

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

+ **CRIMINAL APPEAL NO. 447/2013**

% **Reserved on:** 3rd March, 2015
Date of Decision: 28th May, 2015

RAJU PORWAL @ ANUP KUMAR Appellant
Through Mr. S.C. Buttan, Advocate.

versus

STATE Respondent
Through Ms. Aashaa Tiwari, APP along with
SI Mohd. Haroon, WSI Sarla and HC Prem
Singh, P.S. Tilak Nagar.

CRIMINAL APPEAL NO. 445/2013

RAKESH @ RAJ Appellant
Through Mr. Sunil Upadhyay and Mr.
Sanjeev Sharma, Advocates.

versus

STATE Respondent
Through Ms. Aashaa Tiwari, APP along with
SI Mohd. Haroon, WSI Sarla and HC Prem
Singh, P.S. Tilak Nagar.

CRIMINAL APPEAL NO. 446/2013

MANMOHAN SINGH @ MONU Appellant
Through Mr. Pankaj Kumar, Advocate.

versus

STATE Respondent
Through Ms. Aashaa Tiwari, APP along with
SI Mohd. Haroon, WSI Sarla and HC Prem
Singh, P.S. Tilak Nagar.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ASHUTOSH KUMAR

SANJIV KHANNA, J:

Raju Porwal @ Anup Kumar, Manmohan Singh @ Monu and Rakesh @ Raj impugn the judgment dated 21st December, 2012, convicting them for offences under Section 376(2)(g) and 328 read with Section 34 of the Indian Penal Code, 1860 (IPC, for short) in the charge sheet arising out of FIR No.136/2008, recorded at police station Tilak Nagar. The appellants also impugn the order of sentence dated 2nd February, 2013, by which the three appellants have been sentenced to imprisonment for life, fine of Rs.5,000/- each and in default of payment of fine, to further undergo simple imprisonment for six months for the offence under Section 376(2)(g) IPC; rigorous imprisonment for 7 years, fine of Rs.3,000/- each and in default of payment of fine, to further undergo simple imprisonment for 3 months for the offence under Section 328 read with Section 34 IPC. Sentences are to run concurrently and benefit of Section 428 of the Code of Criminal Procedure, 1973 (Cr.P.C.) has been granted.

2. To avoid prolixity, we are not reproducing the contentions raised by the appellants in detail, for they shall be examined while dealing with the testimonies of the witnesses and recording our findings. At this stage, it would suffice to notice that the appellants have pleaded innocence and submitted that a false case has been

foisted on them for ulterior motives. It is stated that the prosecutrix had repeatedly changed her version and the flawed versions suffer from inherent contradictions besides being improbable. It is contended that the statement of the witness Mamta (PW4) should be rejected, for she had kept quiet for a long time and for other reasons. Similarly, testimonies of the other witnesses, namely, Bishna Devi (PW1), Sonu (PW9) and Babli (PW21) are alleged to be mutually contradictory and not in consonance with the prosecution case. All prosecution witnesses are sought to be declared unreliable. Medical evidence, it is projected, does not support the trial court findings.

3. The prosecution version, in brief, is that the prosecutrix, a minor girl aged about 12 years, while returning from school on 2nd April, 2008, with her friend and neighbour Mamta (PW4), was taken to an isolated spot in a Maruti Van by the appellants Monu and Raj. The appellant Raju Porwal had followed them on a motorcycle. The prosecutrix was made to have an intoxicating drink and, thereafter, was raped in turn by the three appellants. Mamta (PW4) was an eye witness as she was standing outside the Maruti Van. The prosecutrix started bleeding from her private parts as a result of the sexual assault. After the occurrence, the prosecutrix returned home with Mamta (PW4) and thereupon, spoke to and informed her sister Sonu (PW9) about the incident, who in turn spoke on telephone with the mother of

the prosecutrix, Bishna Devi (PW1), who had gone with her husband to their village in District Etah, Uttar Pradesh. PW1 returned and thereafter, FIR No.136/2008 marked Ex.PW8/A was registered on 3rd April, 2008, at 5 A.M. at police station Tilak Nagar.

4. We begin with the statement of the prosecutrix, whose name has been withheld. She had appeared as PW-2 and her statement was recorded in camera. She was about 12 years old and studying in class-VIII, when her statement was recorded. Before recording her statement, the Court had put some preliminary questions to the prosecutrix. Thereafter, the Court proceeded to record her testimony on being satisfied that the prosecutrix wanted to make a voluntary statement and was capable of answering the questions put to her. The prosecutrix has deposed about the school in which she was studying and the factum that she and her friend Mamta (PW4) were taken in a Maruti Van by the appellants Raj and Monu near a deserted park. The van was being driven by the appellant Monu. Raj and Monu consumed beer and she had soft drink in a glass. Prosecutrix asserted that they had mixed something in the soft drink, as a result of which she became giddy. Raj gagged her mouth with a piece of cloth and had asked Mamta (PW4) to get down from the van. Raj raped her and, thereafter, Monu came inside the van and he too raped her. Thereafter, the appellant Raju Porwal, who had followed the van on

his motorcycle, raped her. The three appellants had threatened Mamta (PW4) and warned her not to speak to anyone. Prosecutrix and Mamta (PW4) were dropped near Subzi Mandi Masjid by the appellants. PW4 left the prosecutrix at her house and on reaching her house, the prosecutrix informed her sister Sonu (PW9) about the incident. Sonu (PW9), thereupon, informed her mother Bishna Devi (PW1) on telephone. Bishna Devi (PW1) returned to Delhi at about 12-1.00 A.M at night and got in touch with the police on telephone. Police came to their house and took the prosecutrix to DDU Hospital for medical examination. PW-2's statement (Ex.PW2/A) under Section 164 Cr.P.C. was also recorded. Due to the sexual assault, the prosecutrix felt pain and had started bleeding at the place of occurrence itself. During her examination in the court, prosecutrix identified her underwear (Ex.P6), four disposable plastic glasses (Ex. P1 to P4) and a beer bottle cap (Ex. P5). She also identified the Maruti Van and the motorcycle used during the incident as Ex. PW4/B and Ex.PW4/C respectively. Noticeably, during the examination-in-chief, the prosecutrix had started feeling uneasy and her mother was called to the court room. The mother had then stated that the prosecutrix had not eaten anything since morning. The prosecutrix testified that she and Mamta (PW4) used to roam with the appellants in their Van in the locality. The appellants would give car rides to the

children. On one previous occasion, the appellants had taken the prosecutrix and PW4 to a temple.

5. Mamta (PW4) was 14 years old, when her testimony was recorded in the Court. PW-4 was asked general questions and on being satisfied that she was not under any pressure, the court had recorded her testimony. She has identically deposed about the occurrence in question and also the factum that on an earlier occasion, the appellant had taken her and the prosecutrix to a temple. Describing the incident, she had stated that the appellant Raju Porwal had followed the van on motorcycle and that the appellant Raj had brought a beer and soft drink. The prosecutrix had the soft drink but PW-4 did not have the same as she feeling unwell. After having the soft drink, the prosecutrix started feeling giddy. One by one, the three appellants had raped the prosecutrix.

6. Learned counsel for the appellants have highlighted and submitted before us that the version given by the prosecutrix and Mamta (PW4) should be disbelieved, for the prosecutrix had stated that she was first raped by the appellant Monu, then by the appellant Raj and lastly by the appellant Raju Porwal, whereas as per Mamta (PW4), the prosecutrix was first raped by the appellant Raj, then by the appellant Monu and lastly by the appellant Raju Porwal. We do

not think that the aforesaid difference in the sequence is material and should distract us from the substratum of the testimony and assertions made by both the prosecutrix and PW4. One can easily visualize and understand how the occurrence would have taken place and the trauma and stress, which the prosecutrix and Mamta (PW4) would have gone through at that time and thereafter. The fact is that the prosecutrix and the eye witness i.e. Mamta (PW4) have both *in seriatim* narrated that the three appellants had committed rape, one after the other, in the Maruti Van and at that time, PW4 was standing outside. This is the core and edifice of the testimony of the said witnesses. PW4 had stated that the prosecutrix was crying and bleeding from her private parts and that they were dropped at Keshopur Subzi Mandi. The prosecutrix, in fact, was not even able to properly walk at that time and was constantly crying.

7. Another aspect highlighted by the appellants is the difference in the version given by the prosecutrix's mother in her statement marked Ex.PW1/A, which became the FIR (Ex.PW8/A) and statements made by the prosecutrix. Our attention was drawn to the statement of the prosecutrix under Section 164 Cr.P.C. to highlight the purported discrepancy in the versions given by the prosecutrix in the Court, her statement under Section 164 Cr.P.C. marked Ex.PW2/A and in the FIR marked Ex.PW8/A. The FIR in question was recorded on the

basis of the statement made by Bishna Devi (PW1), mother of the prosecutrix. The statement records that she was illiterate and the prosecutrix, aged about 12 years, was her second child, studying in class-VII. On 30th March, 2008, Bishna Devi (PW1), along with her husband, had gone to their village. At about 4.40 P.M. on 2nd April, 2008, Sonu (PW9) had called her and asked her to return immediately. After returning, PW1 found that the prosecutrix was crying and she narrated the occurrence to her. Bishna Devi (PW1) in her statement (ExPW1/A), has referred to the presence of Mamta (PW4) at the place of occurrence and had named the appellants Raj, Monu and Raju Porwal. The appellants Raj and Monu had taken the prosecutrix and Mamta (PW4) in a Maruti Van and the appellant Raju Porwal had followed them on his motorcycle. However, Bishna Devi (PW1) in Ex.PW1/A, had stated that Monu, Raj and Mamta (PW4) had alighted from the vehicle as the appellant Raju Porwal wanted to speak to the prosecutrix. The appellant Raju Porwal came inside the Maruti Van and had raped the prosecutrix in spite of resistance. Blood had started oozing and only thereafter, the appellant Raju Porwal fled and ran away on the motorcycle. After some time, Monu, Raj and Mamta (PW4) came there and the prosecutrix had thereupon revealed to them what had happened. The prosecutrix and Mamta (PW4) were dropped near the Masjid and on reaching home, the prosecutrix narrated the

incident her sister Sonu (PW9). The FIR, at the behest of Bishna Devi (PW1), thus states that only the appellant Raju Porwal had committed rape, and the said statement does not attribute the actual act of rape by the appellants Monu and Raj. As noticed above, the said FIR was registered on the basis of the statement of Bishna Devi (PW1) and not on the statement of the prosecutrix (PW2).

8. The prosecutrix, in her statement under Section 164 Cr.P.C., had deposed that she and Mamta (PW4) were taken by the appellants Raj and Monu in a Maruti Van near a secluded park. In this statement, the prosecutrix had clearly stated that the appellants Raj and Monu had committed rape on her and that she was earlier made to have a soft drink, after which she felt giddy. The appellants, Raj and Monu, had gagged her mouth with a cloth so that she could not make any noise. With regard to the appellant Raju Porwal, the prosecutrix had stated that she could not remember whether he had committed rape or not. Mamta (PW4) was standing outside the van. Prosecutrix had affirmed that she was bleeding and her clothes had become dirty. The said statement of the prosecutrix under Section 164 Cr.P.C. marked Ex.PW2/A was recorded on 5th April, 2008. Statement of Mamta (Ex.PW4/A) was also recorded under Section 164 Cr.P.C. by the Metropolitan Magistrate on 17th April, 2008. She affirmed the fact that she and her best friend PW2, were given lift by the appellants Raj

and Monu in a Maruti Van and the appellant Raju had followed them on a motorcycle. They had also offered them some drink in cups. Thereafter, they made Mamta (PW4) alight from the vehicle near a park. The appellants Raj and Monu stood next to her. At that time, the appellant Raju was with the prosecutrix in the vehicle. From the glass, PW4 could see that the appellant Raju was committing rape on the prosecutrix, who was crying. After the appellant Raju came out, the appellant Raj went inside the vehicle and after gagging her mouth, he too raped the prosecutrix. Thereafter, Monu raped the prosecutrix. Later on, the prosecutrix and Mamta (PW4) were dropped at the bus stand. The prosecutrix was crying and was consoled by her. Blood was oozing from the private parts of the prosecutrix.

9. In *Narender Kumar v. State of NCT of Delhi* (2012) 7 SCC 171, it was observed that the cases like the present one, should be dealt with utmost sensitivity, examining the broader probabilities without getting swayed by minor contradictions or any insignificant discrepancies in the evidence of the witnesses, which are not of a substantial character. Similar opinion was earlier expressed by the Supreme Court in *Radhu v. State of Madhya Pradesh* (2007) 12 SCC 57.

10. The prosecutrix in her Court deposition had asserted that when

she had narrated the incident to her sister Sonu (PW9) and mother Bishna Devi (PW1), she had named one appellant, as she was terrified and shocked. It is also noticeable that the MLC of the prosecutrix marked Ex.PW3/A was prepared on 3rd April, 2008, at about 4 A.M. The MLC (Ex.PW3/A) records alleged history of sexual assault by three persons at about 4 P.M. on 2nd April, 2008, as given by the patient herself. No doubt, the words 'by 3 persons' have been recorded after putting a mark, but they are in the same pen and handwriting of Dr. Pooja, who had appeared as PW6. The FIR in question, it is pertinent, was recorded on 3rd April, 2008 at 5 A.M. in the morning. Dr. Pooja (PW6) deposed that she had examined the prosecutrix aged 12 years as she had been referred to her for gynecological examination. The prosecutrix was bleeding from her private parts and her underwear was soaked with blood. The prosecutrix did not permit internal examination, which was later done under anesthesia. Slides taken from the vagina, pubic hair clipping and undergarments were sealed and handed over to ASI Sarla. PW6 proved the MLC (Ex.PW3/A) and the discharge summary marked Ex.PW6/A. She affirmed that notings on the MLC including the portion recording "sexual assault by three persons" was in her handwriting. She asserted that the portion mark 'C' i.e. 'by 3 persons', was recorded then and there. The said history as recorded in

the MLC was given by the patient herself. Therefore, it is clear that as per Dr. Pooja (PW6), the patient i.e. the prosecutrix, at that time, i.e. on 3rd April, 2008 at 4 A.M., had clearly stated that she had been sexually assaulted by three persons on 2nd April, 2008 at 4 P.M. The MLC records that at that point of time, no active bleeding point could be seen. Doctor's opinion that possibility of sexual intercourse could not be ruled out, stands noted. The prosecutrix was directed to be admitted in the gynecology ward to observe bleeding. The hymen was found to be torn and mild bleeding was seen through the vaginal introitus. (The MLC opinion has been examined in paragraph 23, *infra*).

11. In view of the aforesaid factual position, it is apparent that the prosecutrix had hesitated and at the initial stage and had not revealed the complete facts even to her mother Bishna Devi (PW1) or to her sister Sonu (PW9). The said hesitation and reluctance is understandable and can be best comprehended, if we keep in mind, the trauma, pain and suffering which the prosecutrix had suffered. Perceptibly but regrettably, the prosecutrix somehow had a feeling that she should not have gone in the Maruti Van or had the drink, which was offered to her and consumed by her. This explains the initial trepidation and fright in accusing the appellants Raj and Monu, and the so called improvements and alleged exaggerations, which

were sought to be highlighted by the appellants. In *Mohd. Iqbal v. State of Jharkhand* (2013) 14 SCC 481, the Supreme Court observed that victims in such cases suffer loss of self-esteem and ironically, have to deal with the wrath of social stigma, which has devastating effect besides psychological trauma and depression. It is unfortunate but true that the survivors sometimes suffer from a feeling of self-blame, especially when they were close to and had reposed faith in the perpetrator or considered him to be a friend. This feeling of guilt, regret and self-blame, affects their decision to reach out and speak in precise terms. They may feel humiliated and embarrassed, when questions are asked by her family members, acquaintances and others. She may suspect and labor the belief that she would be perceived to be a deviant, for not knowing better or for not listening. Such situations require deft, skillful and sensitive handling which, in many cases, may be missing. We have to, therefore, recognise and take cognizance of the prosecutrix's initial uneasiness and discomfort in stating that she was raped by three persons. We should also recognise that it would have been a traumatic and harrowing experience for the prosecutrix to narrate the occurrence once again when her statement under Section 164 Cr.P.C. was recorded. Her nervousness and hesitation is apparent when we examine the statement under Section 164 Cr.P.C. marked Ex.PW2/A (she had hesitated about Raju Porwal) and the facts which

she had first narrated to her mother Bishna Devi (PW1), as recorded in Ex.PW1/A. The prosecutrix even when her court deposition was being recorded on 24th April, 2009, felt dreighed and stigmatized. The prosecutrix felt giddy and her mother had to be called inside and recording was deferred for half an hour. The prosecutrix's mother had then stated that the prosecutrix had not eaten anything since morning. Thus, we would rely upon what is stated on oath by PW2 in the court deposition and asseverated by the MLC (Ex.PW3/A) which specifically states 'sexual assault by three persons'. Mamta (PW4)'s court deposition also supports and affirms the testimony of the prosecutrix.

12. What we have stated would be equally true and applicable when we appreciate and comprehend the testimony of Mamta (PW4). She has named and implicated the three appellants as the persons who had committed rape on the prosecutrix. However, the description of the order in which the three appellants had committed rape was different from the order given by the prosecutrix. Keeping in view, the vulnerable age of Mamta (PW4) and the prosecutrix and what had transpired, we do not think that the difference in the said order would constitute or can be treated as a good ground to disbelieve and discard the testimonies of PW4 and the prosecutrix or to hold that the three appellants had not actually committed the wrongful act.

13. The prosecutrix, in her cross-examination, had not deviated from her statement recorded during the examination-in-chief. She affirmed the fact that she knew the appellants Monu, Raj and Raju and had seen the three appellants. She affirmed having visited Chattarpur Temple along with the appellants Raj and Monu and Mamta (PW4). She accepted that her statement under Section 164 Cr.P.C. marked Ex.PW2/A was incorrect, but this was in a different context. As noticed above, in the said statement, she was unable to recollect and state whether the appellant Raju Porwal had raped her, but she had clearly indicted the appellants Raj and Monu. In her cross-examination conducted on 26th February, 2010, the prosecutrix affirmed that the appellant Raj was the first one to commit rape. Mamta (PW4) in her cross-examination, which withstood all questions, had affirmed the purchase of beer and soft drink and the fact that the van was taken to a deserted park. She accepted that the appellant Raj had taken beer and had offered a soft drink to her and the prosecutrix. She affirmed that the appellant Raj had made the prosecutrix drink beer from a glass. She denied the suggestion that the appellant Raju Porwal had not raped the prosecutrix and affirmed that no one was present in the park at the time of occurrence, as the same was deserted. The prosecutrix was in her school uniform, whereas PW4 was wearing casual clothes. She affirmed that she knew the

appellant Monu for about a month and the appellant Raj had introduced her to the appellant Monu. Both of them knew that PW4 knew the prosecutrix, who was her good friend. The prosecutrix was in fact, studying in class-VII and PW4 was studying in class-VI as she had failed once. Their school timings were the same and earlier on 3-4 occasions, she and the prosecutrix had taken rides in the Maruti Van of the appellant Monu. PW4 testified that her mother was working in an export company at Khyala and used to leave for work at about 9 A.M. and return by 6-7 P.M. Her brother was also working and would return late at night. On 1st April, 2008, PW-4, prosecutrix and the three appellants had roamed in the locality in the same vehicle and PW-4 had noodles, for which money was paid by the appellant Raj. It is noticeable that the said answers were in response to specific suggestions given on behalf of the appellant Monu to PW4.

14. Bishna Devi (PW1), mother of the prosecutrix, had affirmed that she had gone to her village and had received a telephone call from her daughter Sonu (PW9) and, thereafter, they came back to Delhi. The prosecutrix had then informed PW-1 that a boy named Raju had committed rape on her. Later on, when the prosecutrix gained in confidence, she gave the names of the appellants Raj and Monu and accepted that they had also raped her in the vehicle. On cross-examination by the Additional Public Prosecutor, PW1 had accepted

that the prosecutrix and Mamta (PW4) used to go to school together. In her cross-examination, PW-1 had accepted that she had returned with her husband to Delhi, at about 12 midnight and had reached their residence at about 2-2.30 at night. The prosecutrix had then narrated the incident to her. She had gone to the police station with Sonu (PW9) to make a complaint and from the police station, they went to the DDU Hospital along with 2-3 police officers. When PW1 had gone to the police station, the prosecutrix was at home with her landlady. The prosecutrix later reached the hospital and had also gone to the police station on the same day. Prosecutrix, at that time, was not in a position to speak and had remained in the hospital for about 4 days. PW1 deposed that she did not previously know the appellant Raj @ Rakesh.

15. Sonu (PW9) was about 18 years of age when her testimony was recorded on 3rd August, 2010. She had stated that her sister, the prosecutrix, returned home at about 4 P.M. on 2nd April, 2008, and had informed her that the appellant Raju Porwal had committed rape on her. The prosecutrix was perplexed and terrified and was bleeding from her private parts. As their mother was not at home, PW9 spoke to her on telephone and had asked her to come back from the village. Later on, her mother called the police. Her sister was taken to the hospital by the police. She had also gone to the hospital. The

prosecutrix had informed the doctor that three persons had committed rape on her. During her examination in the Court, PW9 had named Raju Porwal and Monu but she could not recollect or name the third person. On a leading question being asked, PW9 gave the name of the third person as Raj. Her statement was recorded at DDU Hospital at about 5 P.M. Police had also recorded the statement of the prosecutrix in the hospital. Sonu (PW9) knew Mamta (PW4) and stated that the prosecutrix had told her that PW4 was also with her at the time of the incident. Her mother had visited the house of Mamta (PW4) but she did not visit their house. When the prosecutrix was medically examined, PW9 was standing outside and no one was present with the prosecutrix at that time. The prosecutrix had named the three perpetrators to the police in her presence. PW9 denied the suggestion that the prosecutrix had not given names of the appellants Raju and Monu.

16. Babli (PW21) is the mother of Mamta (PW4). She is a widow. She had stated that on 3rd April, 2008, at about 9.30 P.M., her daughter Mamta (PW4) had informed her that the three appellants had raped Mamta's friend in a van. Learned counsel for the appellants had referred to this deposition of PW21 and urged that Mamta (PW4) had returned home and informed PW21 about the occurrence at about 9-9.30 P.M. and not earlier. The said assumption is not correct. PW4

had stated that her mother Babli (PW21) was working and used to come back home at about 6-6.30 P.M. PW21 had deposed that about 9-9.30 P.M., she was in her house along with her children. Words 'at about 9.30 P.M., she came back' probably refers to PW21's return to the house and thereafter PW4 had informed PW21 about the occurrence. PW21, in her cross-examination, had stated that she had returned home at about 4 P.M. and had searched for Mamta (PW4), but one would not give much importance and credence to the said assertion to negate the prosecution case and the overwhelming evidence including the testimony of the prosecutrix, Mamta (PW4) and Sonu (PW9). In any case, this minor confusion about the time, would not justify ignoring and erasing PW4's or PW21's testimony on the material aspects. Babli (PW21) had specifically asserted that she had rebuked her daughter, which would indicate cause for delay in disclosure, if any. Mamta (PW4) had then informed PW21 that she had suffered no harm. PW21 had gone to the house of the prosecutrix but her mother was not present. Thereafter, she came back. Later on, she had narrated the facts about the occurrence to the police. In her cross-examination by the Additional Public Prosecutor, PW21 affirmed that the prosecutrix was bleeding and her skirt had blood stains. PW21 accepted that the house of the prosecutrix was at a distance of two streets from her house. Mamta (PW4) and another girl

used to go together to school at about 8 A.M. and return at 12.30-1.00 P.M. They did not have any telephone in their house and they were not on visiting terms with the family of the prosecutrix. PW-21 was cross-examined extensively by the counsel for the appellant Raj on the assertion of false implication for personal reasons and malice. PW21 affirmed having sold her house to arrange for finance for the marriage of her daughter Pooja. The said daughter had got married a month after the occurrence in question. PW21 accepted that Pooja had on 1st November, 2006, filed a complaint resulting in registration of FIR No.821/2006 at police station Tilak Nagar under Sections 376/506 IPC. PW21 had appeared as a witness in the said case. She accepted that she knew the appellant Raj and her mother from before, but denied the suggestion that she had proposed marriage of Pooja with the appellant Raj. She denied the suggestion that the said proposal did not fructify due to registration of the FIR mentioned above and on this account, she and her family members were hurt and agitated. She denied the suggestion that the prosecutrix had named the appellant Raj at her instance. She accepted as correct the suggestion that the appellant Raj had shifted from the colony after registration of FIR No.821/2006, but he used to come and remain in the colony occasionally. The suggestion given and the answer would reflect that the reference to the FIR was to indicate the date. Pooja had married

Om Prakash Chauhan and the FIR filed by Pooja was against one Surender Rai, whom she knew but was not on visiting terms. She denied the suggestion that the appellant Raj had been falsely implicated by her in order to take revenge as the appellant Raj had refused to marry her daughter Pooja.

17. We have intently examined the cross-examination of Babli (PW21) and scrutinized the statements of the defence witnesses, namely, SI Rajni Chopra (DW1), Kavita (DW2), Vijay Kumar (DW3) and Rajiv (DW4). The alibi pleaded by the appellant Raj and the alleged motive of false implication by the prosecutrix is rather far-fetched and fanciful. Mamta (PW4) apparently has a sister named Pooja. The said Pooja had made a complaint against one Surender Rai, which had resulted in registration of the FIR No.821/2006 under Sections 376/506 IPC on 1st November, 2006 at police station Tilak Nagar. The said FIR was not against any of the appellants or their family members. It appears that there was some compromise subsequently. Pooja got married to one Om Prakash Chauhan. No doubt, Mamta (PW4) knew the prosecutrix and they were good friends but this cannot be a ground to assume and accept the implausible suggestion that the prosecutrix had falsely implicated the appellant Raj because he had refused to get married to the sister of Mamta (PW4).

To accept this suggestion based on contrived and baseless

insinuations, would result in miscarriage of justice

18. SI Rajni Chopra (DW1) had asserted with regard to the case in FIR No. 821/2006 at Police Station Tilak Nagar, that Pooja did not support the prosecution case in her statement under Section 164 Cr.P.C. and that one Surender Rai was the main accused in FIR No.821/2006. Pooja had made allegation of rape in her statement under Section 161 Cr.P.C. and had supported the prosecution case during trial. DW1 did not know the appellants Raj, Monu and Raju. Kavita (DW2) is wife of the appellant Raj and had married him on 7th November, 2011 i.e. after the FIR in question was registered. DW2 had claimed that the appellant Raj was with her on 2nd April, 2008 from 11 AM to 9 P.M. as he loved her and was her fiancée. Later on, she came to know about the case and that Raj had been falsely implicated. She had gone to the police station and had stated the facts to the police officers, but was asked to appear before the Court as a witness. DW2, in her cross-examination, accepted that she had not made any written complaint to the police and that her husband Raj had not disclosed about any previous enmity with the prosecutrix.

19. Vijay Kumar (DW3) had claimed that on 4th October, 2008, parents of the prosecutrix had admitted that they had falsely implicated the appellant Raju Porwal and had demanded Rs.5 lacs for

deposing in favour of the appellant Raju Porwal. DW3, in his cross-examination, claimed that the meeting was held in the house of the appellant Raju and was attended by his uncles, but he could not give their names. No written complaint was made by the family members of the appellant Raju Porwal regarding the demand of Rs.5 lacs by the family members of the prosecutrix. We do not think that the statement of DW3 merits acceptance. His statement lacks credibility. Similarly, statement of Rajiv (DW4) does not help the appellant Raju Porwal. He had also deposed about the alleged meeting on 10th April, 2008 and that the parents of the prosecutrix had demanded Rs.5 lacs from the father of the appellant Raju Porwal for a compromise. In his cross-examination, DW4 had accepted that he did not know of any reason for the alleged old enmity between the parents of the prosecutrix and Raju Porwal. He accepted that no written complaint was made regarding the demand of money by the parents of the prosecutrix. He also accepted that he had cordial relations with Raju Porwal and used to attend their family functions.

20. The FSL reports Ex.PW15/H1 and H2 opine that human semen was detected on the underwear of the prosecutrix as well as on the underwears worn by the appellants Raj, Raju and Monu. However, the blood group of the semen stains on the underwear of the prosecutrix remained inconclusive. The FSL report was proved by

ASI Sarla (PW15). Presence of semen stains on the underwear of the prosecutrix corroborates her version that she was raped.

21. Learned counsel for the appellants have submitted that as per the FSL report Ex.PW22/A, presence of alkaloids, barbiturates or tranquilizers could not be detected on the plastic disposable tumblers/glasses and the beer bottle cap. This, according to us, would not affect the prosecution version or dent the statement made by the prosecutrix and Mamta (PW4) regarding her intoxication and that the soft drink given to the prosecutrix was laced with some intoxicant. In fact, Mamta (PW4) had deposed in her cross-examination that the prosecutrix aged about 12 years was made to drink beer. The aforesaid recovery, as per ASI Sarla (PW15), was made on 3rd April, 2008, from the Maruti Van. This was after about 24 hours's time gap. The said recovery from the Maruti Van after one day is highly improbable and we feel that this recovery should not be accepted. No one would have left the said evidence in the Maruti Van after the occurrence. Plastic glasses/tumblers and beer bottle cap are throw-away items and do not have any value.

22. Learned counsel for the appellants have submitted that Dr. Pooja (PW-6), in her cross-examination, had with reference to the medical examination of the prosecutrix, stated that in the present case, bleeding appeared to a periodical bleeding and not on account of any

injury and that she could not give any opinion regarding the time of the assault. Our attention was drawn to the discharge summary marked Ex.PW-6/B, wherein it is recorded that “locally hymen was torn, old tear”. Dr. Pooja (PW-6), in her cross-examination had stated that her finding that the possibility of sexual intercourse cannot be ruled out was recorded on the observation that the hymen was torn. As per the discharge summary (Ex.PW6/B), prosecutrix had remained admitted in the hospital for two days i.e. on 3rd April, 2008 and 4th April, 2008. The version given by Bishna Devi (PW1) that the prosecutrix had remained in the hospital for four days is therefore incorrect. However, it would be incorrect to state that the medical and physical condition of the patient did not require any attention and treatment. On the question whether the bleeding was on account of periods, the discharge summary records a question mark. The MLC (Ex.PW3/A) recorded after the admission and gynaecological examination of the prosecutrix, specifically mentions that mild bleeding was seen through vaginum introitus and the possibility of sexual intercourse cannot be ruled out. This opinion and inference was drawn at about 4 A.M. on 3rd April, 2008. On the question whether the prosecutrix was subjected to sexual intercourse, we would prefer to rely upon the contemporaneous noting made by PW6 at the time of admission and immediately after the gynecological

examination of the prosecutrix. At that time, PW6, as a doctor, had physically and clinically examined the patient and interacted with her before recording her opinion. The contention of the appellants that the prosecutrix did not suffer any external injuries cannot be accepted as a sufficient or good ground to reject the compelling depositions of the prosecutrix (PW2) and Mamta (PW4). The medical evidence as noted below supports the allegations against the appellants. Further, in case of children, who are incapable of offering much resistance, external marks of violence may not exist. (See Modi's *Medical Jurisprudence and Toxicology*, 22nd Edition at page 502).

23. With regard to the age of the prosecutrix, the age certificate issued by Municipal Corporation Modern School, Khyala Colony (Ex.PW-7/D) mentions that as per their record, the date of birth of the prosecutrix is 7th March, 1996. It is, therefore, clear that the prosecutrix was not even a teenager on the date of the occurrence.

24. On the question of sentence, looking at the tender age of the prosecutrix, the faith she had reposed in the appellants Raj and Monu, the manner in which the offence was committed and the factum that there were three perpetrators, we would uphold the punishment of imprisonment for life for the offence under Section 376(2)(g) of the

IPC. We also maintain the other sentences. The sentences will run concurrently and Section 428 Cr.P.C. shall apply.

25. The appeals are accordingly dismissed. Trial court record will be sent back.

(SANJIV KHANNA)

JUDGE

(ASHUTOSH KUMAR)

JUDGE

MAY 28th, 2015
NA