

\$~R-20 (Persons in Custody)

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

% *Date of Decision: December 01, 2017*

+ **CRL.A. 383/2011**

VIRENDER KUMAR JHA Appellant

Through: Mr.M.L.Yadav, Advocate.
(DHCLSC)

versus

STATE (GOVT. OF NCT OF DELHI) Respondent

Through: Mr.Kewal Singh Ahuja, APP
for the State.

PRATIBHA RANI, J. (Oral)

1. The appellant/convict has preferred this appeal impugning the judgment dated 23rd April, 2010 and order on sentence dated 28th April, 2010 passed in Sessions Case No.256/2008 (in FIR no.57/2007 under Section 376/506 IPC, PS Swaroop Nagar) whereby he has been convicted for committing the offence punishable under Section 376(2)(f) and 506 IPC and sentenced as under:-

- (i) Under Section 376(2)(f) IPC : to undergo RI for ten years with fine of ₹20,000/- and in default of payment of fine to undergo SI for one year.
- (ii) Under Section 506 IPC : to undergo RI for one year with fine of ₹2000/- and in default of payment of fine to undergo SI three months.

2. In brief, the prosecution case is that the convict herein was neighbour of the two child victims, who are sisters. The elder sister 'D' was aged about 10 years and the younger sister 'A' (name withheld to conceal their identity) was aged about 6 years at the time of incident.

3. Criminal law was set into motion on 29th October, 2007 when vide DD No.22B Ex.PW1/A an information was received at PS Swaroop Nagar from one Dr.Ritu Chaudhary about the rape being committed on two sisters by the convict Virender Kumar Jha about fifteen days prior to that day. The DD was assigned to SI Sukhbir Singh who alongwith Ct.Suresh reached the spot. Sh.Rajesh Kujur – father of the two child victims met the Investigating Officer and informed that the girls were at school. They were called from the school. The mother of the child victims, who was an employee of Dr.Ritu Chaudhary – the informant, was also called and both the child victims were sent for medical examination. On medical examination vide MLCs Ex.PW4/A and PW4/B, it was opined that hymen of both the child victims was found ruptured. After registration of the FIR, on the statement of their mother (PW-1 Maryam Kujur) the convict was arrested and sent for medical examination. The convict was medically examined vide MLC Ex.PW4/C which records that there was nothing to suggest that he was incapable of performing sexual intercourse.

4. After completion of investigation, the chargesheet was filed and the case was committed to the Court of Sessions. The convict herein pleaded not guilty to the charge framed.

5. Prosecution examined 16 witnesses in all to prove its case. In his examination under Section 313 CrPC, the convict denied the evidence led by the prosecution and claimed himself to be innocent and falsely implicated in this case due to the quarrel between his wife and mother of the two child victims over throwing of the garbage. However, he has not led any evidence in his defence.

6. After trial, relying on the testimony of PW-3 'D' – the elder child victim aged 10 years at the time of occurrence which was duly corroborated by scientific evidence, the learned Trial Court held the convict guilty of the offence punishable under Section 376(2)(f)/506 IPC and sentenced him in the manner stated above.

7. Mr.M.L.Yadav, learned counsel for the convict has submitted that MLCs Ex.PW4/A and B of both the child victims have been manipulated by their mother at the instance of PW-5 Dr.Ritu Chaudhary with whom she was working as maid servant. It has been contended that there are discrepancies about the date of incident as in the MLCs Ex.PW4/A and 4/B the date of incident has been mentioned as 27th October, 2007 whereas PW-1 Smt.Maryam Kujur – mother of the child victims has stated that the incident has taken place about one month prior thereto. It has also been contended that the conduct of PW-1 Smt.Maryam Kujur is also quite unnatural as instead of informing the police, she informed PW-5 Dr.Ritu Chaudhary with whom she was employed. The younger sister 'A' who was also alleged to be victim of sexual assault was unable to make statement before the Court, hence dropped as witness by the prosecution. Thus, the version of PW-3 'D' – another child victim is not supported and

corroborated even by her sister and the scientific evidence also does not prove the guilt of the convict, hence giving benefit of doubt, he may be acquitted.

8. Mr.Kewal Singh Ahuja, learned APP for the State has contended that it is a case where two sisters were raped by turn on the same day by the convict, who was their immediate neighbour. The MLCs of both the sisters show that their hymen was found ruptured. It has been contended that in view of the tender age of both the sisters, the statement of PW-3 'D' - the child victim narrating the incident with minute details, is sufficient to prove the guilt of the convict as she had absolutely no reason to make a false statement against the convict. It has also been contended that after committing rape both the child victims were also threatened by the convict and due to this reason, they even could not disclose this fact to their parents immediately after the occurrence. It was only after a lapse of sufficient time that their mother came to know about the incident and on not being able to take a decision, she confided in her employer who was a doctor. Learned APP for the State has also submitted that Dr.Ritu Chaudhary advised her not to spare such persons and informed the police from her mobile giving her name as informant. Dr.Ritu Chaudhary, who has been examined as PW-5, has corroborated the statement of PW-1 Smt.Maryam Kujur – mother of the child victims that when the mother disclosed about her two daughters being sexually assaulted by their neighbour, she informed the police.

9. I have considered the rival contentions and carefully gone through the record.

10. At the outset, it is necessary to record here that the appellant though stated in his examination under Section 313 CrPC that due to quarrel with his wife, he has been falsely implicated in this case by the mother of the child victims but he even did not produce his wife in his defence.

11. During investigation, both the child victims were produced before the learned MM for getting their statement recorded under Section 164 Cr.P.C. PW-13 Sh.Vijay Shankar, learned Metropolitan Magistrate has deposed that the child victim 'A' was six years old who made statement Ex.PW13/C and child victim 'D' was aged about 10 years who made statement Ex.PW13/G. Since the statement under Section 164 CrPC was recorded in the Chamber, may be due to that reason the child victim 'A' aged about 6 years at that time could make the statement but when she appeared in the Court, she might have been over-awed by the Court atmosphere and could not depose.

12. Since the prosecution has produced both the child victims during trial, merely because the younger child victim was not able to depose before the Court, cannot be taken as a ground to disbelieve the testimony of the elder child victim as both the sisters were raped on the same day in presence of each other.

13. In the decision reported as Madan Gopal Kakkad vs. Naval Dubey (1992) 2 SCR 921 the Apex Court has observed as under:-

'Even in cases wherein there is lack of oral corroboration to that of a prosecutrix, a conviction can

be safely recorded, provided the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities factor' does not render it unworthy of credence, and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.'

14. The elder child victim 'D' when examined as PW-3 before the Court, has very categorically narrated the incident as under:-

'Virender uncle lives in our neighbourhood. Uncle called me and asked me to bring bidi. I went to bring bidi. I went to his house to give bidi to him. Uncle bolted the room of his house and put down my underwear and also put down his underwear and put his penis (susu wali jagah) in my private parts (pishab wali jagah). I suffered pain and started bleeding and threatened me not to tell my parents otherwise he would kill me and he put my underwear to me and ask me to go outside. I told my mother about this incident on 27.10.07. the incident occurred many days before 27.10.2007. My younger sister Anjali was also with me when the incident occurred. Virender uncle is present in Court today. Uncle did the same act with Anjali also. I was afraid so I did not tell about the incident to my parents for many days.'

15. In her statement under Section 164 CrPC Ex.PW13/G also the elder child victim 'D' has stated:

'Jab main ghar mein thi to hum dono ko uncle ne bulaya tha. Bola tha ki bidi leke aa jao. Aur paise de diya tha khidki se. Jab hum leke aaye to darwaza band kar diya tha. Hum dono beheno ko band kar diya tha. Usne apni kacchi kholi aur apni susu humari susu mein dal di thi. Jab hum rone lage to bola chup ho jao. Phir kachhi

pehna kar ghar bhej diya aur bola ki kisi ko batana mat warna maar dalunga. '

16. The statement of PW-3 'D' – the child victim finds due corroboration from the MLCs Ex.PW4/A and 4/B of both the victims which records:

MLC Ex.PW4/A of child victim 'D'

'Alleged history of sexual assault some day back by her mother and PCR on 29.10.07 at 3.20 pm. Pt. has taken bath and changed clothes since then.

Menarche- not yet. Unmarried.

O/E

GC : Conscious, oriented.

PR – 86

P/A - soft.

L/E : No sign of fresh injury on thighs, breast or abdomen.

Vulval examination – hymen ruptured.'

MLC Ex.PW4/B of child victim 'A'

'Alleged history of sexual assault some day back by her mother and PCR on 29.10.07 at 3.20 pm. Pt. has taken bath and changed clothes since then.

Menarche- not yet. Unmarried.

O/E

GC : Conscious, oriented.

PR – 96

P/A - soft.

L/E : No sign of fresh injury on thighs, breast or abdomen.

Vulval examination – hymen ruptured.'

17. In the backdrop of the above legal principles of law, on examination of the testimony of PW-3 'D' – the child victim, who as well as her younger sister 'A' are victims of lust of their immediate neighbour, I find that she and her family had absolutely no motive against the convict to falsely implicate him in this case. Rather, the two sisters were so terrified that for a long period they even could not confide in their mother even as to what the convict had done to them.

18. The minor discrepancy pointed out by learned counsel for the appellant is about the date of incident as mentioned in the MLCs Ex.PW4/A and 4/B to be 27th October, 2007 whereas PW-1 Smt.Maryam Kujur – mother of the child victims has stated that the incident has taken place about one month prior thereto, is concerned, suffice would it be to say that same does not render the testimony of PW-3 'D' - the child victim unworthy of credence. PW-1 Smt.Maryam Kujur – mother of PW-3 'D' is an illiterate lady who was working as maid servant with PW-5 Dr.Ritu Chaudhary. The victim themselves were girls of tender age and might not be in a position to recall the exact date of the incident. Thus, any discrepancy in respect of the date of incident cannot be a ground to discard their version.

19. It would be apposite to quote the observations made in the case of *State of Rajasthan vs. N.K. the accused 2000 CriL.J. 2205* as under:-

"Having heard the learned counsel for the parties we are of the opinion that the High Court was not justified in reversing the conviction of the respondent and recording the order of acquittal. It is true that the golden thread which runs throughout the cobweb of criminal jurisprudence as

administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal courts which gives rise to the demand for death sentence to the rapists. The Courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women".

20. The motive suggested by the convict of his false implication at the instance of PW-5 Dr.Ritu Chaudhary has to be rejected as an after-thought. Dr.Ritu Chaudhary was a stranger to the convict and she had absolutely no reason to implicate him. She only tried to guide and advise her maid servant who was the mother of the child victims and informed the police so that the offender can be brought to book. She had no axe to grind in the matter and merely because she is the informant in itself is no ground to disbelieve the testimony of PW-3 'D' – the child victim and her parents i.e. PW-1 Smt. Maryam Kujur and PW-2 Sh.Rajesh Kujur.

21. I find that the learned Trial Court has rightly placed implicit reliance on the testimony of PW-3 'D' the child victim aged about 11

years, who as well as her younger sister 'A' had been subjected to rape by the convict.

22. The conviction of the appellant for committing the offence punishable under Section 376(2)(f)/506 IPC and the sentence awarded thereunder is upheld.

23. The appeal is accordingly dismissed being devoid of merits.

24. Vide order 29th November, 2017 productions warrant was issued against the appellant and pursuant thereto, report has been received from the concerned Jail Superintendent to the effect that appellant has already been released from the Jail on 19th February, 2016 after completion of sentence awarded to him in this case.

25. Trial Court record be sent back forthwith along with a copy of this order.

26. A copy of this order be sent to the concerned Jail Superintendent for information.

**PRATIBHA RANI
(JUDGE)**

DECEMBER 01, 2017

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