**Subodh Vs. State**

**Subodh Vs. State**

**SooperKanoon Citation** : sooperkanoon.com/1183477

**Court** : Delhi

**Decided On :** Jun-03-2016

**Judge** : The Honourable Ms. Justice Sunita Gupta

**Appeal No.** : CRL.A. No. 1584 of 2013

**Appellant** : Subodh

**Respondent** : State

**Judgement** :

1. It is stated that human lust knows no bounds-if there is any truth in it, the present case is a glaring example of such lust. In the present case a tiny tot aged about 2-1/2 years has become a victim of the lust of the appellant resulting in his conviction under sections 376(2)(f)/363/186/332/353 IPC in Sessions Case No. 85/2011 arising out of FIR No.29/10 PS Govind Puri and sentenced to undergo various prison terms.

2. Succinctly stated, the case of the prosecution is as follows:

Briefly stated, the prosecution case as reflected in the charge- sheet is that on 01.02.2010 at about 08.00 P.M. the appellant after kidnapping the prosecutrix X (assumed name), a minor child, aged about 2 years sexually assaulted her. Police machinery came into motion when information about the incident was recorded vide Daily Diary (DD) No.20A at PS Govind Puri. The investigation was assigned to SI Ashok Giri who went to the spot. First Information was lodged on the

statement of victim's mother - Ruby. She disclosed as to how and under what circumstances, 'X', her daughter was sexually assaulted by the appellant. During investigation, statements of the witnesses conversant with the facts were recorded. 'X' was medically examined. Accused was arrested. While apprehending the accused, he had hit HC Jagat Singh (PW7) by means of an iron rod due to which he suffered injuries. Medical examination of accused was also conducted. The exhibits were sent to Forensic Science Laboratory for examination. After completion of investigation, a charge-sheet was filed against him in the Court.

3. Charge for offence u/s. 363/376/186/332/353 IPC was framed against the accused, to which he pleaded not guilty and claimed trial. The prosecution examined fourteen witnesses to substantiate its case. In 313 statement, the appellant denied his complicity in the crime and pleaded false implication without examining any witness in defence. The learned Trial Court on the basis of circumstantial evidence adduced by the prosecution witnesses held that the prosecution had established the guilt of the accused for the offences u/s 363/376/186/332/353 IPC and sentenced him as under:-

(i) RI for 10 years and a fine of Rs.5000/- in default simple imprisonment for one month for the offence u/s 376(2)(f) of IPC.

(ii) RI for 1 year and a fine of Rs.5000/- in default to undergo SI for one month for offence u/s 363 IPC.

(iii) RI for 1 month for offence u/s 186 IPC.

(iv) RI for 1 year for offence u/s 332 IPC.

(v) RI for 6 months for offence u/s 353 IPC.

All the sentences were to run concurrently. Benefit of Section 428 Cr.P.C. was given to the convict.

Being aggrieved and dissatisfied, he has filed the instant appeal.

4. The learned Trial Court based the conviction of the accused on the following circumstances:-

(i) Evidence of last seen;

(ii) Recovery of prosecutrix from the possession of the accused; and

(iii) Medical evidence

5. Only submission made by the learned counsel for the appellant challenging the legality and validity of impugned judgment is that same suffers from some contradiction. Rebutting the contention learned APP for the State submits that minor contradictions does not affect the substratum of the case. Prosecution has established its case beyond reasonable doubt in proving the heinous crime committed upon two year child and when he was being apprehended, he also obstructed police official in discharge of his duties by hitting him with iron rod. Impugned judgment does not call for interference. Appeal deserves to be dismissed.

6. I have given anxious thoughts to the respective submissions of learned counsel for the parties and have perused the record.

7. Admittedly the case of prosecution is based on circumstantial evidence as the eyewitness to the incident is a minor girl aged about 2-1/2 years. As she was not in a position to speak so she was not made a witness in the case and therefore there is no direct evidence on record that any of the witnesses examined by the prosecution has seen the actual commission of the crime. Thus, there is a definite requirement of law that a heavy onus lies upon the prosecution to prove the complete chain of events and circumstances which will establish the offence and would undoubtedly only point towards the guilt of the accused. A case of circumstantial evidence is primarily dependent upon the prosecution story being established by cogent, reliable and admissible evidence. Each circumstance must be proved like any other fact which will, upon their composite reading, completely demonstrate how and by whom the offence had been committed. Hon'ble Supreme Court and this Court have clearly stated the principles and the factors that would govern judicial determination of such cases.

8. Reference can be made to the case of Sanatan Naskar and Anr. v. State of West Bengal in (2010) CCR 134 (SC) : V (2010) SLT 388 : (2010) 8 SCC 249, where it was observed as follows:-

13. There cannot be any dispute to the fact that it is a case of circumstantial evidence as there was no eye-witness to the occurrence. It is a settled principle of law that an accused can be punished if he is found guilty even in cases of circumstantial evidence provided, the prosecution is able to prove beyond reasonable doubt complete chain of events and circumstances which definitely points towards the involvement and guilt of the suspect or accused, as the case may be. The accused will not be entitled to acquittal merely because there is no eyewitness in the case. It is also equally true that an accused can be convicted on the basis of circumstantial evidence subject to satisfaction of the accepted principles in that regard.

14. A three-Judge Bench of Hon'ble Apex Court in Sharad Birdhichand Sarda v. State of Maharashtra, 1984 (4) SCC 116 held as under:

152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant Govind Nargundkar v. State of M.P., AIR 1952 SC 343. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail v. State of U.P., (1969) 3 SCC 198 and Ram Gopal v. State of Maharashtra, (1972) 4 SCC 625. It may be useful to extract what Mahajan, J. has laid down in Hanumant case (supra):

10.... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any

reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793, where the observations were made:

19.... Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'maybe' and 'must be' is long and divides vague conjectures from sure conclusions;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the Panchsheel of the proof of a case based on circumstantial evidence.

9. Since there can be no dispute with this proposition of law, I proceed to examine the circumstances relied upon by the prosecution and testing the same on the

touchstone of the 'panchsheel' formulated in the case of Sharad Birdhichand Sarda (supra).

10. Admitted position is that 'X' is minor girl aged about 2 years. She was not in a position to speak so she was not made a witness in this case. So far as the age of child is concerned, PW-7 Pawan Kumar from NDMC proved the birth certificate( Ex PW 4/C). Nothing adverse came out in his cross examination. PW 4 Ruby and PW5 Kaushal, parents of the victim deposed age of prosecutrix to be 2 years. Accused has not challenged the age of the prosecutrix. Therefore, it was proved beyond reasonable doubt that the age of prosecutrix was 2 years.

11. It is not in dispute that PW4 Ruby along with her husband, PW5 Kaushal and the victim were residing at the house of Tula Ram, Balmiki Mohalla, Village Tughlakabad. According to PW4, on the fateful day, i.e., 01.02.2010 at about 8 p.m. she left her daughter/victim at the house for getting the change of Rs.500/- to the nearby shop. On returning back she did not find her daughter. She searched for her everywhere but all her efforts went in vain. PW3, Shabnam, resident of the same area informed her that she had seen accused going towards other side of jungle along with the victim. Accused was known to her from before as he was residing in the other mohalla. Earlier they were having a ration shop and accused used to visit the shop. He also used to come to meet Shabnam. She along with her husband made efforts to trace the accused. The victim was recovered from the possession of the accused at about 12:00 night of the same day. Police was informed which came to her house, however, returned as the daughter had been recovered. She further deposed that victim did not eat food and was in a frightened state of mind. When she checked her body, some injury marks were found on her private part. Thereafter, she discussed the matter with her landlord Tula Ram who advised her to take the victim to a private hospital. She took the victim to a private hospital which referred her to a Govt. Hospital. After seeing the injury marks, Govt. hospital advised her to lodge a report to the police. Accordingly, she lodged a report Ex.PW4/A with the police. Thereafter, she along with her husband and the victim accompanied the police to AIIMS Hospital where her daughter was medically examined.

12. PW5, Sh.Kaushal corroborates her testimony regarding the missing of child and thereafter on information given by Shabnam that she had seen accused taking his daughter, firstly he went to the house of the accused where he was not available. Thereafter, he went near Shamshan Ghat, Tughlakabad forest, where he saw accused coming with his daughter with a knife in his hand. He requested the accused to hand over her daughter. The accused threatened him by showing knife, however, he took his daughter and went to his house. The condition of the child was not good. In the morning, his wife informed him that there was injury marks on her private part. Thereafter, she was initially taken to a private hospital, then to the Govt. hospital and thereafter the matter was reported to the police. Then, he along with the police officials and his daughter went to AIIMS where his daughter was medically examined. He handed over garments of his daughter which were worn by her at the time of incident which were seized vide seizure memo Ex.PW5/A. After the medical examination, doctor informed him that the victim was subjected to rape.

13. PW3-Ms.Shabnam is a witness to the last seen and has deposed that on 01.02.2010 at about 8:00 pm she had seen accused going in the gali with the victim. Parents of the victim were searching for her and then she informed them that she had seen accused going with the victim.

14. When the victim was brought to AIIMS, she was medically examined by Dr. Mukesh Aggarwal, who prepared her MLC Ex.PW12/A which was proved by Dr. Shruti and she deposed that on examination, the hymen of the prosecutix was found ruptured and second degree perennial tear in mid line was found.

15. On receipt of DD No.20A, SI Ashok Giri (PW10) along with lady constable Saroj, Complainant Smt. Ruby and her husband Kaushal went to the AIIMS hospital where medical examination of victim was got conducted. The doctor handed over sealed pullandas which were seized. Statement of the complainant Smt.Ruby was recorded on the basis of which FIR was got registered. Efforts were made to locate the accused. He along with Head Constable Jagat and Constable Jeet Singh went to the Tuglakabad village and the accused was apprehended from Balla Fatti Shop, Tughlakabad village. In the process of apprehending the

accused, he became violent and made efforts to evade his arrest. While head-constable Jagat was trying to physically apprehend him, the accused gave him iron rod blow on his eye brow as a result of which he sustained injuries. Accused was arrested. He was medically examined by PW2 Dr. Asit Kumar Sikary who prepared his MLC Ex.PW2/A and opined that there was nothing to suggest that person examined is incapable of performing sexual intercourse. Blood in gauge and penile swab were taken and handed over to the police. The accused got recovered a pant which he was wearing at the time of incident. The same was seized. PW8 Constable Jagat Singh and PW9 Constable Jeet Singh corroborated the testimony of SI Ashok Giri by deposing that during the course of apprehending the accused, he gave an iron rod blow on right eye brow of head-constable Jagat Singh resulting in injury. He was medically examined by Dr. Naushad Alam and his MLC Ex. PW8/C was prepared which was proved by PW13 Dr. Suman Karmakar and as per the MLC Ex.PW8/C, he sustained injuries.

16. The plea of accused in his statement recorded u/s 313 Cr.P.C. is one of denial simplicitor. According to him, he is innocent and has been falsely implicated in this case.

17. I have independently scrutinized the testimony of the prosecution witnesses from which it is amply proved that although the victim could not be examined being of tender age, however, the circumstantial evidence proved the guilt of the accused beyond reasonable doubt as all the witnesses which were subjected to cross-examination withstood the same and nothing material could be elicited to discredit their testimony except for minor contradictions. Minor contradictions or consistencies are bound to occur in the testimony of the witnesses due to lapse of time. However, it is only if the contradiction goes to the substratum of the case that affects the prosecution case and not minor inconsistencies here and there.

18. Accused was well known to the family of the victim from before as it has come in evidence that earlier the father of the victim was having a ration shop and accused used to reside in the other mohalla and used to visit his ration shop. Accused also used to visit the house of the victim as the family of the victim as well as the accused belong to Bihar and sometimes mother of the victim used to

offer him tea as well. He was also known to PW3 Shabnam. He used to visit her house as well. As seen above, Shabnam has seen accused taking the child with him and when the parents of the victim were searching her then she informed that she had seen the accused taking the child along with him, thereafter the victim was recovered from the possession of the accused. Except for a bare suggestion that accused had given a sum of Rs.7000/- to the father of the victim which he was not returning and this suggestion has been denied by him as well as his wife, there is absolutely no cogent reason as to why the complainant or her husband or for that reason Shabnam will falsely implicate him in this case. It was only on the next date of incident when the mother of the victim noted injuries on her private part then the victim was initially taken to a private doctor and then to a govt. hospital from where she was advised to approach the police. Thereafter, she was taken to AIIMS where she was medically examined by Dr. Mukesh Aggarwal and as per MLC, her hymen was found ruptured and second degree perennial tear in mid line was found. Then the police machinery swung into action. Therefore, there was absolutely no rhyme and reason for the complainant or her husband to falsely implicate the accused in this case.

19. Recovery of the child from the possession of the accused has been proved by PW5-Kaushal. When all the incriminating evidence was put to the accused while recording his statement u/s 313 Cr.P.C., he failed to furnish any appropriate explanation.

20. In Pudhu Raja and Anr. vs. State, (2012) 11 SCC 1960, it was observed that it is obligatory on the part of the accused while being examined under Section 313 Cr.P.C., to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence, in order to decide, as to whether or not, the chain of circumstances is complete. When the attention of the accused is drawn to the circumstances that inculpate him in relation to the commission of the crime, and he fails to offer an appropriate explanation, or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances.

21. Then, in para No. 13 it was concluded by the Hon'ble Supreme Court that:-

13....The accused have not been able to properly or reasonably explain as to the legitimacy or origin of their possession of the articles carried by the deceased when he arrived from abroad at the airport at Chennai. In such circumstances, since the facts relating to the same being especially within the exclusive knowledge of the accused, the legislature engrafted a special rule in Section 106 of the Evidence Act, to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. The appellants in this case have miserably failed to explain their lawful possession of those articles with them that really belonged to and were in the possession of the deceased when he landed at the air port at Chennai. Consequently, it was legitimate for the courts below, on the facts and circumstances of this case, to draw the presumption not only of the fact that they were in possession of the stolen articles after committing robbery but also committed the murder of the deceased, keeping in view the proximity of time within which the act of murder was supposed to have been committed and body found and the articles recovered from the possession of the accused....

22. The factum of last seen evidence as proved from PW5 coupled with the recovery of victim from the possession of accused and the medical examination completes the link in the chain for proving that it was the accused, who had committed the brutal rape upon a child of two years only.

23. Although it is true that the FSL result could not lead us anywhere, however, it may be due to the fact that it was on the next day of the incident that the victim was medically examined and the accused could be arrested after two days of the incident and then medically examined. Due to lapse of time, no concrete information could come but that itself is not sufficient to discard the other evidence which has come on record. As such, the learned Trial Court was justified in convicting the appellant for offence u/s 363/376(2)(f) IPC. It also stands proved from the testimony of SI Ashok Giri, Head Constable Jagat and Constable Jeet

Singh that in the process of apprehending the accused, he obstructed Head Constable Jagat in discharge of his official duties while assaulting him with an iron rod as a result of which he sustained injuries. As per the MLC Ex. PW8 wherein the injuries were opined to be simple blow on the right forehead above eye brow. SHO PW14-Inspector Veer Singh proved the complaint u/s 195 Cr.P.C., as such, the accused was rightly convicted u/s 186/332/353 of IPC. The conviction of the accused for the aforesaid offences was based on the entire appreciation of the testimony of the witnesses which does not suffer from any infirmity so as to call for interference.

24. Coming to the quantum of sentence, needless to say the offence committed by the accused is very heinous in nature, who in order to satisfy his lust did not leave even a child of two years and committed the brutal act of rape upon her. The minimum sentence as prescribed u/s 376(2)(f) has been awarded to the appellant by sentencing him to undergo RI for 10 years. Various other sentences were imposed upon him. There are no mitigating circumstances so as to warrant any interference even regarding quantum of sentence.

25. That being so, the appeal is bereft of any merit and the same is accordingly dismissed.

The appellant be informed through Superintendent Jail.

Trial court record along with copy of the judgment be sent back forthwith.