

Javed Vs. State

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Court : Delhi

Decided On : Feb-21-2013

Judge : Pratibha Rani

Appellant : Javed

Respondent : State

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision :21st February, 2013 % + CRL.A. 843/2009 JAVED Through:Appellant Ms.Rakhi Dubey, Adv. versus STATE Through: Respondent Ms.Rajdipa Behura, APP for State. CORAM: HON'BLE MS. JUSTICE PRATIBHA RANI % PRATIBHA RANI, J.

1. The complainant, in this case, is mother of the child victim and wife of the appellant. Her miseries seem to be never ending as despite being married twice, she could not lead a peaceful matrimonial life and now is burdened with the responsibility to maintain not only herself but also four children i.e. two children from her first marriage and two children from her second marriage with appellant, the eldest one is the traumatized girl just 8 years old who has been sexually assaulted by her second husband i.e. step-father of the child victim.

2. It was not the first instance that the complainant knew about the ill-intentions of the appellant qua his step-daughter i.e. the child victim S (name of the child victim withheld to conceal her identity) as earlier also he molested S. Perhaps due to fear of losing the company of second husband and shelter in his house and also

sceptical about her future and that of four children as to where she would go if her second husband is convicted, instead of nipping the evil in the bud, she preferred not to prosecute her second husband in case FIR No.226/2005 under Section 354 IPC, PS Gandhi Nagar, resulting in his acquittal in that case.

3. The appellant despite getting an opportunity to mend his ways, seeing that his wife and step-daughter did not stand against him as prosecution witnesses in case FIR No.226/2005 under Section 354 IPC (wherein allegations against him were outraging the modesty of the child victim S), got encouraged that the mother and daughter were so helpless and dependent upon him that they would not dare raise their heads whatever he may do with S.

4. On the night of 31.12.2006 while the complainant was away to make some purchases for the festival of Baqried and leaving her four children under the care of the appellant, she did not have even the faint idea that by the time she return, the appellant would turn into a beast and sexually assault her 8 years old daughter.

5. This act was unpardonable and the mother instinct made her to realize that it was enough. Hence immediately on coming to know about her daughter being sexually abused by her second husband, she did not hesitate to inform Police Control Room and ensure that this time, the appellant is not let off and must be punished for the crime he has committed.

6. The appellant was convicted for committing the offence punishable under Section 376/377 IPC in Sessions case No.76/2007 and sentenced to undergo RI for 10 years with fine of Rs.2000/- and in default, to undergo SI for three months under Section 376 IPC. The substantive sentenced awarded to him under Section 377 IPC was ordered to be run concurrently.

7. Feeling aggrieved, the appellant preferred the present appeal.

8. The complaint Ex.PW1/A made by the mother of the child victim, formed the basis of registration of case FIR No.3/2007 at PS Krishna Nagar. The complainant, who is wife of the appellant, made statement to the effect that she is permanent

resident of District Shahjahan Pur, U.P. She got married to one Balil about 10 years prior to this incident and had two children namely S daughter aged about 8 years and M son aged about 6 years from that marriage. She was divorced by her first husband about five years prior to this incident and she married the appellant Javed about 3 years before the incident. She also had two children namely F aged about three years and N aged seven months from the second marriage. She used to buy cloth from Gandhi Nagar Market and sell door to door.

9. On the night of 31.12.2006 at about 10.30 pm after leaving her four children at home with her husband Javed, she went for some shopping and returned by 11.30 pm. By that time, all the children had slept. Next day, in the morning at about 6.30 am, she was informed by her daughter S that her Papa Javed had put his male organ in the place from where she urinate and also in the back from where she pass stool and that Javed was inserting sometime in her back and sometime in her front (private part) and that due to pain, she became unconscious. The complainant noticed that her daughter was not even in a position to stand properly and she informed the Police Control Room.

10. On the basis of above statement Ex.PW1/A, FIR Ex.PW8/ was registered. The child victim was sent for medical examination on 01.01.2007 at about 11.20 am. In view of her tender age and also that the child victim was not permitting proper examination, with the consent of the complainant, the child victim was examined under anesthesia. The MLC Ex.PW7/A records that hymen was ruptured and presence of injuries on the vagina and anal.

11. Subsequently, the appellant Javed was also arrested on 16.01.2007 and he was medically examined vide MLC Ex.PW7/B which establish his capability to perform sexual intercourse.

12. Prosecution examined 11 witnesses to prove the charge against the appellant. In his statement under Section 313 Cr PC, the plea taken by the appellant was that the complainant married him concealing the fact of her previous marriage and brought the prosecutrix later on. They were having strained relations in the year 2005 when she got him arrested in a false case under Section 354 IPC for allegedly molesting the prosecutrix and he was acquitted in that case. He

preferred not to lead any defence evidence.

13. After considering the testimony of complainant and child victim as well as the medical evidence, learned Trial Court found testimony of the child victim to be trustworthy and inspiring confidence and duly corroborated by the medical evidence. Since it was a case of sexually assaulting a child under 12 years of age, the appellant was sentenced to RI for 10 years, which is the minimum sentence prescribed under Section 376(2)(f) IPC as well fine. The sentence awarded to him for the offence punishable under Section 337 IPC was ordered to be run concurrently.

14. On behalf of appellant, Ms. Rakhi Dubey, learned Amicus Curiae has filed the written synopsis as well made oral submissions. Learned APP for the State has also filed written synopsis justifying conviction of the appellant.

15. Learned Amicus Curiae for the appellant submitted that the complainant is in the habit of falsely implicating her second husband as earlier also she got him implicated for committing the offence punishable under Section 354 IPC in which case he was acquitted. She also placed on record the copy of the judgment. Learned Amicus Curiae for the appellant submitted that the child victim in this case is the tutored witness who deposed at the instance of her mother who was having strained relations with the appellant. She submitted that the statement of the child victim should be disbelieved especially when she has stated in her cross examination that I told to the police as told to me by my mother. She has further stated that Doctor asked her about the incident and she told same to the Doctor, which is sufficient to prove that she was tutored by her mother to make statement against her step-father. Learned Amicus Curiae for the appellant also tried to take advantage from the fact that the date of incident is 31.12.2006 but statement of the child victim under Section 164 Cr PC was recorded only on 09.02.2007. Thus, there was ample opportunity to tutor her. It was argued that the material witness in this case was M brother of the child victim who was aged about 6 years and he should have been examined by the prosecution to prove the occurrence and failure of the prosecution to examine this witness is fatal to the case of prosecution. Referring to the testimony of the child victim that while committing the

offence, her mouth was gagged by the appellant, it was submitted that no such cloth was seized by the police and even no knife was seized though she claimed that she was threatened with a knife.

16. Learned Amicus Curaie for the appellant pointed out that the investigating officer failed to take into possession the bedsheet or the pillow which could have proved that the appellant had sexually abused his step-daughter on the takhat on which bedsheet and pillow were there and it is sufficient to infer falsity in the case of prosecution. She further submitted that on the frock of the child victim, blood was not detected and the semen detected on the salwar could not be connected with the appellant. Learned Amicus Curaie for the appellant has relied upon Mohabbat vs. State of U.P. 2005 Cri.L.J.

3238, Vijay Kumar vs. State in CrI.A. No.165/1978 decided on 09.03.1981, Arbind Singh vs. State of Bihar 1994 Cri.L.J.

1227 and Lala Ram @ Lala vs. State (MCT) 81 (1999) DLT 29.in support of her contentions.

17. I have considered the submissions made by learned Amicus Curaie for the appellant. In the case Mohabbat vs. State of U.P. (Supra) relied upon by learned Amicus Curaie, the appellant was acquitted for the reason that medical examination report did not corroborate prosecutrix's statement and also did not match the FIR. Further the circumstantial evidence to corroborate statement of prosecutrix was also missing as no trampled crop and scrubbed grass was found on spot, no sign of attack was found, as alleged by victim and further petticoat found at spot was not sent for chemical examination.

18. Case Vijay Kumar vs. State (Supra) was relied upon by learned Amicus Curaie to emphasise the point that before convicting a person on the testimony of a child, it has to be ensured that the child has not been tutored and some corroboration is available. In the case Arbind Singh vs. State of Bihar (Supra), the acquittal of the appellant in a murder case was mainly for the reason that conviction was based on the basis of testimony of a child aged about five years who was daughter of the deceased and the Apex Court noticed traces of tutoring on the aspect of method

adopted for killing or as to the cause why her mother was killed by her father and appellant was acquitted of the charge of murder by giving benefit of doubt. There cannot be any quarrel about the legal proposition as well the caution to be exercised by the Court while considering the testimony of the child victim/witness.

19. In the case *Lala Ram @ Lala vs. State (Supra)*, the appellant was acquitted in view of the inconsistencies in the statement of material witnesses and the case being based on circumstantial evidence. The facts of) Lala Rams case being distinct from the facts of the present case, no benefit can be derived by the appellant by placing reliance on this decision.

20. Before referring the testimony of the complainant and the child victim and looking into the medical and scientific evidence for corroboration, it is necessary to consider the legal principles to be kept in mind while appreciating the testimony of a child victim and whether in a case of sexual assault and that too, by a close family member, the conviction can be safely based on the sole testimony of child victim.

21. *State of Himachal Pradesh vs. Asha Ram AIR 200.SC 38*.is a case where the father was convicted by learned ASJ for committing rape on his own daughter but acquitted by High Court. Expressing anguish where the protector becomes predator, the Apex Court observed : There can never be more graver and heinous crime than the father being charged of raping his own daughter. He not only delicts the law but it is a betrayal of trust. The father is the fortress and refuge of his daughter in whom the daughter trusts. Charged of raping his own daughter under his refuge and fortress is worst than the gamekeeper becoming a poacher and treasury guard becoming a robber.

22. In the above noted case, though the appellant was convicted by the Trial Court, on appeal, the High Court acquitted him for the reasons that (i) no spermatozoa were found on the salwar and underwear of the prosecutrix; (ii) no evidence that hymen was ruptured and if ruptured, same was afresh rupture; and (iii) medical evidence was considered as unreliable to prove that the prosecutrix was subjected to sexual intercourse.

23. State of Himachal Pradesh impugned the order of High Court acquitting the appellant before the Apex Court. In para 5 of the report, the Apex Court has expressed its concern to such an insensitive approach in following words :

5. We record our displeasure and dismay, the way the High Court dealt casually with the offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on the minor girls. The High Court was swayed by sheer insensitivity totally oblivious of growing menace of sex violence against the minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now well settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also well settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.

24. In view of above settled legal principles as to how the statement of victim of sexual assault is to be considered and appreciated by the Court, now it is time to refer to the statement of PW-1 the complainant, who is wife of the appellant and mother of the child victim and PW-3 S the child victim and then to ascertain whether their testimony is trustworthy and inspiring confidence finding corroboration from the medical and scientific evidence.

25. PW-1 Guddi stated about her first marriage with Balil and two children born to her from that wedlock namely S aged about 8 years and M aged about 6 years.

She also stated about her divorce from the first husband and marriage with the appellant and two children born to her from this wedlock who were aged about 3 years and 1 year at the time of her deposition in the Court.

26. PW-1 stated that on the night of 31.12.2006 at about 10.00/11.00 pm, she left her four children under the care of appellant who was at home and went for shopping for Baqried festival. By the time she returned, her children had slept. Next day, in the morning, she woke up her daughter S but she was not even able to sit properly. After her husband left home, her daughter informed that on the previous night, the appellant had gagged her mouth and sexually assaulted her from the front as well as from the back side (per vagina and anal). She informed the police and her daughter was medically examined at SDN Hospital. She also made complaint Ex.PW1/A. After 15-16 days of the incident, her husband was arrested in this case. She has also identified the frock Ex.P1 and salwar Ex.P2 to be the same which her daughter was wearing on the date of incident.

27. In her cross examination, she admitted that police had not seized the dari which was lying on the takhat and no knife was also recovered from her house. She denied the suggestion that the accused refused to keep her with him and therefore, she has falsely implicated him in this case.

28. PW-3 the child victim was questioned by the Trial Court to test her understanding. Though she was unable to tell her age, she referred the name of the appellant as her father. While narrating the incident, she was unable to give the date or time but stated that one day, in the evening, when her mother had gone to the market, accused pushed cloth in her mouth and committed battamiji with her first from front side and then from back side. She further stated that appellant told her that if she would disclose anything to her mother, he would kill her and her mother. The appellant showed her knife and told that he would put the knife into her vagina. She further stated that thereafter she became unconscious. She told the whole incident to her mother when her father went to answer the call of nature. Her mother telephoned the police and she was medically examined in the hospital.

29. In her cross examination, she admitted that her brother M was at home when her mother was away to the market. She also stated that she raised noise when accused Javed was committing battamiji but he had raised the volume of TV high and that she narrated the incident to her mother next day morning. She denied the suggestion that Javed had not committed the act and she was falsely deposing against him at the instance of her mother.

30. PW-6 Mr.Ravinder Singh, MM recorded the statement of the prosecutrix under Section 164 Cr PC Ex.PW6/D wherein the child victim explained the manner in which she was sexually abused by the appellant by putting the male organ sometime in her vagina and sometime in her anal.

31. So far as contention of learned Amicus Curaie for the appellant that the child victim was tutored witness in view of her statement made during cross examination that I told to the police as told to me by my mother which has also been stated by her before the Doctor, we have to understand that she was trying to recollect an incident which shattered her life not by a stranger but by a person whom she considered as her father. She is an illiterate child, she put her thumb impression everywhere and the meaning she wanted to convey was that she told the incident to her mother and when the police came, her mother told her to narrate the incident to the police in her statement and the same she told to the doctor.

32. Thus, she is not a tutored witness but trying to look towards her mother while narrating the incident, perhaps for some emotional and moral support. The MLC, specially the fact that she had to be examined under anesthesia and the injuries found on her private part, are sufficient to rebut any such apprehension in the mind of the appellant that she is a tutored witness. If due to some exigency of work, her statement under Section 164 Cr PC could not be recorded by the Magistrate at the earliest, it is not fatal to the case of prosecution.

33. Here it would be apposite to refer to the decision of Supreme Court in Asha Rams case (Supra) wherein almost in similar situation, such contentions were negated observing as under :

12. It is contended by the counsel for the accused that because of the strained relationship between PW3 - mother of the prosecutrix and the accused, the prosecution case has been foisted against the accused at the instigation of the mother and deserves outright rejection. From the evidence it is clearly established that P.Ws. 1 and 2 despite of strained relationship between their mother and father were happily staying with the accused and there is no rhyme or reason as to why the daughter should depose falsely so as to expose her honour and dignity and also expose the whole family to the society risking the out casting or ostracization and condemnation by the family circle as well as by the society. No girl of self respect and dignity who is conscious of her chastity having expectations of married life and livelihood would accuse falsely against any other person of rape, much less against her father, sacrificing thereby her chastity and also expose the entire family to shame and at the risk of condemnation and ostracization by the society. It is unthinkable to suggest that the mother would go to the extent of inventing a story of sexual assault of her own daughter and tutor her to narrate a story of sexual assault against a person who is no other than her husband and father of the girl, at the risk of bringing down their social status and spoil their reputation in the society as well as family circle to which they belong to.

34. The contention of the learned Amicus Curiae for the appellant that PW-3 S being a child victim, her statement cannot be believed by this Court without corroboration, is liable to be rejected in view of the decision of Apex Court in the case Rameshwar vs. The State of Rajasthan AIR 195.SC 54. wherein it was held that :Where rape has been committed on a child of tender years there is no rule of law requiring corroboration from an independent source of the evidence of the child as to the identity of the accused.

35. It is well settled that corroboration is not the sine qua non for conviction in a rape case (see Dinesh alias Buddha vs. State of Rajasthan, 2006 (3) JT (SC) 66).

36. In the case Jayaseelan Vs. State of Tamil Nadu, 2009 III AD (SC) 136, the Apex Court has held that even if major portion of evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, his conviction can be maintained and that while normal discrepancies do not corrode the credibility of a

party's case, material discrepancies do so.

37. So far as contention of the appellant regarding absence of semen on the frock of the child victim is concerned, it is also of no consequence in view of the judgment of Sayed Pasha v. State of Karnataka 2004 Cri.L.J.

4123, wherein was held : Mere non-presence of semen stain, spermatozoa and gonococci itself is not a ground to reject the testimony of prosecution witnesses.

38. One of the contentions of learned Amicus Curiae for the appellant is that the investigating officer failed to take into possession the bedsheet or the pillow which could have proved that the appellant had sexually abused his step-daughter on the takhat on which bedsheet and pillow were there and it is sufficient to infer falsity in the case of prosecution. This contention is also in view of the judgment of Apex Court in the case Kashi Nath Mondal vs. State of West Bengal AIR 201.SC 313. where it was held that : But, it is well settled that remissness and inefficiency of the Investigating Agency should be no ground to acquit a person if there is enough evidence on record to establish his guilt beyond reasonable doubt. It is said by this Court in a number of cases that irregularities or deficiencies in conducting investigation by prosecution is not always fatal to the prosecution case. If there is sufficient evidence to establish the substratum of the prosecution case, then irregularities which occur due to remissness of the Investigating Agency, which do not affect the substratum of the prosecution case, should not weigh with the court.

39. From the testimony of the prosecutrix, which is duly corroborated by the medical evidence, as well as the fact that semen was detected on her salwar, the only inescapable conclusion is that it is the appellant who sexually assaulted his own step-daughter taking advantage of the fact that she was of tender age incapable to put any resistance and other three children were so young i.e. between 7 months to 6 years that he did not fear any retaliation from the younger siblings who might be sleeping at that time or unable to understand what was going on.

40. The motive attributed to the complainant by the appellant is that she concealed the factum of her first marriage and later on brought the child victim to the house of the appellant. This plea cannot be accepted for the reason that in the year 2005 also, the complainant took a bold step by getting the FIR registered against her second husband i.e. the appellant but later on preferred not to step into the witness box resulting in his acquittal in a case under Section 354 IPC. It only shows that the child victim was living in the house of the appellant alongwith her mother and other siblings much prior to this incident. The fact that youngest child was seven months old shows that the complainant had every intention to pull on with the appellant in the same house especially in view of the fact that she was earlier also a divorcee and after two divorce and four children to look after, she hardly had any option but to continue living with the appellant as his wife. By securing conviction of the appellant in this case, she does not stand to gain anything. Rather she has just tried to protect her daughter and in the process, must have face humiliation being instrumental in getting her husband sent to Jail and thereby closing all her future prospects of leading happy life. Thus, except to seek justice for her 8 years old daughter, she had absolutely no motive.

41. The impugned judgment convicting the appellant under Section 376/377 IPC being passed on correct appreciation of the testimony of victim and the complainant duly corroborated by the MLC and the CFSL report, calls for no interference.

42. So far as sentenced awarded to the appellant is concerned, minimum sentence as provided under Section 376(2)(f) IPC i.e. 10 years with fine of Rs.2000/- and the sentence awarded to him under Section 377 IPC has been ordered to be run concurrently, the conviction and sentence awarded to the appellant is maintained.

43. In view of above discussion, the appeal is hereby dismissed. TCR be sent back alongwith copy of the order.

44. Copy of the order be also sent to concerned Jail Superintendent for information to the appellant about the dismissal of his appeal.

45. Ms.Rakhi Dubey, Advocate was appointed as Amicus Curaie to assist the Court in the hearing of the appeal. The Delhi High Court Legal Services Committee will pay her the fee as per its schedule. PRATIBHA RANI, J February 21, 2013 st

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