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

\+ ***Crl.M.A 1539/2009 & CRL.LP No.38/2009***

% ***Date of Decision: 31.08.2010***

State of NCT of Delhi …. *Petitioners*
Through Mr.Vikas Pahwa, Additional Standing Counsel and Mr. Piyush Singh, Advocate

Versus

Amit Kumar @ Mohan …. *Respondent*
Through Ms. Trishna Mohan, Advocate

CORAM:
HON'BLE MR. JUSTICE ANIL KUMAR
HON'BLE MR. JUSTICE SURESH KAIT

1.	Whether reporters of Local papers may be allowed to see the judgment?	*YES*
2.	*To be referred to the reporter or not?*	*NO*
3.	Whether the judgment should be reported in the Digest?	*NO*

ANIL KUMAR, J.
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Crl.M.A No.1539/2009

This is an application seeking condonation of 82 days delay in filing the leave petition.

For the reasons stated in the application delay is condoned.

CRL.LP No.38/2009

1. The petitioner/state has sought leave to appeal against the judgment dated 21st August, 2008 convicting the respondent under Section 354 of Indian Penal Code and the order dated 21st August, 2008 sentencing him to undergo two years' rigorous imprisonment for the offence under Section 354 IPC, however absolving him of the charge under Section 376 of IPC in FIR No. 378/2006 u/s 376 and 377 IPC P.S. Nangloi.

2. Brief facts to comprehend the case are that the prosecutrix is a minor and used to live with her parents, brother and sisters in the area of Nangloi. On 5th August, 2006, at about 8:00 p.m. while she was playing with the children in the street, wife of the accused had called the prosecutrix inside the house and had asked her to go up and play. It was alleged that when she went up stairs, the accused was taking bath and he asked her to go and bring oil from his wife.

3. The further case of the prosecution is that when the accused was given the bottle of the oil, he removed the underwear of the prosecutrix and though the prosecutrix started weeping the accused applied oil to his finger and inserted his oiled finger in the private part of the prosecutrix and then made her lie on the ground and inserted his penis in her private part and thus committed rape on her. Before committing

the acts of inserting his oiled finger and inserting his penis in the private part of the girl, he had shut her mouth.

4. According to the prosecution, the prosecutrix started weeping and crying when the oiled finger of the respondent was inserted. The persons from public had come on hearing her cries and gathered there and the accused was beaten up. Parents of the prosecutrix, namely, Santosh Kumar, father and Kanti Devi, mother, on hearing about the incident, came to the house of the accused and found many persons thrashing the accused where after police was informed. ASI Mahender Singh, PW 11, Constable Lalit Kumar, PW-10 and Lady Constable Beena, PW-9 removed the accused and the prosecutrix to the Sanjay Gandhi Memorial Hospital where both were medico legally examined and the statement of prosecutrix was recorded by the police. The case was registered on 6th August, 2006 at 2:45 a.m. vide FIR No. 782/2006, Ex. PW-2/A on the basis of Rukka sent by the ASI Urmil Sharma from the Hospital, through constable Lalit Kumar, PW-10

5. The police had recovered a bottle containing mustard oil vide seizure memo Ex. PW-10/B. After the prosecutrix was discharged from the hospital, on 18/8/06 her statement, Ex. PW-12/B was recorded under Section-164 of Crl. Procedure Code by the Metropolitan Magistrate, PW-12.

6. The respondent was charged for an offence under Section-376 of Indian Penal Code, however, the accused pleaded not guilty. During the trial, statement of prosecutrix and her parents, mother and father were recorded as PW-6, PW-4 and PW-5 respectively and the statement of Dr. Upma, PW-1 and Dr. Vijay Kumar, PW-3 were recorded. Other witnesses of the police were also recorded and the Metropolitan Magistrate before whom the statement of prosecutrix under Section 164 of the Crl. Procedure Code was recorded as Ex. PW-12/B.

7. The respondent/accused, when examined under Section 313 of the Crl. Procedure Code had denied the circumstances alleged against him. The plea put forth by the accused was that on 5th August, 2006, he had gone to a factory in the area of Shakurpur to do the job of tailoring and came back by train at about 8:20 p.m. at Nangloi Station. He deposed that when he was present at his house along with his wife, father of the prosecutrix, PW-5 came with 7-8 persons and started beating him. The father Santosh had come with his son at factory, on the same day during the noon time and had promised to return 7,500/- which he had borrowed from the accused three or four months back. He further stated that the father of the prosecutrix and he, used to travel by the same train to go to Shakurpur. In the evening, instead of repaying the amount, he was beaten up by Santosh, PW-5 and his 7-8 companions. According to him, his wife started weeping finding her husband being beaten by Santosh and other persons. In the

meanwhile, police came and took accused to the police station and thereafter, he was implicated falsely in the case.

8. The Trial Court after perusing the evidence of the parties noted that though the case of the prosecution is that the occurrence took place at 8:00 p.m., however, in the history provided to the doctor at the time, the prosecutrix was medico legally examined as PW-1/A, the time of sexual assault has been given as 5:00 p.m.

9. It was also noticed that the prosecutrix in her examination-in-chief stated that the accused inserted his finger, smeared with oil into her private part and thereafter made her to lie on the ground, shut her mouth and then did commit rape on her but in her cross-examination, she stated that she started bleeding even when the accused inserted his finger and when she raised hue and cry, the persons from the public gathered there and the accused was beaten up.

10. Considering the medical report of the accused, Ex. PW-1/A, it was also noticed that there was no injury on the private part of the accused nor any semen or blood was detected on any of the clothes sent for analysis. The Trial Court did not put much weightage to the fact that when the prosecutrix was medico legally examined, the time of the incident was given as 5:00 p.m. as it was not disclosed or established as to who had provided the history to the doctor, PW-1 recording the time

as 5:00 p.m. Considering the evidence, the Trial Court, however, inferred that the occurrence had taken place at about 8:00 p.m. and not at about 5:00 p.m.

11. The version of the prosecutrix, PW-6 is that she had gone to the wife of the accused who had asked her to go upstairs where the accused was taking bath. Accused asked her to get the oil which she got from the wife of the accused and gave it to him. Thereafter, the accused applied oil on his finger, removed her underwear because of which she started weeping and he inserted his finger into her vagina. It is further deposed by her that though she was weeping and bleeding, the accused made her lie on the ground and then shut her mouth and committed rape. The prosecutrix further deposed that the accused wiped out the blood with a towel and threw the towel in the room and thereafter she became unconscious. After she regained consciousness she came down and started crying, as a result whereof the public gathered and the accused was beaten. The children, who were playing in the street, went to her father, PW-5 where after, the father, PW-5 and mother, PW-4 came and the police was informed.

12. According to the prosecutrix, her blood stained underwear was removed by the doctor, PW-1 as she had been wearing the same. The Trial court has considered the material contradictions in her statement which makes the hypothesis of rape being committed improbable and

not proved. The prosecutrix had stated that accused was taking bath under a tap in front of the bathroom and not inside the bathroom and that the accused called her five minutes after he had finished taking bath. However, in her earlier statements, she had not stated that when she went upstairs, the accused was taking bath and thus, it was inferred that the prosecutrix had improved upon her statement because of which the Trial Court considered her statement with circumspection. The findings of the Trial Court are also based on the statement of the prosecutrix that when the finger was inserted in her private part, she started bleeding and weeping and thus created hue and cry because of which people gathered and the accused was beaten. According to the Trial Court, once the accused had already inserted the finger which led to bleeding and weeping of the prosecutrix which had attracted the public and they gathered and started beating the accused, there was no possibility of committing rape on her. It has also been held that on the basis of medical evidence it cannot be held that the rape was committed on her. The respondent has, however, been convicted under section 354 of IPC which conviction and sentence has not been challenged by the respondent/accused.

13. The improbability of the rape is inferred by the Trial Court based on the fact that the wife of the accused was present in the house and rather she had given the bottle of the oil which the prosecutrix had given to the accused. Considering the site plan, Ex. PW-13/B, it has

been found improbable that the sexual intercourse would have been committed by the accused in presence of his wife in the house where even according to the prosecutrix the accused was taking bath not inside the bath room but under the tap outside the bath room.

14. Reliance has also been placed on by the Trial Court regarding failure of the prosecution to examine any of the person who had collected there on hearing cries of the prosecutrix and who had beaten the accused and as no explanation has been given for not recording the statement of any person from the neighborhood who had reached the spot. The Trial Court has also relied on the fact that even according to the prosecutrix, the accused has not removed the pant at the time he made her lie on the ground and allegedly committed the rape. Infact the accused did not remove his pant in her presence on the basis of testimony of the prosecutrix. The Trial Court has also noticed that it has not been established that the pant which he was wearing had a zip or the accused had opened the buttons of the trouser before allegedly committing the rape.

15. The pant seized by the prosecution was half pant and on analysis neither any stains of semen or blood were found on the pant. This has been found to be improbable as after inserting finger in the private part of the prosecutrix, she had started bleeding and if the rape was committed afterwards then there would have been blood stains on the

pant of the accused. The version of the prosecutrix that the blood was wiped out by the towel which was thrown in the room was not established as neither any towel was recovered nor the prosecutrix had stated in her earlier statement before the police and the Magistrate that after inserting finger in her private part when she started bleeding, the blood was wiped by a towel which was thrown in the room. Had the version of wiping out the blood which had started oozing on account of insertion of finger by the accused had been established, the absence of blood stains of the prosecutrix on the pants of the accused could be explained. If the theory of wiping out the blood which oozed from the vagina has not been established, then it is improbable that the accused committed rape without removing his pants and no blood stains could have come on his half pants.

16. The material improvement which has been noticed by the Trial Court is that before the police and the Magistrate, under Section 164 Crl. P.C. as Ex. PW-12/B, the prosecutrix had not stated that she had become unconscious whereas in her testimony she stated that after insertion of finger by the accused laced with oil when she started bleeding she became unconscious. If she had become unconscious after insertion of finger in her vagina when she started bleeding then how she could know about the insertion of penis by the accused in her vagina.

17. Noticing the medical evidence, it has been noted on the basis of Dr. Upma, PW-1 that the vagina of the prosecutrix had perineal tear present and hymen was ruptured, however, the vaginal swab taken did not have either the blood of the accused or his semen. Similarly, there was no injury observed by doctor on the penis of the accused and there was no mention about the presence or absence of smagma. In the present facts and circumstances when on account of insertion of finger by the accused when the prosecutrix started bleeding, absence of blood of the prosecutrix on any of the garments of the accused and no injury on the private part of the accused does negate the plea of insertion of penis by the accused in the vagina of the prosecutrix. This is not the case of the prosecution that just after the act, the accused washed himself or washed his cloth as on account of weeping and crying the accused was immediately caught by public and beaten up and thereafter taken to the hospital for medico legal examination.

18. In the circumstances, the Trial Court has inferred that if the prosecutrix had started bleeding after insertion of the oil laced finger and the rape was committed later on and as according to the prosecutrix the pant was not removed by the accused, his pant would have got the stains of blood, which makes the allegation of rape being committed by the accused not proved and that the Trail Court's findings are neither unreasonable nor such a finding in our opinion is perverse or unsustainable.

19. This cannot be disputed that unless the conclusion of the Trial Court on the evidence of record are unreasonable, perverse or unsustainable, the High Court would not interfere with the order of the acquittal. Though the High Court has the power to assess the evidence and reach its own conclusion which power is as extensive as in appeal against the order of conviction, yet as a Rule of Prudence, the High Court should always give proper consideration to matters such as (i) the views of the Trial Judge as to the credibility of the witnesses; (ii) the presumption of innocence in favor of the accused; a presumption which certainly is not weakened by the fact that the accused has been acquitted at his trial; (iii) the right of the accused to the benefit of any doubt, and (iv) the slowness of an Appellate Court in disturbing a finding of the fact arrived at by a Judge who had the advantage of seeing the witnesses and noticing their demeanor.

20. On the analysis of facts and circumstances and the evidence of the prosecution, this Court does not differ with the conclusions of the Trial Court acquitting the respondent of the charge under section 376 of IPC but convicting him and sentencing him under Section 354 of Indian Penal Code nor finds the inference as unreasonable, perverse or unsustainable. The respondent has not challenged his conviction under section 354 of the Indian Penal Code. Since the view taken by the Trial Court does not suffer from any unreasonableness, perversity nor is it unsustainable on any ground, any other view even if possible by this

Court is not to be substituted with the view of the Trial Court in the facts and circumstances.

21. The learned counsel for the petitioner has relied on (2009) 6 SCC 635, Satyapal Vs State of Haryana and (2005) 13 SCC 766, State of HP Vs Asha Ram. In Satyapal (supra) the testimony of prosecurix was corroborated by the testimony of her aunt who had categorically stated that the accused had removed her salwar and underwear and had shut her mouth and the accused was performing sexual intercourse with the prosecutrix. In the present case the dispute is whether the accused only inserted the oil smeared finger in the vagina of the prosecutrix or also inserted his penis in her vagina. The finding of insertion of finger resulting into bleeding of the prosecutrix and rupture of her hymen has not been challenged by the accused and he has already been convicted and sentenced for that. However, considering other circumstances that the wife of the accused was present in the house, the accused was not inside the bathroom but was outside the bathroom; despite prosecutrix bleeding on account of rupture of her hymen and blood oozing out and the fact that the accused did not remove his half trouser, no blood stains of prosecutrix blood were found on his garments and private part though accused did not get the chance to wash or change his cloth and no injury of any type was found on his private parts and the accused was immediately apprehended by the public on hearing the cries of the prosecutrix and was beaten up and none of the public persons who had

collected and apprehended the accused were examined and no explanation given by the prosecution for their non examination. In Asha Ram (supra) the allegation was of the father raping his own daughter who was cross examined at length and whose testimony remained un-impeached in contradistinction to the present case where the trial Court recorded improvements made by the prosecutrix and prosecution and those improvements have remained unsubstantiated.

22. It is no more res integra that the ratio of any decision must be understood in the background of the facts of that case. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It must be remembered that a decision is only an authority for what it actually decides. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. The ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances in two cases. The Supreme Court in Bharat Petroleum Corporation Ltd and Anr. v. N.R.Vairamani and Anr. (AIR 2004 SC 778) had held that a decision cannot be relied on without considering the factual situation. In the judgment the Supreme Court had observed:-

> " Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too

> taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

In P.S.Rao Vs State, JT 2002 (3) SC 1, the Supreme Court had held as under:

> ". There is always a peril in treating the words of judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusion in two cases.

In Rafiq Vs State, (1980) 4 SCC 262 it was observed as under:

> "The ratio of one case cannot be mechanically applied to another case without having regard to the fact situation and circumstances obtaining in two cases."

23. The arguments were heard in detail on 30th August, 2010. After considerable arguments by Mr. Vikas Pahwa on that day the matter was adjourned at his request to consider the ratio of the judgments cited by him being applicable to the present case. On 31st August, 2010 the learned counsel agreed that the ratio of the judgments cited by him do not apply squarely on account of various difference between the present case and the facts and circumstances of the cases cited by him.

24. No other grounds have been raised by the petitioner seeking leave against the judgment of the Trial Court dated 21st August, 2008 in Sessions Case No. 15/2 (RBT) titled as State Vs. Amit Kumar convicting and sentencing the accused respondent under Section 354 of IPC but absolving and acquitting him of the charge under section 376 of IPC.

25. For the foregoing reasons, we do not find any ground to interfere with the decision of the Trial Court acquitting the respondent from the charge under Section 376 of IPC but convicting and sentencing him under section 354 of IPC. Therefore, the leave to appeal is declined and the petition is dismissed.

ANIL KUMAR, J.

SURESH KAIT, J.

AUGUST 31st, 2010
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