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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : AUGUST 14, 2015

DECIDED ON : SEPTEMBER 10, 2015

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CRL.A. 679/2005 & CRL.M.A.No.8422/2005

BHAKTI RAM PANDEY

..... Appellant

Through : Mr.Pramod Kharwar, Advocate
with Mr.Sher Singh, Advocate.

VERSUS

STATE

..... Respondent

Through : Mr.Amit Ahlawat, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

CrI.M.A.8422/2005

(1) For the reasons mentioned in the application, the delay in filing the appeal is condoned.

(2) Application stands disposed of.

CrI.A.679/2005

1. Aggrieved by a judgment dated 31.1.2005 of learned Additional Sessions Judge in Sessions Case No.9/2000 arising out of FIR 257/99 registered at Police Station Kamla Market by which the appellant was

convicted under Section 109 read with Section 376 IPC, he has filed the instant appeal. He was sentenced to undergo RI for seven years with fine ₹5,000/- by an order dated 01.02.2005.

2. Briefly stated the prosecution case as reflected in the charge-sheet was that on 10.07.1999 at around 1.25 p.m. when ASI Hari Parkash of Police Station Kamla Market was present at Kotha No.56, First Floor, G.B.Road for investigation of a case, 'X' (assumed name) surfaced there and recorded her statement. Eleven other girls present also recorded their statements. In her complaint Mark 'A', 'X' implicated the appellant, Uma and Vishnu for committing various offence under Sections 363/366/368/372/ 373/376/342/506/109/120-B IPC and Sections 3,4,5 & 6 ITP Act. After making endorsement (Ex.PW-7/A), the Investigating Officer lodged First Information Report. The victims were medically examined. Statements of witnesses conversant with the facts were recorded. The appellant along with Uma and Vishnu were arrested. Upon completion of investigation, a charge-sheet was filed against all of them for the commission of afore-said offences. By an order dated 4.5.2000 various charges were framed against the accused persons to which they pleaded not guilty and claimed trial. The prosecution examined seven witnesses to substantiate its case. In 313 statements, the accused persons

denied their involvement in the crime and pleaded false implication. It is relevant to note that during trial, Vishnu expired and proceedings against him were dropped as 'abated'. After considering the rival contentions of the parties and appreciating the evidence on record, the Trial court acquitted Uma of all the charges. The appellant was also acquitted of the charges under Section 366 read with Section 368/376/506 IPC and Sections 4 & 5 of the ITP Act. State did not challenge the acquittal.

3. I have heard the learned counsel for the parties and have examined the file. Undisputedly, none of the victims of their own had lodged the FIR. When PW-7 (Hari Parkash) along with Ct.Balwan (PW-2) and PW-1 (Lady Ct.Krishna) was present in connection with investigation of a case whose particulars have not been disclosed at Kotha No.56, G.B.Road, First Floor at around 1.25 p.m., 'X' lodged complaint Mark 'A'. Eleven more girls were recovered from the said 'kotha' and their statements were reduced into writing. At the time of recovery of the complainant and other victims from the 'kotha', no independent public witness was associated despite their availability. Undisputedly, the police officers used to visit the said 'kotha' in routine before that. PW-1 (Lady Ct.Krishna) admitted to have visited the said kotha on 7.7.1999 and thereafter before 10.07.1999. She further admitted to have participated in

many raids conducted at Kotha at G.B.Road. None of the complainant or other witnesses came forward on 07.07.1999 to lodge any such complaint against the appellant. The Investigating Officer was unable to produce complainant 'X' for examination before the Court despite various opportunities granted. Contents of the complaint mark 'A', thus, remained unproved. The Investigating Officer also failed to produce other victims except PW-4 'S' (assumed name). 'S' herself had not lodged any complaint any time to bring police machinery in motion. Adverse inference is to be drawn against the prosecution for not producing prosecutrix/complainant and other victims.

4. Undeniably, 'S' aged 22 years on the day of incident was major. She had travelled along with one Dilip from West Bengal to Delhi long back. During investigation, Dilip's role in the occurrence was not ascertained and he was not implicated. The investigating agency did not examine 'S's parents to establish as to how and under what circumstances, she left her house without informing them. The exact date when she was brought from West Bengal to Delhi by Dilip has not come on record. At no stage, 'S' lodged any complaint against Dilip or other perpetrators of the crime. She continued to stay for sufficient duration in the said 'kotha'. Nothing emerges to infer if she ever attempted to come out of the 'kotha'.

or was forcibly prevented to do so by the appellant. 'S' did not explain as to why she continued to remain in the 'kotha' despite having opportunity to escape particularly when the appellant lived at a far distance along with his family.

5. In her 161 Cr.P.C. statement, 'S' disclosed that Dilip had sold her to the appellant for a sum of ₹10,000/- after abducting her on the pretext to provide her job at Delhi. After that, he (the appellant) committed rape twice upon her against her wishes and threatened to kill if she disclosed the incident and pushed her into prostitution. However, in Court statement, she made vital improvements. She implicated Vishnu (since expired) and Uma (since acquitted) also. She deposed that Dilip had left her at the appellant's residence where she was kept for about a month. There the appellant committed rape upon her. He started sending customers to have physical relations with them for money consideration to be retained by him and on her refusal, he used to beat her. In the cross-examination, she introduced a new story that after Dilip had given her something to eat, she became unconscious and was brought to Delhi. She was left at appellant's house where he sexually assaulted her.

6. Statement of the victim 'S' was found deficient by the Trial Court to convict the appellant for committing rape upon her at his

residence. He was also acquitted of the offences under Sections 3,4,5 & 6 ITP Act. 'S' did not testify if she was sold by Dilip for ₹10,000/- to the appellant. No evidence has surfaced if the appellant was the owner of Kotha No.56 or used to remain present there or abetted 'S' to have physical relations with any customer. No such customer/principal offender has been identified or implicated. The customer (if any) apparently was not guilty of 'rape' as 'S' allegedly had physical relations with her free consent albeit for money consideration. On the date of raid on 10.07.1999, the appellant was not present in the 'kotha'. The investigating officer did not collect any document to prove if the appellant had any connection with the said 'kotha' and was a regular visitor. Uma, who used to remain present in the 'kotha' to manage the affairs has since been acquitted by the Trial Court. Vishnu was also alleged to be the Manager of the kotha. It is unclear which of the accused was in control of the affairs of Kotha No.56 and if so since when. 'S' did not elaborate as to when the appellant had aided, abetted or facilitated the commission of rape upon her. She never lodged any complaint any time to allege if she was black-mailed any time by the appellant by adopting any means. It is necessary to prove that the act abetted was committed in consequence of the abetment. It is highly unsafe to convict the appellant on the wavering statement of the witness

‘S’ who was not relied upon found reliable to convict the appellant for commission of offence under Sections 363/376 IPC at his residence. The Trial Court was of the view that it was not at all believable that the appellant would commit rape upon ‘S’ in the presence of his wife and sister.

7. Soon after recovery from the kotha ‘S’ was medically examined. However, no visible external injuries were found on her body, it falsifies her version of physical torture. ‘S’'s statement has not been corroborated by any other victim.

8. Considering the various deficiencies in the prosecution case, conviction and sentence recorded by the Trial Court can't be sustained. The appeal is allowed and the appellant is acquitted giving benefit of doubt.

9. Trial Court record be sent back forthwith along with the copy of this order. Intimation be sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

SEPTEMBER 10, 2015

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