

\$~2

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

+ **CRL.L.P. 367/2011**

% *Judgment delivered on: 13th March, 2012*

STATE Petitioner

Through : Ms. Rajdipa Behura, APP

versus

VICKY & ORS Respondent

Through : None

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. Vide the instant petition, the petitioner/State has assailed the judgment dated 24.12.2010 whereby the learned trial judge has acquitted all the three accused persons/respondents.
2. Learned counsel for the petitioner submits that the learned trial judge has not passed reasoned order on the report of FSL and has simply said that the FSL does not connect with the evidence.
3. Learned counsel further submits that sometimes the tests of the FSL does not come proper because of so many reasons, therefore, the trial judge would not have taken it as fatal to the case. Further, learned counsel submits that the prosecutrix has proved the case fully and has not shaken the deposition before the trial judge.
4. Learned APP has relied upon the Supreme Court judgment where it

is held that the sole testimony of the prosecutrix is sufficient and reliable as per the case of **Vijay @ Chinee v. State of Madhya Praedesh (2010) 8 SCC 191**. In paras 9 to 14 it is held:

“9. In State of Maharashtra v. Chandraprakash Kewalchand Jain AIR 1990 SC 658, this Court held that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Court observed as under:

A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on

the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

10. In State of U.P. v. Pappu @ Yunus and Anr. AIR 2005 SC 1248, this Court held that even in a case where it is shown that the girl is a girl of easy virtue or a girl habituated to sexual intercourse, it may not be a ground to absolve the accused from the charge of rape. It has to be established that there was consent by her for that particular occasion. Absence of injury on the prosecutrix may not be a factor that leads the court to absolve the accused. This Court further held that there can be conviction on the sole testimony of the prosecutrix and in case, the court is not satisfied with the version of the prosecutrix, it can seek other evidence, direct or circumstantial, by which it may get assurance of her testimony. The Court held as under:

It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. She stands at a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would do.

11. In State of Punjab v. Gurmit Singh and Ors.: AIR 1996 SC 1393, this Court held that in cases involving sexual harassment, molestation etc. the court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some

assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. The Court further held that the delay in filing FIR for sexual offence may not be even properly explained, but if found natural, the accused cannot be given any benefit thereof. The Court observed as under:

The court overlooked the situation in which a poor helpless minor girl had found herself in the company of three desperate young men who were threatening her and preventing her from raising any alarm. Again, if the investigating officer did not conduct the investigation properly or was negligent in not being able to trace out the driver or the car, how can that become a ground to discredit the testimony of the prosecutrix? The prosecutrix had no control over the investigating agency and the negligence of an investigating officer could not affect the credibility of the statement of the prosecutrix.... The courts must, while evaluating evidence remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.... Seeking corroboration of her statement before replying upon the same as a rule, in such cases, amounts to adding insult to injury.... 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 courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must

be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

12. In State of Orissa v. Thakara Besra and Anr. AIR 2002 SC 1963, this Court held that rape is not mere a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence.

13. In State of Himachal Pradesh v. Raghubir Singh (1993) 2 SCC 622, this Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity.

14. A similar view has been reiterated by this Court in Wahid Khan v. State of Madhya Pradesh (2010) 2 SCC 9, placing reliance on earlier judgment in Rameshwar v. State of Rajasthan AIR 1952 SC 54.”

5. It is further submitted that the evidence to this effect has connect all the accused persons. Learned counsel has also submitted that the prosecutrix was a married lady and therefore, much importance has to be paid. She has relied upon a judgment of **Ram Singh @ Chhaju vs. State of**

Himacah Pradesh (2010) 2 SCC 445 wherein it is held in para 15, as under:

“It was submitted before us by the learned counsel for the appellant that there was no injury on the person of the victim. According to him, if there was sexual assault on the victim, she would have resisted the offender and in that process she would have received some injuries on other parts of the body. Much importance cannot be given to the absence of defence injuries, because it is not inevitable rule that in the absence of defence injuries the prosecution must necessarily fail to establish its case. In the first information report and also in the evidence of PW-1, it has come on record that she could not cry out for help since her mouth was gagged by the accused. It has also come in the evidence that the victim was aged about 40 years and the accused persons were young and aged about 20 years and, therefore, she was not in a position of equal strength so as to resist the appellants. Even in the absence of any injuries on the person of the victim, in our view, with the other evidence on record, the prosecution is able to establish that the offence was committed.”

“17. It is also submitted that in the absence of any injury on the private parts of the victim the High Court should have disbelieved the prosecution story. In our view, it is difficult to accept the submission of the learned counsel. The reason being the doctor who has been examined as PW2 has found that the victim, PW1 was used to sexual intercourse and as such absence of injury on the private parts of the victim may not be very significant. PW1 was also used to sexual intercourse. The evidence of the victim has been corroborated by the evidence of PW2 and 3, the two post occurrence witnesses, as well as by the FIR which was lodged without any delay. Therefore, it is difficult to differ from the findings of the High Court.”

6. Learned trial judge has recorded in its impugned judgment that there were material contradictions and discrepancies in the testimonies of the prosecution witnesses regarding the respondent/accused Vicky and Raj Kumar who were arrested on 2.10.2009 itself on the alleged date of

incident. PW1 the prosecutrix and PW12 constable Sunder Singh are the witnesses to the arrest memo of both these accused persons.

7. Respondent/accused Raj Kumar was arrested vide arrest memo Ex. PW12/A and respondent/accused Vicky was arrested vide arrest memo Ex. PW12/B. A perusal of the arrest memo of the accused Raj Kumar shows that in Column of Date time, date is mentioned as 2.10.2009 however, time is missing though it is mentioned as “2/10/09 at-----”. There is no explanation on behalf of the prosecution as to why time was not mentioned therein.

8. Similarly in the arrest memo of accused/respondent Vicky, the time of arrest is mentioned as 6:00 pm, but there is overwriting of time. PW1 prosecutrix in her chief examination did not testify at all that both the accused persons were arrested in her presence and it is only during her cross examination by learned APP, she admitted suggestion that on 2.10.09 accused Vicky and Raj Kumar were arrested and she had also signed the documents of their arrest.

9. Besides, PW1 did not testify at all in her chief examination or cross examination by learned APP as to from where these two accused persons were arrested nor any question was put to her in this regard. It is only during her cross examination dated 15.04.2010 by Id. Counsel of accused Raj Kumar that she stated respondent/accused Raj Kumar was arrested at 4 pm while he was roaming and accused Vicky was arrested from his house at about 5 a.m.

10. Whereas, as per prosecution case both these respondent/accused persons were arrested together near the taxi stand while they were talking to each other. Therefore, it appears that accused persons were not arrested in

her presence as at 5 a.m. on 02.10.09, even the police had not reached at the spot as the first DD vide which the information was received in the PS i.e. DD No. 7A was recorded at 5:25 a.m. Due to these reasons, it is not possible that respondent Vicky was arrested before even the police was informed about the incident.

11. It is further seen that PW5 Shamsheer Singh in his cross examination submitted that he went to PS at 4/5 pm, as when he reached his house from his native village, he did not find his wife there. He also stated that he remained at the PS for 20/25 minutes and thereafter returned along with his wife to his house at 4:30 p.m.

12. This witness was also declared hostile by learned APP as he was partially resiling from his earlier statement recorded under Sec. 161 CrPC. During the cross examination by the learned APP, he admitted that police had recorded statement and therein he had stated that they had gone in search of accused persons in the village with the police.

13. If this testimony is believed to be correct, then he must have gone in search of respondent after 4:30/5 p.m. when he returned from the police station and therefore, the accused persons must have been arrested later on.

14. It is also seen from testimony of PW1, that respondent Raj Kumar was arrested at about 4 p.m. and respondent/accused Vicky arrested at about 5 p.m., whereas the PW14 ASI Saroj Bala testified in her cross examination that accused Vicky and Raj Kumar were apprehended at about 6:30/7 p, which is contrary to the time mentioned in the arrest memo Ex. PW12/B and the time deposed by other witnesses.

15. The case of the prosecution is that the statement of PW5 Ex. PW5/PA recorded under Sec. 161 CrPC, wherein stated he along with his

wife i.e. PW1 had accompanied the police in search of accused persons and they found accused persons/respondent Vicky and Raj Kumar standing opposite the taxi stand. They were pointed out by his wife. The respondents were standing on the taxi stand Balmiki Mandir and they were apprehended. However, neither PW1 nor PW2 so stated in their testimonies.

16. PW5 during cross examination by learned APP also denied the suggestion that he made any such statement to the police. He was confronted with statement Ex.PW5/PA wherein this fact was found recorded, but voluntarily stated that respondent/accused persons were apprehended in front of the temple.

17. The other relevant witness with regard to the arrest of accused persons/ respondents is PW12 Constable Sunder Singh, who during his chief examination testified that after registration of the case he returned to the spot along with the copy of FIR and original Ruka, where ASI Bhoop Singh and ASI Saroj Bala were present. He testified that in front of the house of the prosecutrix, respondents/accused Vicky and Raj Kumar were passing and they were pointed out by the prosecutrix, and were arrested by ASI Bhoop Singh with his help and with the help of Ct. Manoj.

18. As per the testimony of this witness, respondent seems to have been arrested immediately after he returned to the spot along with the copy of the FIR and original rukka and they were arrested from outside the house of the prosecutrix which in fact is not the case of the prosecution. His said statement is contrary to the testimony of PW5 who stated that these two respondent/accused were arrested from near the temple as he along with his wife and police had gone in search of them and they were seen talking to each other near the taxi stand and were pointed out by the prosecutrix.

19. Settled Law is that the nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspires confidence and there is absence of circumstances which militate against her veracity.

20. On perusal of the impugned Judgment, I note, the learned trial judge has recorded reasons in its impugned judgment that since there are material contradictions in the testimony of prosecutrix and other witnesses examined by the prosecution who have created strong doubt about the truthfulness of the prosecution case. The quality of the testimony of prosecutrix is not such which is sufficient for the conviction of respondents/accused persons for such heinous offence. It is further recorded that there is no medical evidence on record to prove that the prosecutrix was subjected to sexual assault. Even as per the FSL report, the prosecution has failed to connect respondent/accused Mahender with the offence of rape. I have also perused the FSL report and found that report do not connect the accused with the alleged rape. Therefore, on this aspect, the opinion recorded by the trial

court is correct.

21. The exhibits which were allegedly lifted from the spot i.e. the pieces of broken bangles, pearl string and even the clothes worn by the prosecutrix which were allegedly torn by accused Mahender were not shown to the prosecutrix during her testimony for identification, as their plantation cannot be ruled out.

22. Learned trial judge has also recorded that the absence of husband of the prosecutrix on the night of the incident and her sleeping alone in the jhuggi has also not been proved beyond doubt. There are material contradictions in the testimony of prosecutrix and her sister Rekha and her son Naveen. Even the recording of statement of prosecutrix at the spot by ASI Bhoop Singh, has not been proved in view of the contradictory statement of the prosecutrix.

23. It is further recorded that there are material contradictions in the testimony of prosecution witnesses with regard to arrest of respondents on 2.10.2009 itself. In view of the quality of the evidence produced by prosecution, it has failed to bring home the guilt of the accused persons beyond reasonable doubt.

24. Defence taken by the accused persons that since the husband and the brother in law of the prosecutrix were facing trial under Sec. 308 Indian Penal Code, 1860, in a case wherein respondent / accused Mahender was the injured, Balji Singh, the father of accused Raj Kumar was the complainant and Surjan Singh, the father of respondent / accused Vicky had stood surety for the husband of the prosecutrix, but later on had withdrawn the surety and for this reason the prosecutrix had falsely implicated the accused persons in the present case, seems more plausible.

25. The learned trial judge has also held that the contention of learned APP that no lady would put her character at stake by alleging falsely that she was raped, though sounds plausible but is not a universal truth. The defence of the accused persons has been admitted by the prosecutrix and other witnesses that her husband and brother in law were facing trial under Section 308 Indian Penal Code, 1860 as recorded above.

26. At the same time it is noticed that the prosecutrix concealed this material fact in her complaint Ex. PW1/B and statement Ex. PW1/A under Sec. 164 CrPC and even in her chief examination. She concealed that there was any enmity between her family and the accused persons. More so, she concealed this fact that the respondent/accused Vicky was the son of her sister in law.

27. Keeping in view such concealment and the contradictions mentioned above as the respondent Raj Kumar is not connected with the alleged rape vide FSL report, therefore, the learned trial judge acquitted all the accused, by giving benefit of doubt, under Sec. 376(2)(g) Indian Penal Code, 1860.

28. In view of the above discussion, I find no discrepancy in the order passed by the learned trial judge. Therefore, I confirm the same.

29. Accordingly, Crl. L.P. 367/2011 is dismissed with no order as to costs.

SURESH KAIT, J

MARCH 13, 2012

'raj'/jg