW-5/A.

22. Relevant would it be to note that the thrust of cross-examination is that at the time of the incident the children of the appellant and her children were watching a movie in the CD in the room of Pappu i.e. the appellant, a fact which she denied. Admitting the fact that she lived in one room and so did Pappu in the same building, she denied that her husband was sitting outside his room. She denied that her

husband, Pappu and some other persons were consuming liquor in the room taken on rent by Pappu. It is apparent that what was attempted to put to Savitri was that with so many people present in the room of Pappu, where was the question of Pappu doing the offending act.

23. Relevant would it be to note that no suggestion was put to Savitri of any fight between Savitri's husband and the appellant or between Savitri and the wife of the appellant or with the appellant.

24. Umesh PW-6 corroborated Savitri when he deposed that cries of Savitri, his co-tenant, attracted him. He saw Savitri chase the appellant and that he i.e. Umesh with the help of persons in the locality apprehended appellant and the local people gave a beating to the appellant and handed him over to the police when the police came. Surprisingly, Umesh was given suggestion that a quarrel had taken place between the appellant, him i.e. Umesh and the husband of Savitri.

25. The appellant produced his wife Gajra DW-1 who deposed that three persons, Mahender, Janak Pal and Chet Ram (husband of Savitri) were consuming liquor when her husband Pappu returned. The three requested her husband to join them in drinking liquor. Her husband refused. The three men started abusing and started quarrelling with her husband.

Savitri started beating her husband. Kumari 'P' who was standing on a cot fell down and hurt herself. Somebody informed the police who came and took away her husband.

26. Relevant would it be to note that no such version was put to Savitri PW-5.

27. It is apparent that through his wife the appellant wanted to prove that Kumari 'P' suffered an injury when she fell from the cot. This is in harmony with the line of cross-examination adopted when Dr.Sangeeta Kumari PW-3, the author of the MLC Ex.PW-3/A deposed. Her cryptic cross-examination is: *"The examination conducted by me on the patient and reduced in writing at encircle 'X' in Ex.PW-3/A. There is no possibility in this case that such type of bleeding in this case may be possible due to touch of finger or fall on wood."*

28. As recorded in the MLC Ex.PW-3/A and as deposed to by Dr.Sangeeta Kumari PW-3 when she examined Kumari 'P' she saw: *"Mild swelling in the perineal region, small tear in forechette. Bleeding was present. Hymen?"*

29. It is apparent that, not full, but partial penetration had been made near the perineal region of the young girl evidenced by mild swelling, small tear in forechette and bleeding there from.

30. We have no reasons to hold that Dr.Sangeeta Kumari would collude to incorrectly record as aforesaid. The MLC corroborates the ocular version of Savitri, Const.Ved Prakash, Umesh and SI Pradeep that they saw blood on the private parts of Kumari 'P'.

31. That no blood was detected on the vaginal swab of Kumari 'P' and no semen was detected therein is neither here nor there in view of the ocular evidence of afore-noted four witnesses; the testimony of Dr.Sangeeta Kumari PW-3 and the MLC Ex.PW-3/A of Kumari 'P'. It is possible that the young infant and unfortunate victim passed urine and thereby diminishing the possibility of blood being detected in her vaginal swab. As regards no semen being detected therein, there is no law that unless there is ejaculation, rape is not complete. There is no law that for rape to be complete there must be full penetration.

32. It was urged that at best, evidence suggested a digital rape. The argument has to be rejected inasmuch as the testimony of Savitri PW-5 establishes that the appellant was with his pant and underwear pulled down and he crouching over Kumari 'P' with his penis on the private part of the young girl.

33. That the MLC of the appellant shows his having a swollen face evidences the appellant being slapped. The attempt by the appellant to prove the circumstances of his being beaten through the testimony of his wife has to be rejected for the reason this version was not even remotely put to Savitri PW-5. The version of false implication has surfaced for the first time when Umesh PW-6 was given a very weak suggestion that the appellant was beaten on account of his refusing to sit down and consume liquor with husband of Savitri and in respect whereof a full blown, but false version, was sought to be brought on record through the testimony of the wife of the appellant.

34. No sane person would damage the private parts of her child to simply falsely implicate somebody. Well, stray incidents have been detected where a parent is proved to have created false evidence of rape of a minor child by inflicting an injury on the private part of the child and then falsely implicated an accused, but in said stray cases, extremely strong evidence of false implication has surfaced.

35. The lame duck argument that the wife and children of the appellant were in his room and hence the question of the appellant committing rape upon Kumari 'P' is most improbable is rejected for the reason there is no proof of the

wife and the children of the appellant being in the room. We find a shifting stand by the appellant on the attempt to prove presence of the wife and children of the appellant in his room. Savitri PW-5 has been given a suggestion that Savitri's children and children of the appellant were watching a movie on CD in the room of the appellant and some persons and the appellant were consuming liquor in the room of the appellant. To Umesh PW-5 a totally different version of a simple quarrel over liquor has been suggested. A full blown account of a fight has been attempted to be brought on record through the testimony of his wife. A completely different version has surfaced through the mouth of the appellant when he was examined under Section 313 Cr.P.C. He stated: *"I am innocent and have been falsely implicated in this case by the police. I have not committed any offence. When the quarrel occurred between Savitri and me, her daughter/prosecutrix fell near the cycle and hurt himself and as the child was injured, Savitri had got me falsely implicated in the present rape case. The public had beaten me at the instance of Savitri and took away the articles lying in my house."* The shifting currents sought to be navigated by the appellant have actually created a whirlpool drowning the object which the appellant intended to conceive.

36. We hold that there is sufficient and credible evidence wherefrom the guilt of the appellant can be inferred. We reject the theory of the appellant being falsely implicated.

37. Last submission urged was that the sentence to undergo imprisonment for life was excessive. It was urged that the victim being a minor girl as an aggravating circumstance has been included in the minimum sentence prescribed by the legislature for the offence of rape if the victim was a minor by prescribing the same to be of imprisonment for 10 years as against the minimum sentence prescribed being that of imprisonment for 7 years in the case of normal rape. Thus, counsel urged that ends of justice would be met if sentence imposed was to undergo rigorous imprisonment for a period of 10 years.

38. In our opinion a distinction has to be drawn when the rape victim is a minor and an infant. Notwithstanding the fact that every rape is a crime of debauchery and is repulsive and loathsome by its very nature for the reason not only is the body of the victim defiled but even her spirit is polluted and the trauma may last forever and in that sense there is societal hatred against the rapist. But retribution has no place in a judicial mind, in sentencing, merely because a rape has been committed would not justify the highest sentence to be

imposed, for if this was the demand of the society, legislature would have so enacted the law. By prescribing a minimum sentence and a maximum sentence, the obvious legislative intent is to leave judicial discretion while imposing the sentence. It is recognized that there is no absolute judicial discretion; for every Judge has to be guided by precedent, logic, legislative intent etc. It is in this context that a distinction needs to be drawn while awarding a sentence of not only the victim being a minor and a major but within the former, to classify the sub-category of the minor victim being an infant and said being an aggravating circumstance while awarding the sentence.

39. It is recognized that corrective action can be taken by the Appellate Court only when a discretion vested in the Trial Court is manifestly absurd. Appellate corrective action relates to wrong law or wrong principle of law being adopted by the learned Trial Judge while exercising a discretion. In the instant case we find none and hence we confirm the sentence imposed upon the appellant to undergo imprisonment for life.

40. The appeal is dismissed.

41. Since the appellant is in jail we direct that a copy of this decision be sent to the Superintendent, Central Jail Tihar to be made available to the appellant.

42. If we do not dovetail a paragraph to what we have penned in paras 1 to 4 of our decision above, we would be failing in discharging our duty of guiding the learned Trial Judge who has penned the instant decision, with a hope that the learned Trial Judge would peruse her decision and ours, and be guided how evidence has to be discussed at a criminal trial and not simply brushed aside by stating that it is settled law that blemishes have to be ignored. Before something can be ignored as a blemish, it has to be brought out that it is a blemish and hence we direct the Registry of this Court to send a copy of this decision to the learned District & Sessions Judge, Delhi with a letter of request that it be forwarded to the learned Judge who has penned the impugned decision.

**(PRADEEP NANDRAJOG)
JUDGE**

**(SURESH KAIT)
JUDGE**

**MAY 05, 2010
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