

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

Reserved on: October 21, 2009

Pronounced on: October 30, 2009

+ **(1) CRL.A. 746/2006**

SITA RAM @ SONU Appellant

! Through: Mr. R.S. Malik, Advocate.

Versus

\$ STATERespondent

^ Through: Mr. Amit Sharma, Addl. PP for the State.

+ **(2) CRL.A. 941/2006**

HARISH Appellant

! Through: Mr. V.K. Raina, Advocate.

Versus

\$ STATERespondent

^ Through: Mr. Amit Sharma, Addl. PP for the State.

CORAM:

HON'BLE MR. JUSTICE V.K. JAIN

1. Whether Reporters of Local newspapers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the Judgment should be reported in the Digest? Yes

V.K.Jain, J.

These are two appeals from the judgment dated 3rd August, 2006 and order on sentence dated 5th August, 2006 whereby the appellants were convicted under Section 376(2) (g) of Indian Penal Code and were sentenced to undergo rigorous imprisonment for ten years each and to pay fine of Rs.5,000/- each or to undergo simple imprisonment for six months each in default.

2. The case of the prosecution, as disclosed in the FIR is that on 1st September, 2001, at about 10.30 AM the prosecutrix was sitting outside her house when complainant Sita Ram @ Sonu, who was previously known to her, came there and took her towards forest side on the pretext of taking her for a walk. In the forest, the appellant Sita Ram @ Sonu raped her. Thereafter appellant Harish came there and raped her. She returned home weeping and narrated the incident to her sister Rita. On the parents returning home, the matter was brought to their knowledge and the prosecutrix was got medically examined.

3. The prosecutrix come in the witness box as PW-5 and stated that about 6-7 months ago, when she was sitting outside her house, the appellants came there, threatened to kill her, and took her to a jungle on foot. In jungle she was raped by both of them, firstly, Sonu and then by Harish. She came back to her house and

narrated the incident to her elder sister Rita. In the evening when her parents returned home, she told them about the incident and then she, along with her parents, went to the Police Station where her statement was recorded.

4. PW-7 Jaswant Singh has stated that about 7-8 months ago when he was present at a tailoring shop at R-1019 Mangol Puri, he found the prosecutrix standing near House No.997. Both the appellants were talking to her at that time. The appellant Sonu was known to him. Both of them took the prosecutrix with them from the street. In the evening he came to know about the rape.

5. PW-8 Rita is the sister of the prosecutrix. She has stated that on 3rd September, 2001 at about 11.30 AM the prosecutrix, who is her younger sister, and is residing in the neighbourhood, came to her and told her that she was taken by Harish and another boy, whose name was not known to her, to jungle and was raped by them. She being on bed at that time, could not go anywhere and when her parents came back in the evening, she narrated the matter to her, whereupon the prosecutrix was taken to Police Station by her parents.

6. PW-3 Jamni is the mother of the prosecutrix. She has stated that on the day of this incident when she came home at about 6.00 pm her daughter Anju told her that Sonu, who used to reside in

their neighbourhood, had taken her to jungle where Harish also joined him. There, she was first raped by Sonu and then by Harish. She narrated the incident to her husband and then they took the prosecutrix to the Police Station where her statement was recorded and she was got medically examined.

7. PW-12 Ramesh is an official from the school of the prosecutrix. He has stated that School Leaving Certificate Ex. PW12/A has been issued by the Vice Principal of the school and as per school certificate her date of birth is 12th March, 1988. PW-13 Sh. Rajender Kumar, Metropolitan Magistrate has stated that on 3rd September, 2001 appellant Harish was produced before him but he refused to join TIP vide his statement Ex. PW13/B.

8. In their statement under Section 313 Cr. P.C., both the appellants denied the allegations against them and stated that no such incident had taken place. The appellant Harish also stated that he was not produced before any Magistrate nor any application for Test Identification Parade was moved. Both the appellants have also stated that they were not previously known to the prosecutrix.

9. There is discrepancy in the testimony of the prosecutrix as regards the manner in which she was taken from her house towards the forest. In the FIR, she alleged that the appellants Sonu had taken her towards forest on the pretext of taking her for a walk,

but, when she came in the witness box she stated that both the appellants had come to the place where she was sitting outside her house and taken her to jungle after threatening to kill her. No doubt, this is a material contradiction. Even otherwise, it is difficult to accept that the prosecutrix was taken to forest in the manner stated by her. As admitted by her in her cross examination there are other residential houses near her house and the street in which she was sitting is used by public at large for coming and going. She has also admitted that residential houses adjoining her house are occupied by other persons. This is not the case of the prosecutrix that the appellants were armed with any weapon. It is difficult to accept that the appellants threatened the prosecutrix and she meekly accompanied them, without making any attempt to raise alarm. If a girl who is present outside her own house, is threatened, her natural reaction would be to raise alarm when the culprits are not armed and the place where she is present is a public street, having a number of houses occupied by people. Moreover, the deposition of PW-7 Jaswant Singh also contradicts the version given by the prosecutrix as regards the manner in which she was taken to the forest. PW-7 found the appellants talking to the prosecutrix and taking her along with them. The presence of PW-7 on his shop at that time also shows that the street was not deserted at that time. Even otherwise at 10.30 or 11.30

am, a public street in a colony like Mangolpuri cannot be deserted on and people are bound to be present in the street at that hour of the day. Therefore, it is difficult to accept that any threat was extended to the prosecutrix before taking her to the forest.

10. I, however, do not see any reason to believe the prosecutrix as regards rape alleged to have been committed on her person. No particular motive has been attributed by the appellants to the prosecutrix to concoct a false story of rape with her. Though the father of the prosecutrix PW-4 Ram Kishore has admitted in his cross examination that the mental status of the prosecutrix is not well and sometimes, on account of her mental status, they do not reply upon her, I find that the prosecutrix has stood the test of cross examination and has given logical answers to the questions put to her. The prosecutrix being a young girl of about 13-14 years at the time of this incident, neither she nor her parents would have put her future into jeopardy by making false allegations of rape. They would be fully conscious of the fact that in our tradition bound society, a sort of social stigma comes to be attached with the victim of rape. Therefore, they would not like to go the police and subject the prosecutrix to examination first by the police officers and then in the court unless she has actually been subjected to physical abuse and assault.

11. It was pointed out by the learned counsel for the appellants that the medical examination of the prosecutrix did not reveal any marks of injury on her private part nor her hymen was found torn. I find that when the prosecutrix was examined by PW-6 Dr. Vineeta Aggarwal, she found that one finger could be easily introduced in her vagina and her vagina was found to be tender. She opined that sexual assault could not be ruled out. The medical examination of the prosecutrix, coupled with her positive statement in the court, leaves no reasonable doubt about her having been subjected to rape. As noted earlier, it is difficult to believe that the prosecutrix was subjected to any threat before she accompanied the appellants to the forest. The facts and circumstances of the case suggests that either the prosecutrix was lured on some pretext or she was a consenting party to accompany the appellants to the forest. In case she was a consenting party, there was hardly any likelihood of mark of injury or violence being found on the private part of her body.

12. The appellants have not attributed any motive to the prosecutrix or her family members to implicate them in a false case of rape. This is not their case that they had any previous enmity or ill will with the prosecutrix or her family members. Therefore, there could have been no reason, either for the prosecutrix or for her family members to implicate the appellants in a false case of

rape. They had nothing to do again but a lot to lose by reporting an incident of rape with a minor girl to the police.

13. The prosecutrix is an unmarried girl. The parents of an unmarried girl would be the last persons to give publicity to an incident of rape of their daughter on account of fear of social stigma that come to be attached to the victims of such crimes. When they took the prosecutrix to the police station and lodged report of commission of rape on her person, they must be conscious of the fact that when they report the matter to the police they will have to produce their daughter first before a Magistrate and thereafter before the trial court. They were at all likely to fabricate and set up a false case of rape as they would be the last persons to put the future of their daughter into jeopardy by making public the dishonor inflicted on her. They would be aware of the possibility of difficulties which they may face in finding a suitable match for a girl who has been subjected to such a heinous crime. Therefore, unless they were fully satisfied with the version given by the prosecutrix, they would not have taken her to the police station, to report this incident.

14. A perusal of the report of Forensic Science Laboratory shows that semen was found on the underwear of both of them and shorts of one of them which the appellants were wearing when they were

arrested and were seized by the police. There is absolutely no explanation by either of the appellants as to why semen was found on their underwears at the time of their arrest. In the absence of any explanation, presence of semen on their undergarments points towards them as the persons who were responsible for committing rape on the person of the prosecutrix.

15. As regards identity of the appellants, the allegation in the FIR is that the appellants Sita Ram @ Sonu was previously known to the prosecutrix, whereas the other culprit Harish was not known to her. But, when the prosecutrix came in the witness box, she stated that she knew both of them. As far as appellants Sita Ram @ Sonu, there is consistency in the testimony of prosecutrix regarding his identity. She has maintained in the FIR as well as during her deposition in the court that Sita Ram @ Sonu was known to her. As regards Harish, the testimony of PW-13 Sh. Rajender Kumar, Metropolitan Magistrate shows that he had refused to join TIP. The proceedings conducted by the learned Magistrate show that a warning was given to him that refusal to participate in the TIP may lead to adverse inference being drawn against him during trial. But he declined to join TIP on the ground that he was shown to a number of persons in a Police Station. In his statement under Section 313 Cr. P.C., the appellant Harish took the stand that he never refused to join TIP. He did not say that he was shown to the

witnesses in the police station and that is why he refused to join TIP. Therefore, I have no hesitation in holding that the appellant Harish refused to join TIP without any justified reason and, therefore, an adverse inference can be drawn against him that had he participated in the Test Identification Parade, he would have been identified by the prosecutrix. In any case both the appellants have been identified by PW-7 Jaswant Singh and the appellant Sonu was previously known to him. This is not the case of appellant Sonu that he was not known to Jaswant Singh. No such suggestion was given to him in the cross examination. The suggestion given to him was that he had not seen the accused taking away the girl. Therefore, the deposition of the prosecutrix in the court coupled with the appellant Sita Ram @ Sonu being previously known to her, refusal of the appellant Harish to join TIP without any justification corroborated by the testimony of PW-7 Jaswant Singh established the identity of the appellants beyond reasonable doubt. If the accused of his own volition declines to join test identification parade, without reasonable cause, he does so at his own risk and cannot say that in the absence of test identification parade, identification was not proper.

16. In any case, the prosecutrix could not have committed mistake in identifying the persons who committed rape on her person. No girl is likely to ever forget in his life the face of a person who

ravishes her and subjects her to such an indignity. In *State of M.P. Vs. Sunder Lal* (1992) 2 SCC 578, the accused forcibly took the prosecutrix during night and committed rape on her. The prosecutrix in that case was a 13 year old girl. The Hon'ble Supreme Court observed that she could not have forgotten the face of the man, who committed such ghastly crime upon her. The rape in that case was committed in the light of lamp. The Hon'ble Court noted that it was not a case where the prosecutrix had a mere glimpse of the accused and, therefore, his identity has been amply established by the evidence of the prosecutrix and the servant who was also forcibly taken alongwith her. In *Arasappa Vs. State* 1997 Cr.L.J. 1456, the appellant and another person forcibly took the prosecutrix with them in an auto-rickshaw, to a remote house, where she was repeatedly raped. Thereafter they ran away from the place where the crime was committed. During trial, the prosecutrix stated that she did not know the appellant and his co-accused and at the time when she was forced into auto-rickshaw, it was dark. No identification parade of the appellant was held in that case. It was, therefore, contended that the prosecution had failed to establish his identity. It was noted by the High Court that the prosecutrix had sufficient time at her disposal to observe the appellant as well as his friend and the appellant being a resident of the same area was not a total stranger to her, though she did not

know him personally. It was, therefore, held that non-holding of test-identification-parade was not fatal to the case of the prosecution.

17. In the present case, the prosecutrix was taken in day time and admittedly both the appellants were residing in the same locality where the prosecutrix was residing. Moreover, they were seen by PW-7 Jaswant Singh. Identification by the prosecutrix coupled with corroboration from the testimony of Jaswant Singh is sufficient to establish the identity of the appellants beyond reasonable doubt.

18. Learned counsel for the appellant, Sita Ram has referred to the decision of the Hon'ble Supreme Court in *Mohan Lal Vs. State of Maharashtra* AIR 1980 SC 839. That was a case of offence u/s 326/323/34 of IPC. The accused in the case was not previously known to the appellant. In his statement to the Doctor, he named one person while in subsequent statement, he named another person as the assailant. He was also shown by the police to the witnesses before he was identified in the court. In these circumstances, he was held entitled to acquittal. In the present case, there is no inconsistency in the names given by the prosecutrix. Both the appellants have been identified not only by the prosecutrix but also by PW7. The appellant Harish has also refused to join test-identification parade without any justification.

Both the appellants were living in the same locality in which the prosecutrix was living. The very fact that the prosecutrix accompanied them either on account of allurement or of her own consent is also a strong indicator that the appellants were known to her and that is why she accompanied them without raising any alarm. Therefore, this judgment does not apply to the facts of the present case.

19. The learned counsel has referred to *Canon & Ors. Vs. State of Kerala*, AIR 1979 SC 1127. That was also a case where the accused was not previously known and no test identification parade was held. Therefore, it was held that it would not be safe to rely on identification for the first time in the court. For the reasons discussed earlier, this judgment does not apply to the facts of the present case.

20. The testimony of PW-12, Ramesh who is an official of the school in which the prosecutrix was studying, coupled with the certificate Exhibit PW-12/A shows the date of birth of the prosecutrix as 10th March, 1988. Computed accordingly, the prosecutrix was less than 14 years of age at the time she was subjected to rape by the appellants. It has come in the cross-examination of PW-3 Jamna, mother of the prosecutrix, that she was born in the year 1987. Documentary evidence in the nature of

school certificate has to be given precedence over the oral evidence, but, even if benefit as regards the age of the prosecutrix, given orally by her mother and the age shown in her school records is given to the appellants, and it is presumed that the prosecutrix was born on the last date of the year 1987, she was less than 15 years of age on the date she was subjected to rape.

21. It was pointed out by the learned counsel for the appellants that municipal record of the birth of the prosecutrix has not been produced by the prosecution. The father of the prosecutrix has specifically stated in his cross-examination that he had not obtained birth certification of the prosecutrix from MCD. If the parents, on account of ignorance or illiteracy do not obtain birth record from the municipal committee, that by itself would not be a good ground to reject the documentary evidence available in the form of school certification wherein a specific date of birth is recorded. At the time when father of the prosecutrix disclosed date of her birth to the school authorities, he could not have known that one day he will have to prove her date of birth in a court of law. Therefore, there could have been no reason for him to give a wrong date of birth of the prosecutrix in the school record. I, therefore, have no hesitation in confirming the finding that the prosecutrix was less than 16 years of age at the time she was subjected to rape.

22. The learned counsel for the appellant Harish has referred to the decision of the Hon'ble Supreme Court in *State of Himachal Pradesh Vs. Suresh Kumar* 2008 (10) SCC 104. In that case, the prosecutrix was found to be more than 16 years old. The High Court found that she had voluntarily accompanied the accused and was a consenting party to sexual intercourse. In the present case, the evidence produced by the prosecutrix shows that the prosecutrix was less than 16 years of age at the time of commission of offence and, therefore, her consent being immaterial, this judgment is of no help to the appellant.

23. The learned counsel has next referred to *Emperor Vs. Mahadev* AIR 1942 Bombay 121 where it was observed that in rape cases, the evidence of the complainant must be corroborated. Much water has flown down the Ganges, since this judgment was delivered. There has since then been a marked change in the view being taken by courts, as regards testimony of a woman, who is victim of a sexual crime. She cannot be treated at par with accomplice in a criminal case, whose testimony requires corroboration before it can be accepted. No reliance can be placed upon this judgment in view of a catena of judgments of Hon'ble Supreme Court including its judgment in the case of *Bhogin Bhai Vs. Hirji Bhai* AIR 1983 SC 753 holding therein that the testimony of the prosecution does not require any corroboration before it can

be acted upon. In any case, even if one must look for corroboration, it is available in the form of the statement made by the prosecutrix to her sister immediately after this incident had taken place and then to her mother in the evening when she returned home.

24. The testimony of the sister of the prosecutrix could not be assailed during cross examination. She being confined to bed on account of delivery could not have done anything immediately as both her parents were not present in the house at that time. As soon as the parents came home, the incident was narrated to them by both the sisters. As noted earlier the testimony of PW-3 Smt. Jamni and PW-4 Sh. Ram Kishore, parents of the prosecutrix shows that the incident of rape was narrated to them by the prosecutrix when they returned home in the evening. The statement of the prosecutrix to both her parents is yet another corroboration of her testimony.

25. Presuming that the prosecutrix accompanied the appellants of her own without any inducement or coercion, the appellants would nevertheless be guilty of commission of rape as the age of the prosecutrix was less than 16 years at the time of commission of the offence and in view of the provisions of Section 375 (Sixthly) of the Indian Penal Code, sexual intercourse with a girl of less than 16

years of age, even with her consent renders the accused liable to punishment u/s 376 of the Act.

For the reasons given in the preceding paragraphs, I hold that both the appellants have been rightly convicted u/s 376 of IPC. Their conviction is accordingly maintained. However, keeping in view the age of the appellants, both of whom were about 19 years old at the time of commission of this offence and their social and economic background including the fact that they have not been able to engage an Advocate on their own and were provided legal assistance by Delhi High Court Legal Services Committee, the sentence of the appellants is reduced from rigorous imprisonment of 10 years each to rigorous imprisonment of 7 years each. The amount of fine is, however, maintained.

One copy of this order be sent to trial court and the other copy be sent to Jail Superintendent for information of the appellants and for record.

(V.K. JAIN)
JUDGE

October 30, 2009/acm-sk