

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

*Date of decision: 27<sup>th</sup> February, 2013*

+ **CRL. RP.79/2006**

MISS UMA PAWAR & ANR. .... Petitioners

Through: Mr. V.P. Katiyar, Sr. Adv. with  
Mr. Shamim Mohd., Adv.  
Mr. Neeraj Pandey, Adv.

versus

MR. NIZAMUDDIN & ORS. .... Respondents

Through: Mr. Rohit, Adv. for R-1,2 & 4.  
Mr. Mukesh Kumar Sharma, Adv. for  
R-3.  
Mr. Sunil Ahuja, Adv. with  
Mr. Kanishk Ahuja, Adv. for R-5 & R-6.  
SI Yogesh Kumar, PS Timarpur.

**CORAM:**

**HON'BLE MR. JUSTICE G.P.MITTAL**

## **J U D G M E N T**

### **G. P. MITTAL, J. (ORAL)**

1. The Petitioners who are the private Complainants (and victim of sexual assault) prefer this Revision Petition under Section 397 of the Code of Criminal Procedure (Cr.P.C.) and impugn the order dated 04.10.2005 and order on sentence dated 05.10.2005 passed by the learned Additional Sessions Judge ('ASJ') whereby Respondents were acquitted of the charges under Sections 363/366/376/376(g)/305/368/109/34 of the Indian Penal Code ('IPC'). However, Respondents Nos. 1 to 4 were convicted for the offence punishable under Section 354 read with Section 34 IPC whereas Respondents No.5 and 6 were convicted for an offence

punishable under Section 342 read with Section 34 IPC. The conviction of Respondents No.1 to 6 for the offences stated earlier is not before the Court as the conviction under the said offences was not challenged by Respondents No. 1 to 6.

2. FIR No.85/1998 was registered on the statement Ex.PW-4/1 made by prosecutrix 'U' (name withheld to conceal identity as this being a case for offence under section 376 IPC). She informed the IO that on 21.02.1998 in the evening she went to attend the function in the house of her friend with her sister 'B' (name withheld to conceal identity) as her friend's Bhabhi (sister in law) Rekha gave birth to a male child. Respondent No.4 (Jitender Rohilla) who is her (prosecutrix's) sister's husband (in relation) met them there. At about 9:45 P.M. Jitender asked her that he would drop them on his two wheeler to their house. He made her and her sister sit on the pillion of the two wheeler. Finding that the two wheeler was not going in the direction of their house, she asked Jitender as to where was he taking them, Jitender informed 'U' that he was taking them to the house of their relative at Yamuna Vihar and they will return soon. She told him that she did not know the relative even then he took them to a place named Nehru Vihar across Yamuna river. According to the statement made by 'U' to the IO she and her sister 'B' reached a house at Nehru Vihar. Jitender took them to a room on the first floor where two cots were lying. After some time Jitender's friends Shashi Bhushan, Ramesh Kumar @ Raju and Nizamuddin came there, whom she knew earlier as she had seen them with Jitender. The name of the owner of the house was revealed to her as Suresh Chand and his wife as Smt. Kamlesh. According to the prosecutrix Suresh and Kamlesh waited outside the room in the *verandah* after speaking to Jitender and Respondent Ramesh

Kumar @ Raju put a curtain on the door. Respondents Jitender Rohilla, Ramesh Kumar @ Raju and Shashi Bhushan took turns to commit rape on her one after the other whereas Respondent Nizamuddin committed rape on her younger sister 'B'. It is the case of the prosecution that the prosecutrix 'U' became unconscious and regained consciousness after some time. She asked Jitender to drop them at their house. Prosecutrix 'U' informed the IO that the house owner Suresh Chand and his wife Kamlesh did not come to their rescue. Jitender and his three friends threatened both the sisters not to disclose the commission of rape on them to anyone.

3. On their way back, when the two wheeler reached Wazirabad Bridge, she ('U') got down from the two wheeler and jumped in the river Yamuna. She was saved by the boatmen and was taken to Hindu Rao Hospital.
4. In order to establish its case before the learned ASJ, the prosecution examined 22 witnesses. PW-4 prosecutrix 'U' and PW-13 prosecutrix 'B' are the star witnesses of the prosecution.
5. During the course of investigation on 04.04.1998 the police got recorded the statements of both the prosecutrices under Section 164 Cr.P.C. by the Metropolitan Magistrate ('MM'). They gave an entirely different version to the learned 'MM'. In their statements under Section 164 Cr.P.C. they informed the learned 'MM' that they were simply teased and touched by the Respondents No.1 to 4 which was objected to by them. She gave a clean chit to the occupiers of the house and his wife stating that when the lady entered the room, the other persons stopped their activities. With regard to jumping into river Yamuna, prosecutrix 'U' informed the learned 'MM' that on their way back to their house Jitender again started

touching and teasing them. While she jumped from the two wheeler she fell into the river Yamuna.

6. On appreciation of evidence, the learned ASJ found that there are wholesale improvements and contradictions in the statement made by the two girls in their deposition in the Court (as PW-4 and PW-13) and in the circumstances, the case for offence under Section 376 (g) was not established against the accused beyond the shadow of all reasonable doubt. The Respondents were accordingly acquitted of the charge of rape but were convicted under Section 354/34 and 342/34 as stated earlier.
7. It is urged by the learned counsel for the Revisionist that the testimonies of the prosecutrix were corroborated by the medical evidence in the shape of MLC of both the prosecutrices. Thus, the learned ASJ ought not to have attached much importance to the improvements, contradictions and discrepancies in the statement of the two prosecutrices and ought to have convicted the Respondents for the offence punishable under Section 376 (g) IPC.
8. It is no longer *res integra* that the testimonies of victims of sexual assaults cannot be compared with the testimony of an accomplice. The testimony of the victim of a sexual assault must be placed on a higher pedestal than the testimony of an injured. There is no gainsaying that it is very difficult, embarrassing and humiliating for a female particularly an unmarried girl to level false acquisition of rape involving her. I am reminded of the observation of the Supreme Court in *State of Punjab v. Gurmit Singh & Ors. (1996) 2 SCC 384* where the Supreme Court held as under:-

*“8...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. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act 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....”*

9. In the instant case the two prosecutrices leveled allegations of gang rape against the Respondents in their statements made to the police. They made a somersault when their statements were recorded by the learned ‘MM’ under Section 164 Cr.P.C. It is not in dispute that since the registration of the case till the recording of their statements before the learned ‘MM’ under Section 164 Cr.P.C. both the prosecutrices were in the custody of their parents. Prosecutrix ‘U’ in her examination-in-chief tried to wriggle out of the statement made under Section 164 Cr.P.C. on the ground that it was made at the instance of a police officer who visited their house twice and advised them to make the statements as stated by him.
10. Admittedly, no complaint was made by the prosecutrix ‘U’ either to her parents or to any other authority regarding the misconduct of the police officer before she was examined in the Court in the year 2000. Thus, although PW-4 claimed to be under threat of a police officer but she did

not disclose about the same either to her parents or to any other person for two long years. She made a disclosure for the first time when her statement was recorded in the Court during trial on 12.07.2000. Similarly, prosecutrix 'B' although gave an entirely different version in her statement in the Court but at the same time she was firm that she did not lie to the learned 'MM' when her statement under Section 164 Cr.P.C. was recorded (which did not inculcate the Respondent). In view of this contradictory statement made by the two prosecutrices and their shifting stands, the duty was cast on the learned 'ASJ' to scrutinize the evidence of the two alleged victims of sexual assault with extra care and caution and to seek for some assurance if the offence of rape was really committed against them. The two victims during their cross-examination were confronted with their previous statements with regard to improvements and contradictions made by them to which PW-4 and PW-13 had no answers.

11. It is worthwhile to note that in the statement made before the learned 'MM' under Section 164 Cr.P.C. the two victims met Respondent Jitender at Ashok Vihar not at 9:45 PM but at 6:45 PM. In the statement made to the police PW-4 stated that the function was at the house of her friend whereas in her deposition in the Court she stated that the function was at some Banquet Hall. She did not give the name of the Banquet Hall or as to where the same was located. It is highly improbable, rather it is unbelievable that the two young girls aged 16 years and 13-14 years would instead of going to the destination to attend the function would travel on the two wheeler with Respondent Jitender to a far off place in Yamuna Vihar against their wishes.

12. Admittedly, neither of the two girls raised any alarm when they were being taken to the distant place on a two wheeler. In fact, they did not even raise their voice against Jitender taking them to a far off place in Yamuna Vihar. In view of this, the suggestion on behalf of the accused Respondent Jitender that prosecutrix 'U' was in love with Respondent Jitender and that they had accompanied him and 'U' had established physical relationship with him out of her free will and that Jitender and his friends were falsely implicated when Jitender refused to marry 'U' cannot be easily brushed aside.
13. There were contradictions in the statement before the police and the statement in the Court on the aspect of Jitender's friends being already present in the house or reaching their subsequently; contradiction with regard to the place from where Jitender took the prosecutrix; contradiction with regard to venue/place where two victims were to go to attend the function, do cast some doubt in the case of the prosecution.
14. Replying on CFSL Serologist reports Ex.PW-22/A and Ex.PW-22/B the learned counsel for the Petitioners argues that the prosecution version is corroborated by the two reports. A close reading of the same in fact falsifies the case of the prosecution. As per the CFSL report human semen was detected on Ex.1 and Ex.2. Ex.1 is the undergarment of prosecutrix 'U' whereas Ex.2 is undergarment of prosecutrix 'B'. On the undergarment of prosecutrix 'U' the semen found was of 'AB' group. Prosecutrix 'U' as per the prosecution version was gang raped by Respondents Jitender Rohilla, Ramesh Kumar and Shashi Bhushan. Her undergarment was found to be having semen of 'AB' group which pertained to Respondent Nizamuddin. Nizamuddin as per prosecution

version did not commit any rape on prosecutrix 'U'. He committed rape only on prosecutrix 'B'. Similarly, on the under pant of prosecutrix 'B' human semen of 'B' group was deciphered who was allegedly raped by Respondent Nizamuddin, whose blood group was neither 'A' nor 'B' but 'AB'. Thus, the CFSL report does not corroborate the prosecution version rather it gives a dent to the prosecution version.

15. Referring to the MLCs of the two victims, learned counsel for the Petitioners urges that the MLC supports the prosecution version in as much as hymen of both the prosecutrices was found to be torn and as per the report of Dr. Sapna (PW-2) vagina admitted '1' finger. I do not find any corroboration to the prosecution version or even assurance from the MLCs Ex.PW-2/1 and Ex.PW-2/B. The prosecutrix 'U' is alleged to have been gang raped by three persons. She was a young girl of 16-17 years. She was examined on the next day of the alleged sexual assault. If she was really gang raped by three young boys, there would have been some external or internal injuries which were totally absent. Thus, MLCs Ex.PW-2/1 and Ex.PW-2/B also do not lend any corroboration to the prosecution version.
16. It is well settled that ordinarily the High Court does not interfere in an order of acquittal while hearing a Revision under Section 397 Cr.P.C. In its revisional jurisdiction, the High Court may interfere with the order of acquittal in exceptional cases to prevent gross miscarriage of justice or to set right a patent wrong or error of law or fact which would otherwise cause an irreparable injury.
17. The Petitioners have failed to produce any material on record to exhibit that there was any patent error of law or fact committed by the Trial

Court. Even in case of Appeal against an order of acquittal, the High Court interferes with an order of acquittal only when the finding reached by the Trial Court is perverse. Where two views are possible the High Court would not set aside the order of acquittal holding that another view ought to have been taken.

18. As observed above, there are grave doubts in the prosecution version. The order of acquittal does not call for any interference in the revisional jurisdiction under Section 397 Cr.P.C.
19. The Revision Petition is devoid of any merit; the same is accordingly dismissed.
20. Pending Applications also stands disposed of.

**G.P. MITTAL, J.**

**FEBRUARY 27, 2013**

vk