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

% *Date of Decision : 19th January, 2009*

+ **CRL. APPEAL 53/2008**

STATE Appellant
Through: Mr.Pawan Sharma, Advocate.
versus

ONKAR Respondent
Through: Nemo.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE ARUNA SURESH

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

: **PRADEEP NANDRAJOG, J.** (Oral)

1. Police swung into action when a telephonic information was received at PS Tilak Marg on 4.9.2004 at around 11.15 AM, recorded vide DD Entry No.13-A that a person was harassing a woman at 10 Bhagwan Das Road. The police reached the site. The lady allegedly being harassed, G, (the prosecutrix), made a statement to ASI Nar Singh to the

effect that she was married and that around 10.00 AM the accused first teased her and thereafter caught her left hand and forcibly dragged her 3/4 floors upstairs and at the spot where the stairs were broken and on a wide step committed rape on her. She claimed that after committing rape, the accused tried to run away. She followed him raising an alarm. Her brother-in-law Ram Suresh who had gone to the market to make purchases had returned and apprehended the accused at the spot.

2. It is not in dispute that a multi-storeyed building popularly known as 'White House' has been constructed on 10 Bhagwan Das Road. Semen was lifted from bathroom of flat No.7-AB White House. The prosecutrix was taken to RML Hospital where she was examined by Dr.Meeta Chauhan PW-9, who recorded the MLC, Ex.PW-9/A to the effect that possibility of recent sexual intercourse could not be ruled out by her on examining the prosecutrix. She noted no mark of injury or wound on the person of the prosecutrix.

3. The accused was taken to RML Hospital where PW-4 Dr.B.K.Kundu examined him and recorded in the MLC, Ex.PW-4/A that no fresh mark of injury on the person of the accused could be noted.

4. Inter alia, from the evidence which surfaced, a plea was urged by the accused; being of sex by consent. In aid thereof, it was urged that it was not a case where the prosecutrix alleged being suddenly pounced upon; her being thrown to the ground and pinned down and the wrong act committed. With reference to the testimony of the prosecutrix where she categorically stated of being dragged up the stairs and pulled up 3-4 floors it was urged that lack of any injury on the person of the prosecutrix was important and suggests of the prosecutrix walking up 3 – 4 floors voluntarily with the accused and thereafter having sex by consent. It was also urged that the prosecutrix alleged having sex on the stair-case and presence of semen inside the bathroom of flat No.7A shows that the prosecutrix visited the flat, probably to urinate; and hence semen falling on the floor and thereafter walking down which is contrary to her testimony that she ran after the accused raising a hue and a cry.

5. With reference to the evidence brought on record it was urged on behalf of the accused that the building is a multi-storeyed building and if the prosecutrix was dragged up by 3 to 4 floors, she would have obviously cried and shrieked, to attract the attention of the residents of the building. It was

urged that since nobody heard the cries and shrieks of the prosecutrix, evidenced by the fact that no resident of the multi-storeyed building came out, much less met the police who reached the spot, shows that the prosecutrix voluntarily walked up. It was urged that the evidence probablizes that when the prosecutrix and the accused, after indulging in sex by consent, came down, the prosecutrix got alarmed on seeing her brother-in-law and to show her innocence concocted a cock and a bull story of being forcibly dragged upstairs and raped.

6. The learned Trial Judge has discussed this aspect of the matter as under:-

“There is also no evidence on record that the prosecutrix raised any alarm or resisted the accused from going upstairs. It is pertinent to mention that as per her own testimony PW-3 Geeta was forcibly taken to the roof of the employer of her husband and in view of her statement to the police Ex.PW-3/A she was dragged 3/4 floors by the accused, however not a single injury was found on her person or on her feet or on her back or arms showing that accused had pulled her upstairs forcibly. There were even no abrasions or scratches found on her body when she was medically examined. Had it been that the accused had dragged her upstairs in the natural course of event she must have sustained injuries on her person. Similarly, as alleged by her in statement Ex.PW-3/A that the accused committed rape upon her on a wide step without her consent and her testimony before the Court that the accused lifted her saree and did wrong act with her and then went away, it is nowhere stated by her either before the police or before the Court that she showed any resistance to the

forcible act of rape upon her. No doubt in the MLC Ex.PW-9/A it is mentioned that the possibility of recent sexual intercourse i.e. rape could not be ruled out but at the same time it is mentioned in the MLC that there were no injury marks or wounds or bruises on her person which could show that she showed any resistance nor there was any injury on the person of the accused due to resistance as in the MLC Ex.PW-20/B of the accused again it is mentioned that there is no evidence of any fresh external injury on his person. From the record it appears that there was no resistance even purported to have been offered. These factors clearly indicate that the version of the prosecutrix that she had been forcibly raped cannot be believed. It is further pertinent to mention that in her statement to the police Ex.PW-3/A the prosecutrix mentioned that after the incident accused ran away downstairs and while raising alarm she followed him and when the accused had reached the second floor her brother-in-law Ram Suresh caught hold of him. Whereas she has nowhere deposed about these facts in her testimony before the Court but to the contrary she stated that after the accused had forcible sexual intercourse with her he went away, she while weeping came down stairs to the house of the employer of her husband. Her brother-in-law came from the market and asked her as to what had happened and at that time the accused was standing in front of his room, then she narrated the entire incident to her brother-in-law who informed her husband, her husband came there and thereafter they went to the PS and brought police to the spot and thereafter the accused was apprehended by the police. Her testimony in the Court shows that Ram Suresh had not reached the spot when the accused after committing the alleged offence was running downstairs and was apprehended by him but on the other hand noting happened in the presence of Ram Suresh who when came from the market found the PW-3 Geeta crying and on his questioning she disclosed to him about the incident while accused was standing outside his room. It is against natural human conduct that the accused after committing rape upon PW-3 Geeta would stand outside his room, wait for her to complain against him and then get him arrested. It is also against the human natural conduct that the brother-in-law after

hearing about the incident instead of apprehending the accused who was standing in front of his room would report the matter first to his brother, wait for him and thereafter they both would go to the PS and only when the police accompanied them to the spot the accused would be apprehended who would still be waiting for the police to come there and arrest him. Thus the story put forward by PW-3 Geeta in her chief examination is improbable, particularly when PW-2 Ram Suresh did not depose about all these facts. On the other hand, he testified that when he came back home after purchasing vegetables he found his bhabhi was crying and coming down the stairs and the accused who was also seen running who was apprehended by him and was brought to the ground floor where many people had collected. That his bhabhi told him about the incident. Thereafter he informed his brother in his office who came to the spot and informed the police. Police reached there and they handed over the accused to the police officials. As per the testimony of this witness accused was apprehended while he was coming downstairs and the police was called there and accused was handed over to the custody of the police, whereas as per PW-3 Geeta, her husband and her brother-in-law had first gone to the police station brought police to the spot and then the accused was apprehended. In view of the aforesaid discrepancy in the testimony of PW-2 Ram Suresh and PW-3 Geeta the manner how the accused was apprehended and who apprehended has not been proved by the prosecution. In view of the above discussion, the prosecution has failed to prove that accused had committed rape on the prosecutrix or that if there was any such incident it was without her consent. The prosecutrix in her cross-examination had admitted that she did not give any beating to the accused or tried to rescue herself from the accused. She further testified during her cross-examination that when she reached downstairs 4/5 persons were standing there and both the chowkidars had also collected there which lend support to the argument of the defence counsel that there was consenting sexual intercourse between the two and when they were spotted by the public persons, she concocted the story that accused had committed rape upon her. Her testimony to the effect that the accused had broken

her bangles and she had received injury on her hand is not supported by any medical evidence and is thus false statement.”

7. We note that various submissions hinging on the peripheries of the evidence gathered and in particular to the semen lifted from a bath-room as also on the vaginal swab of the prosecutrix has been discussed. The said discussion pertains to the issue whether the prosecutrix went to the bath-room and urinated there and the possibility of the semen falling on the floor of the bathroom.

8. Nothing of substance could be brought out by learned counsel for the State during arguments to shake the reasoning of the learned Trial Judge. Indeed, it appears to be a case of sex by consent. Though, lack of injuries on the person raped is not suggestive of consent, but in the instant case lack of injuries on the prosecutrix assumes importance because she alleged being dragged on the stairs; pulled upwards by 3 – 4 floors. It is not possible that she would not have received even a scratch. Further, that the building is a multi-storeyed building; the time was 10.00 AM; residents would be presumed to be available in the flats and would have responded to the shrieks of the victim. We agree with the reasoning of the learned Trial Judge that the evidence probablizes the

prosecutrix being alarmed upon seeing her brother-in-law when she came down with the accused and concocted the story.

9. We record our satisfaction that there is no material infirmity in the appreciation of evidence. We record our concurrence with the view taken by the learned Trial Judge.

10. We find no merits in the appeal. The same is dismissed.

PRADEEP NANDRAJOG, J.

ARUNA SURESH, J.

JANUARY 19, 2009
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