

(1985) 08 DEL CK 0052

In the Delhi High Court

Case No : Criminal Appeal No. 243 of 1984

Jagdish Maur

APPELLANT

Vs

The State

RESPONDENT

Date of Decision : 20-08-1985

Acts Referred:

Citation : (1986) 10 DRJ 44 : (1986) 1 RCR(Criminal) 477

Hon'ble Judges : H.C. Goel, J

Bench : Single Bench

Advocate : R.P. Kathuria and R.P. Lao, for the Appellant;

Judgement

H.C. Goel, J.

(1) This is an appeal by Jagdish Maur, appellant, against his conviction u/s 376 Indian Penal Code and sentence of 12 years" Ri and a fine of Rs. 1000.00 there under passed by the court of Shri S.M. Aggarwal, Additional Sessions Judge, Delhi, by his impugned judgment and order of sentence, both, dated October 27,1984. The prosecution case stated in brief is that the prosecutrix Kamini alias Kammo aged about 7 years is an inmate of Anath Ashram, Pataudi House, Daryaganj, Delhi. Accused, Jagdish Maur, was working as a Resident Tutor and used to teach boy students of the orphanage. The girl inmates of the orphanage used to live in the Girls" Ward and the boys used to live in a separate ward across the main gate of the Girls" Ward and had a separate entry. On the night between April 8/9, 1982 the appellant took the prosecutrix on the first floor by alluring her that he would give her burfi. The appellant committed rape on Kammo He then brought her back to the ground floor. On the morning of April 9, 1982 Bha PW5 who was employed as a warden in the orphanage and whose duty was to attend to the girl inmates saw that Kammo was not feeling well. Bhagwani took some girl inmates of the orphanage to the hospital for getting some injections and allowed Kammo to remain in the Ward. On her return from the hospital Bhagwani contacted Kammo. She found that Kammo was bleeding from her private part and her salwar had got blood stains. Bhagwani removed her

blood stained salwar and took Kammo to the hospital. Pushpa another employee of the orphanage, also accompanied Bhagwani to the hospital. Kammo told the lady doctor who attended on her that Jagdish Maur had raped her on the last night after having allured her to give a piece of burfi. Dr. Nutan Gupta on examination found hymen of Kammo torn completely. The salwar of the prosecutrix which was taken into possession by the police was sent to the CFSL have reported that human semen mixed with blood was detected on the salwar. One underwear was got removed from the person of the appellant. The CFSL on examination of the same also found human semen thereon. Kammo, prosecutrix, in her statement as Public Witness I narrated the prosecution version. Bhagwani, Public Witness 5, also supported the prosecution version. She stated that the prosecutrix Kammo had told her and the lady doctor in the hospital on the morning of April 9, 1982 that the accused Jagdish had raped on her on the night of April 8, 1982. He had allured her by giving a piece of burfi. The appellant in his statement u/s 313 Criminal Procedure Code . recorded after the conclusion of the prosecution evidence denied the prosecution allegations. He, however, stated that his Kachha was seized but stated that he could not say about its alleged sealing by the police. He further stated that he was innocent. The sons of Bhagwani used to go to the Girls' Ward at odd hours. He used to object to their visits there. Their mother Bhagwani was annoyed with him for that reason and had threatened to harm him whenever any occasion arose. He further stated that on April 8, 1982 he was not in the Arya Orphanage and had gone to his village and returned to the orphanage on April 9, 1982. He also stated that on April 9, 1982 he took one boy inmate by the name of Devi Mittar to Irwin Hospital, as he had received injuries with a glass splinter on his foot. They came back from Irwin Hospital, at about 4.30 p.m. His shirt and pant had blood stains at that time which he got while lifting Devi Mittar in his lap while taking him to the hospital. The appellant examined four witnesses in his defense. The learned trial court found the charge punishable u/s 376 Indian Penal Code as proved beyond a reasonable doubt from the evidence of the prosecution as adduced on the record. The appellant was accordingly convicted and sentenced.

(2) I have heard Mr. R.P. Kathuria, learned counsel for the appellant, and Mr. R.P. Lao, learned counsel for the State, and was taken through the record of the case. Mr. Kathuria raised a number of points in support of his contention that on the facts and circumstances of the case as brought out on the record the learned trial court was not justified in relying on the statement of Kammo who was a child witness and that of Bhagwani, Public Witness 5. I may say at the very outset that almost all the points as urged by Mr. Kathuria were urged before the learned Additional Sessions and he has dealt with them correctly and the impugned judgment is unassailable. Broadly speaking the prosecution had to establish two things to bring guilt home to the appellant, firstly that rape had been committed on Kammo, prosecutrix, and secondly that it was the appellant who committed rape on her. It has come in evidence that Kammo was just about 7" years of age on the date of the occurrence. Regarding the first point; the

statement of Kammo that the appellant took her upstairs on the night between April 8/9, 1982 and committed rape on her there finds full corroboration by the medical evidence consisting of the Mlc report of Dr. Nutan Gupta, Ex. Public Witness IO/A, duly proved by Kanwar Singh. Public Witness 10, record clerk of Lnjp Hospital. As per this Mlc report of Dr. Nutan Gupta she found that the hymen of Kammo was torn completely with post vaginal wall exposed slightly. No tear was seen. She found bleeding from the vagina and thighs stained with blood. She gave the opinion that it was probably a case of rape. The reports of the CFSL. Ex. Public Witness 12/D and that of serologist. Ex. Public Witness 12/E wherein human semen mixed with blood was detected on the salwar of the prosecutrix, fully corroborated the version of the prosecution that Kammo was subjected to sexual intercourse. This fact was not disputed by Mr. Kathuria. We are thus left to see as to whether the conclusion of the learned trial court that the appellant committed rape was or was not justified. Mr. Kathuria, learned counsel for the appellant, first of all submitted that there was a delay in the recording of the Fir Ex. Public Witness 1/A which was recorded at 4.40 P.M. on April 9, 1982 while the occurrence took place on the night between April 8/9, 1982. The prosecutrix Kammo was a young lass of 7 1/2 years of age at the time of the occurrence. According to her statement as Public Witness 1 she was left back in the ward by the appellant after committing rape with her upstairs. A young girl of 7" years would certainly get highly shocked on being ravished by a male and in such a situated the conduct of Kammo in not awakening or talking to any other inmate of the ward at the night or early in the morning about the occurrence till she was attended to by Bhagwani Public Witness is not some thing abnormal. On Bhagwani Pw having detected that Kammo was bleeding from her private part she removed her to the hospital where she learnt from Kammo herself that she had been raped. Kammo was medically examined at about 2.00 p.m. A report about Kammo having been brought to the hospital was lodged by the duty constable at the hospital to the local police which was recorded as D.D. No. 13A (copy of which is Ex. Public Witness 13/A) at 2.35 P.M Under the circumstances the delay in the lodging of the Fir could not be considered to be any circumstance introducing any infirmity in the case of the prosecution and there was no reason to disbelieve the statement of Kammo, prosecutrix, which stood corroborated from the medical evidence as also from the statement of Bhagwani Public Witness . It was next submitted by Mr. Kathuria that from the medical evidence adduced on the record it was clear that no mark of injury was found on the organ of the appellant. It was submitted that had the appellant committed rape on the prosecutrix who was a child of 7 1/2 years of age, the appellant would have suffered injury on his male organ. In this connection it is worth-noting that Dr. L.T. Ramani, Public Witness . 6 who examined the appellant medically in his cross-examination stated that it is not necessary that male sex organ of the person should suffer injury during the process of rape even if the female had suffered extensive injuries on her genital. No question was put to this witness in cross-examination if a male committing rape on a child girl of about 7 years must suffer injury on his male sex organ No attempt was also made to

confront Dr. Ramani in his above assertion by referring him to the medical jurisprudence on the point. Thus whereas it may be that a male committing rape on a child girl about 7 years of age may often suffer some injury on his male sex organ, that is not absolutely necessary in each case. In the absence of Dr. Ramani having been confronted with his above statement and not being specifically questioned regarding a child submission of Mr. Kathuria. The Supreme Court in *Rafiq v. State of Uttar Pradesh*. 1980 Cr. L.J. 1344 regarding the need for corroborative evidence to the statement of a prosecutrix being raped and regarding absence of injuries on the person of the aggressor or the victim held as below:

"Corroboration as a condition for judicial reliance on the testimony of a prosecutrix is not a matter of law, but a guidance of prudence under given circumstances, indeed, from place to place, from age to age, from varying life-styles and behavioral complexes, inferences from a given set of facts, oral and circumstantial, may have to be drawn not with dead uniformity but realistic diversity lest rigidity in the shape of rule of law in this area be introduced through a new type of precedential tyranny. The same observation holds good regarding the presence of the aggressor or the aggressed. .

(3) It was next submitted that the Additional Sessions Judge who recorded the statement of Kammo, prosecutrix, as Public Witness 1 did not incorporate the questions that were put to her to find out if Kammo was able to understand the questions properly and was able to give intelligible answers thereto. It was submitted that reduced the evidentiary value of the statement of Kammo. Some case law was cited in this regard. The Additional Sessions Judge who recorded the statement of Kammo has given her observations prior to be recording of the statement of Kammo as Public Witness 1. It has been stated therein that the Additional Sessions Judge had talked to Kammo and she understood the sanctity of oath. She was quite intelligent and had answered queries intelligently and that, Therefore, she (the Additional Sessions Judge) was of the view that Kammo could answer the questions put to her. The mere fact that the Additional Sessions Judge did not record the questions as put by her to the child witness or the answers of the witness to find out if the child witness was a competent witness did not, in my opinion, render the statement of Kammo as bad in law, nor reduced its evidentiary value in view of the said certificate of the Additional Sessions Judge. It may be pointed out here that the prosecutrix, Kammo, was aged about 11 years at the time of the recording of her statement. This point was duly considered by the learned Additional Sessions Judge and I find myself in agreement with the view taken by him that Kammo was a competent witness and her statement deserves to be given due weight and consideration. The Bombay High Court in *Prabhu and two others v. The State of Maharashtra*, 2nd (1977) Bom 1505 observed that in cases when no oath is administered to a child witness his evidence is required to be recorded in the form of questions and answers and that the failure to record evidence in this manner although not fatal is bound to cause some prejudice to the accused. No reference is made to any

provision of the Code of Criminal Procedure in the judgment particularly on which the said conclusion was reached by their Lordships of the Bombay High Court. Section 276(2) Criminal Procedure Code . is the relevant provision which provides the mode of taking and recording evidence in enquiries and trials. It states that evidence shall ordinarily be taken down in the form of a narrative, but the Presiding Judge may, in his discretion, take down, or cause to be taken down any part of such evidence in the form of questions and answers. It thus appears to me that whereas in the case of a child witness it may be desirable to record the statement of such a witness in question answer form, the fact that the statement of the child witness is recorded in a narration by the court cannot by itself be taken as causing prejudice to the accused unless it is shown on behalf of the accused either with reference to the statement of the child witness or by any other facts as brought on the record of the case that the statement of the witness could not be properly recorded in the narrative form. In this regard it is worth-noting that this is not the case of the appellant that any request was made to the court to record the statement of the child witness Kammo in question answer form and that that request was declined by the Additional Sessions Judge and the statement of Kammo was recorded in a narrative form in disregard of any such request. I thus find myself in agreement with the view taken by the learned Additional Sessions Judge that no prejudice was caused to the appellant by the recording of the statement of the prosecutrix in the narrative form instead of the same having been recorded in a question answer form.

(4) It was next submitted that the time of rape has not been disclosed by the prosecution on the record. Nothing turns on that. However, from reading the entire prosecution evidence one can make out that it was some time between 9.00 and 11.00 p.m. or so when the girl inmates of the ward retired to the ward and the appellant had made his entry in the ward from the kitchen of the orphanage. It was next submitted that the prosecution did not examine six of their cited witnesses and two of whom, namely Pushpa and Smt. Motia Devi were later examined by the accused as defense witnesses. So far as Pushpa and Motia Devi are concerned, they having been examined as defense witnesses, their evidence was available to the Court and for the reasons to be stated here after the trial court was perfectly right in rejecting their evidence as in fact the entire defense evidence. It was submitted that according to the statement of Bhagwani, Public Witness 5. Kammo had narrated the occurrence to Shri R.N. Sharma. Supervisor of the Orphanage also. As such Shri Sharma was a material witness and his non-examination by the prosecution went against the prosecution. I see no merit in this submission as well. It was open to the accused to examine Shri R.N. Sharma as a defense witness as he examined two other said prosecution witnesses in defense or a request could be made to the Court to examine Shri Sharma as a Court Witness. In the absence of either of these things the said submission is devoid of any force.

(5) As regards the defense evidence, reference was made by Mr. Kathuria to the statement of Motia Rani, mother of the prosecutrix. She stated as DW3 that on a

telephonic call at about 10.00 a.m. that her daughter K.ammo had been admitted to Jpn Hospital she reached there at about 4.00 p.m. after finishing her duty as a nurse in Jiwan Hospital at Bhogal, New Delhi. She wanted to take back Kammo, but the doctor did not permit her telling her that it was a police case. She further stated that she was not interested in police case being made; that Kammo told her that Bhagwani had given a danda blow to her, suggesting there from that hymen of K.ammo must have been torn by the danda blow given to her by Bhagwani and that K.ammo had told her that she was advised by Bhagwani to name Jagdish. It was tragic that this woman who was the mother of the girl child who was ravished had given a patently false statement. The first thing to note is that her suggestion that the injury to the private part of K.ammo was caused by a danda blow given to her by Bhagwani Public Witness stands belied from the material as adduced on the record, particularly the evidence of the CFSL to the effect that human semen was found on the salwar of the prosecutrix. Next it is wholly in convincing that Kammo would have falsely implicated Jagdish appellant in the case if in actuality she had suffered the injury on her private part by a danda blow from Bhagwani Public Witness and had told this to her mother Motia Devi, as in that case Motia Devi would have certainly been able to prevail upon her young daughter Kammo, prosecutrix not to depose falsely against the appellant. Motia Divi has five daughters and is a midwife by profession. She stated that she did not enquire from the doctor if injury on the private part of Kammo could be caused by a danda blow. She also stated that she did not have any talk with Bhagwani about the matter. These replies of the witness go to show that the witness in fact knew the true state of affairs and had no better way of explaining the said two things than to reply admitting the lack of initiative to make a reasonable probe in the matter as that would have led her to further cross-examination in the matter. Pushpa, DW1, was also employed as a maid servant in the orphanage. She stated that she and Bhagwani had taken Kammo to Jpn Hospital for medical examination and that she remained outside while Bhagwani talked to the child inside the ward. To that extent her statement corroborates the statement of Bhagwani that she got Kammo medically examined from a lady doctor and where according to her (DWI) and the Mlc report Ex. Public Witness 10/A Kammo had stated before the lady doctor and Bhagwani that Jagdish had committed rape on her. She, however, stated that Bhagwani had told Kammo not to name her but to name Jagdish otherwise she would be given beating by her. The question of Bhagwani having committed rape on Kammo obviously could not arise. The suggestion of Pushpa although not so stated by her is that Bhagwani must have caused hurl to the private part of Kammo somehow and Bhagwani had told Kammo not to tell that and give her name as responsible for the same. As mentioned by me already above it stood proved on the record beyond a reasonable doubt that this was a case of rape having been committed on Kammo and the injury to her private part was not the result of any blow by hitting of a danda etc. on the private part of Kammo. The learned trial court was thus right in rejecting the statement of Pushpa, DW1, as well. No reference was made by Mr. Kathuria to the statements of DW2 or DW4

and there is nothing of any help to the case of the appellant in the statement of either of these witnesses. In fact the statement of Dev Mittar, DW4, goes to show the guilty mind of the appellant. His statement is to the effect that on April 8, 1982 he had sustained an injury on his foot and was removed to the Jpn Hospital by the appellant in a rickshaw and that some blood had failed on the clothes of the appellant from his wound. It was tried to be shown that the blood that may be found on the underwear of the appellant that was seized had come on the underwear of the appellant from the said wound of Dev Mittar, DW4. This, however, is not the case of the prosecution that any traces of blood were found on the underwear of the appellant. According to the prosecution some faint brownish stains were found on the under wear of the appellant which were that of human semen as per the report of the Chemical Examiner, Ex. Public Witness 12/D. Apart from what has been said above it may also be stated that it has come in the statement of Bhagwani Pw that she had seen the appellant coming to the kitchen of the Orphanage in the night between April 8/9, 1982, and further that a person could easily come from the kitchen to the girls' ward as the kitchen used to remain open up to about 11.00 p.m. although the main-entrance to the girls' ward used to be locked it about 9.00 pm. This showed that the appellant who was a Supervisor in the Orphanage must have made his entry to the girls' ward from the kitchen. It is also worth-noting that the appellant in his statement u/s 313 Criminal Procedure Code . took the plea of alibi. That was, however, not proved by him. This fact also thus went against the appellant. Further the appellant has tried to give different defense versions. It was one of the defense versions and about which suggestion was given to Kammo PW1 in her cross-examination that she sustained the injury to her private part because of having been hit on her there by Bhagwani. I have already held above that this is a case of raps and the injury on the private part of Kammo could not be attributed to any blow given by hitting there with a danda etc. A suggestion was given to Bhagwani Public Witness that her sons used to come to the girls' ward about which the appellant used to object and Bhagwani was annoyed with the appellant on the account and she, Therefore, got him falsely implicated in the case. This suggestion by itself does not take the case of the appellant to any extent as it is not explained as to who was responsible for the commission of rape on Kammo. So far as the sons of Bhagwani are concerned as per her statement, to which no challenge was made, the age of her eldest son was about 12 years at the time of the com- mission of the offence. It docs not appeal to reason that a boy of 12 years at the time of the commission of the offence would be able to commit rape, not has any such suggestion been given on behalf of the appellant.

(6) In conclusion in view of what has been said above I hold that the learned trial court was right in holding that the offence of rape as punishable u/s 376 Indian Penal Code was fully established against the appellant beyond a reasonable doubt and he was rightly convicted there under. As regards the sentence of 12 years" Ri and a fine of Rs. 1,000.00 awarded to the appellant, having regard to

the fact that the appellant was an Instructor in the Orphanage whose duty was to serve the Orphanage and to look after the welfare of the young inmates of the Orphanage and the fact that the appellant instead of looking to the welfare of the inmates of the Orphanage indulged in the most beastly act and ravished a minor girl child of too tender an age as about 7" years, the learned Additional Sessions Judge was right in awarding deterrent sentence. The sentence as awarded to the appellant cannot be said to be excessive in the circumstances of the case and the same is maintained. The appeal of the appellant is accordingly dismissed. The appellant is already in Jail custody. He shall serve his unexpired period of sentence.