

Jagdish Prasad Vs. State

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Court : Delhi

Decided On : Feb-24-1995

Reported in : 1995IAD(Delhi)1220; 1995(3)Crimes9; 58(1995)DLT740

Judge : P.K. Bahri and; S.D. Pandit, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 376

Appeal No. : Criminal Appeal No. 26 of 1991

Appellant : Jagdish Prasad

Respondent : State

Advocate for Pet/Ap. : D.C. Mathur,; Rebecca Mamman and; P.S. Sharma, Advs

Judgement :

S.D. Pandit, J.

(1) Jagdish Prasad, appellant convicted of the offence punishable under Section 376 of the Indian Penal Code by the Additional Sessions Judge of Delhi in Sessions Case No. 189/87on24.1.1991 and is sentenced to suffer imprisonment for life and to pay a fine of Rs. 6,000.00 and in default to suffer further R.I. for two years with a direction to pay Rs. 5,000.00 as compensation to the victim Shivani Sood, daughter of Kesari Dass Sood.

(2) Shri Kesari Dass Sood is resident of House No. I/206/47, Sanatan Dharam Building, Sadar Bazar, Delhi Cantonment. He is residing there along with his wife and children. The present appellant is his neighbour.

(3) On 4.3.1987 there was a function in the house of the appellant on account of birth of his grand child. Gita Devi, wife of Kesari Dass Sood, had gone to the house of the present accused along with her daughter, victim Shivani Sood, in order to attend a Kirtan. The grand-daughter of the present appellant, viz., Shalu is of the age group of the victim Shivani Sood. When the function was going on the ground floor of the house, victim Shivani Sood and Shalu were playing the game of Chhupa Chhupi along with other children, viz., Golu, Bholu and Pinku. When they were so playing the present appellant took Shivani in his room on the first floor and there he removed her under-wear (Kucchi) and put his male organ in her private part. She felt pain. Thereupon appellant got up and went away and child Shivani also went down.

(4) SHIVANI'S father Kesari Dass Sood had returned home on that day at about 9.30 p.m. and he had learnt that his wife, Geeta Devi, and daughter Shivani had gone to the appellant's house for attending Kirtan. At about 10.40 p.m. he found his daughter and wife returning home. At that time he found that there were bloodstains on Shivani's frock as well as on her thighs. When he made inquiries from her as to what had happened to her, she disclosed to him that Shalu's grandfather, the present appellant, had done something with her. He found that her Kucchi (Nikar) was also blood stained. He, therefore took her to PW/10, Dr. Harish Sood. Dr. Harish Sood on questioning the girl came to know that she was sexually assaulted. He took victim Shivani with her father, PW/2 Kesari Dass Sood, to Delhi Cantonment Police Station. There Kesari Dass Sood lodged his complaint.

(5) On the strength of his complaint the First Information Report was registered as First Information Report No. 170 /87. Thereafter, the Investigating Officer went to the house of the present appellant. There he found blood stains on the Chhadar (bed-sheet) on the bed of the appellant. He also found that the appellant had washed his Lungi, which was also having blood stains. He seized both these

articles under memoranda. The Investigation Officer, thereafter, sent child Shivani Sood to Medical Officer, PW/13 Dr. Renu Mishra. Dr. Renu Mishra had found that there were blood stains on the medical surface of both the thighs. Her undergarments were blood stained. She also found that her he men admitted tip of finger but was very tender and painful. Dr. Renu Mishra did not carry out vaginal examination as the child did not allow her to do so. However, she took vaginal swab and vulvae swab. The Medical Officer sealed the frock and underwear of the child as well as vaginal and vulvae swabs and forward the same to ChemicalAnalyser. The appellant was arrested and he was also sent for examination to PW/3 Dr. Bindal Gupta. On completion of the necessary investigation the present appellant was challaned by the Police of Delhi Cantonment Police Station. But since the offence punishable under Section 376 of the Indian Penal Code is exclusively triable by the Court of Session the learned Metropolitan Magistrate committed the accused to the Court of Sessions.

(6) Charge was framed against the present appellant for the offence under Section 376 of the Indian Penal Code on 20.7.1987. Accused appellant pleaded not guilty to the charge. His defense is of total denial and false implication.

(7) In order to prove the case of the prosecution, the prosecution had examined in all 14 witnesses, including victim Shivani. The learned Additional Sessions Judge, had found the evidence led by the prosecution quite sufficient to hold the appellant guilty of the offence punishable under Section 376, Indian Penal Code and he accordingly sentenced him, as stated above.

(8) . Shri D.C. Mathur, learned Counsel for the appellant, has urged before us that in view of the medical evidence on record it is not at all possible to hold that appellant Jagdish Prasad had committed rape on child Shivani. He urged before us that even if this Court happened to accept the evidence led by the prosecution the same would at the most disclose an offence punishable under section 376 read with Section 511 of the Indian Penal Code. He also contended before us that the punishment awarded to the present appellant is very harsh.

(9) As against, the Shri P.S.Sharma, learned Standing Counsel (Criminal) for the State, urged before us that the evidence on record clearly shows that the appellant

has committed an offence punishable under Section 376 and he contended that in view of the nature of the offence the punishment awarded to him is quite appropriate. He, thus, contended that the present appeal be dismissed.

(10) The main and material question that emerges for determination in this case is as to whether appellant committed rape on Shivani Sood. To put in nutshell, rape means, having sexual intercourse with a woman without her consent and against her will and if the woman is below the age of 16 years then her consent is immaterial. Even slightest penetration is sufficient to constitute a rape. In the present case, as usual, the only direct evidence against the accused is the testimony of Shivani. It is settled that in rape cases direct evidence is not available beyond the words of the raped woman. It is also settled that there is no rule or practice that there must be in every case corroboration to the testimony of the victim before a conviction can be allowed to stand. In the case of *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, : 1983 CriLJ1096 the following principles are laid down:

'CORROBORATION is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tagged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.'

'A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that only incident which is likely to reflect on her chastity had even occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society including by her own family members, relatives, friends, and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors, the

victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated.'

therefore, bearing the above observations of the Supreme Court in mind we proceed to consider the evidence in this case.

(11) As usual, in the case the direct evidence is of the victim Shivani. Shivani was hardly six to six and a half years of age at the time of the incident in question. Due to the said age she is not in a position to understand and to describe the sexual acts, as could be seen from her testimony on record. She has deposed that on that day she had gone to the house of the appellant along with her mother as there was some Kirtan in that house. She has further deposed that she was playing therewith the appellant's grand-daughter Shalu and other children and when she was so playing she happened to go upstairs in the room which was having more darkness than light and in that room the present appellant was present. She has deposed in her examination-in-chief as under:

'THE accused came out there. He did not say anything to me and took me to his room. At that time I was wearing a frock and an underwear. The accused was wearing a shirt and lungi at that time. He took out my Kucchi. The accused did something with his organ after taking off my Kucchi.

'THE accused put his organ in my private part. I felt pain in my private part. I did not weep. I did not cry. My Kucchi went red. I came down and went to my mother.'

The said child witness is cross-examined at length but from her cross-examination it is not possible to hold that there was any tutoring to the said child witness. There is no material in her cross-examination to discard the above evidence of the said child witness.

(12) PW2, Kesari Dass Sood, is father of Shivani and he has deposed in his examination in chief as under:-

'AT about 10.30 p.m. my daughter baby Shivani and my wife returned home. I saw blood on the thighs of my daughter Shivani. On further examination, I found her

back side of the frock and her Kucchi also bloodstained. I immediately removed baby Shivani to the Doctor and I took my son Along with me. I could not imagine even in my dream that she could be raped. While I was about to take her to the Doctor, she said, 'Kuch Nahinhua. Shalu ke baba ne munch kiya hai.'

The said witness had taken her to Public Witness 10 Dr.Harish Sood. Dr.Harish Sood had stated in his examination-in-chief as under:-

'HE also told me that when his daughter Shivani aged six years old returned from the house of Jagdish Prasad, she was bleeding. I also found the daughter of Kesari Dass who was having blood stains on her panty and frock.In my presence Kesari Dass asked from her daughter Shivani as to what had happened with her and as to why the blood was oozing from beneath herpanty. His daughter disclosed that Jagdish Prasad had inserted his penis in her private part in the room on the first floor of the house of JagdishPrasad. Thereupon Kesari Dass, myself and Shivani had gone to the Police Station on the same night where a report was lodged by Kesari Dass.'

In his cross-examination the following material is brought out :

'I had taken off the panty from the body of baby, Shivani in the presence of her father and saw myself that there were blood stains on the panty and there was blood around the private part of the baby. At the time I saw Shivani after taking off her panty I found that the private party was wet and blood was oozing out in small quantity. I did not notice any external injury on the private part of Shivani and I had not examined her internally.'

(13) Dr. Renu Mishra, PW/13, who had examined Shivani at 1.25 a.m. on the night between 4.3.1987 and 5.3.1987, has deposed as under:

'THERE was no external mark of injury over her body. Her undergarments were blood stained. There was no mark of injury on the private parts.However, there were blood stains over the medical surface of both thighs. On separation the labia minor a there were no fresh lacerations seen in the hymen.The hymen admitted tip of finger but was very tender (painful). So the child did not allow per magnum

internal examination. There was no active bleeding from any site.'

She has further deposed that she had taken the child's underwear, frock, vaginal swab and vulvae swab and sealed them. These were later on sent and Chemicalanalyser's report. The evidence of the Medical Officer clearly shows that she had not carried out the internal examination of child Shivani. Child Shivani was minor and when she had found the dried blood onm medical surface of thighs of the said child and it was alleged that the child was raped, it was her duty to examine the child with the consent of the parents under the general anesthesia or localanesthesia. She has admitted in her cross-examination that she had not sought permission from her parents to examine Shivani under general or local anesthesia Thus, it is obvious that the Medical Officer, Dr. Renu Mishra, had not performed her duty properly and correctly as she had not carried out the internal examination of the child. The evidence as to whether there was any injuries on the internal part of child's vagina or not has not thus come on record.

(14) It must be further mentioned here that not only there was blood on her underwear as well as her frock, the police had seized the bed sheet on which also there were blood stains. The underwear of Shivani, her frock, the vaginal and vulvae swabs taken by Dr. Renu Mishra and the bed-sheet were forwarded to the Chemical Analyser and the report of Senior Scientist Officer of the Central Forensic Science Laboratory shows that Along with the, said articles the sample of the blood of the appellant was also recived by him. The accused's blood is of 'O' Group and the report of the Chemical Analyser shows that on vaginal swab he had found'blood of 'B' Group. He had also found blood of 'B' group on the bed sheet. He had further found that there was blood of 'O' and 'B' group on Shivani's frock as well as underwear - He had also found semen stains on her underwear ofappellant's blood group. The presence of the blood and semen of the blood group of the accused on her clothes and the presence of blood of her group on the bedsheet of the accused's bed gives the necessary corroboration to her claim. The presence of blood in her vulva and the fact that the Doctor found that her humen was very tender and painful indicates and suggests that the accused must have made slight penetration and must have made an attempt to have sexual intercourse with her. Child Shivani has deposed that when the accused had

pressed his male organ on her private part she had felt pain. So when she had felt pain the accused must have withdrawn from her.

(15) It must be mentioned here that if the cross-examination of Shivani her father as well as Dr. Harish Sood, PW/10, are taken into consideration then it would be quite clear that there is no material in their cross-examination to show or suggest that they have got any animosity or ill will towards the present appellant. On the contrary, it has come in evidence of Shivani's father that relations between him and the present appellant and his family members were quite good and they were on visiting terms till the date of incident in question. Therefore, in the circumstances, it is not at all probable that Shivani's father will try to stake the reputation and life of his daughter in making the claim against the present appellant without any foundation or reasonable cause. In these circumstances, there is no reason to discard and disbelieve the oral evidence of these three witnesses.

(16) It is true that the Medical Officer, PW/3, Dr. Bindal Gupta, who had examined the appellant on the fateful night had not found any injury on the person or on the organ of the present appellant. Here again we would like to observe that there was no thorough examination by the said Doctor of the present appellant. When the appellant was alleged to have raped a minor child it was necessary that the Doctor should have conducted thorough examination to find out as to whether there was any injury on the person or on the organ of the person alleged to have committed the rape. It is also necessary to find out as to whether smegama was present on his penis or not. The detection of smegama is not only to prove the prosecution case but it is also to prove the innocence of the accused. But it seems that the Doctor who carried out the said examination is not aware of these basic principles regarding examination of the person alleged to have committed rape, as has been the case of the Doctor who did not carry out the internal examination of the victim. Thus, the medical officers in this case were not true to their jobs.

(17) At the cost of repetition it must be said that Dr. Renu Mishra had found that the hymen of Shivani was tender and painful. She had found blood stains on the medical surface of both thighs of the victim. The vaginal swabs taken by her

indicated bleeding inside. Along with this evidence, the following material brought out in the cross-examination of Shivani's father, Kesari Dass Sood must be considered:

'MY daughter - prosecutrix followed her mother after my wife had taken the Parshad from house of the accused. Both of them came walking to their house, there was abnormality seen by me in her walking. However, when she came close and on seeing the bleeding on her clothes, suspicion developed.'

Thus, the material brought out in the cross-examination of the father of the victim immediately after the act is that the victim had difficulty in walking. Thus, on consideration of the aforesaid evidence, it is quite clear that the appellant on that day must have inserted his penis in her private part and attempted to have sexual intercourse with her. In the case of State of Uttar Pradesh v. Babu Lal Nath, 1995(1) Chandigarh Criminal Cases 17, it has been held that 'even slightest attempt to penetration into the private part would amount to rape.' It would be clear from the following paragraph No. 8:-

'8. It may here be noticed that Section 375 of the Indian Penal Code defines rape and the Explanation to Section 375 reads as follows:-'Explanation': Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.'

From the Explanation reproduced above, it is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the offence of rape neither Section 375 of Indian Penal Code nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words, to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 of Indian Penal Code. That being so, it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains.'

(18) It must further be mentioned here that immediately after the incident victim's father and Dr. Harish Sood, PW/10 had gone to the house of the accused and at that time it was told that the accused had washed his Dhoti and that he had gone away. Police had attached the washed Dhoti of the accused and the said washed Dhoti was forwarded to Chemical Analyser Along with the bed sheet and other articles and the said Dhoti was found by the Chemical Analyser to contain blood stains of group 'O'. If this finding of the Chemical Analyser is taken into consideration Along with the evidence of Dr. Bindal Gupta, PW/3, it would show that Dr. Bindal Gupta had not performed his duty properly. therefore, merely because Dr. Bindal Gupta had not performed his duty properly, we are unable to distrust the victim. No doubt the accused had taken the defense that on that day he was overjoyed on the arrive of a grand son and, therefore, he could not control himself and he enjoyed sex with his wife who was in her men sturation and due to the same there were blood stains on the bed sheet of his bed. This claim of the accused does not at all seem to be probable. Apart from this even considering the Explanationn given by him, what at the most could be said in his favor is that the blood stains on the Chhadar were of his wife but there is no Explanationn as to how there were blood stains on his Dhoti of his own blood group, which was washed by him on that night and how there were blood stains of his blood group on the underwear and frock of the child.

(19) In the view of the above discussion, we agree with the finding of the Trial Court that the accused had committed the offence of rape and therefore, he was rightly convicted by the learned Additional Sessions Judge.

(20) It is urged before us by the learned Counsel for the appellant that the sentence of imprisonment for life is very harsh. No doubt, the offence committed by the accused is heinous. The material brought on record shows after this incident in question his wife took also died. The accused is in jail since, the date of the incident till today except for few periods on Which he was related on interim bail. The accused is also very old. therefore, taking into consideration these circumstances, and the fact that the accused had made slight penetration and only attempted to have a complete intercourse with the child and that not much damage was caused to her organ, we hold that the sentence of imprisonment for

life be reduced to the period of 10 years. However, the order of fine and compensation awarded by the Trial Court deserves to be maintained. We accordingly modify only the order of sentence.

(21) The appeal is partly allowed only on the point of sentence. The order of conviction passed by the Trial Court is maintained. However, the order of sentence of imprisonment for life, ordered by the Trial Court is set aside and in its place the order of sentence for a period of 10 years of R.I. is passed. The order of compensation and fine and further R.I. for a period of two years in default of payment of fine, as passed by the Trial Court is maintained.

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