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

Judgment Reserved on: May 26, 2016

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Judgment Delivered on: May 31, 2016

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CRL.A. No.834/2015

RAJENDER KUMAR

..... Appellant

Through : Mr.S.B.Dandapani, Advocate.

Versus

STATE

..... Respondent

Through : Mr.Kewal Singh Ahuja, APP for the
State.

PRATIBHA RANI, J.

1. This appeal has come up for hearing pursuant to the directions issued for expediting hearing in appeals filed by persons in custody (with sentence more than five years and upto seven years).
2. The appellant has preferred this appeal against the judgment dated 23.05.2015 and order on sentence dated 25.05.2015 whereby he has been convicted for committing the offence punishable under Section 376/506 IPC and sentenced to undergo RI for seven years with fine of ₹ 5,000/- and in default of payment of fine, to undergo SI for one year for the offence punishable under Section 376 IPC and further to undergo RI for three years for the offence punishable under Section 506 IPC.
3. Case FIR No.45/2014 under Sections 376/506 IPC has been registered

at PS Bara Hindu Rao on the basis of statement made by the Prosecutrix 'VS' aged about 38 years wherein she stated that she started residing at Kabir Basti, Malka Ganj, Delhi 3-4 months prior to this incident. She is having three sons, eldest being 18 years old, second son being 17 years old and third son being 8 years old at that time. While the two elder sons were from her first husband who had divorced her, the youngest son was from her second husband. She was working in J.P. Building at 4th Floor on monthly salary of ₹4500/- and was doing the job of cutting and stitching of '*taat patti*' (*Jute sheets*). She had not received her salary for the preceding two months.

4. On 27.03.2014 at about 10.00 am, she reported for duty and worked till 5.00 pm. While she was sitting on the floor and doing her work, all of a sudden appellant Rajender came from behind, pulled her and she fell on the '*taat*'. Then she tried to raise alarm, he gagged her mouth with her chunni. He also picked up the knife lying there for cutting '*taat patti*' and threatened to kill her. He also cut *nada* of her *salwaar* with knife and pulled *salwaar* upto her knees and after opening his pant, mounted on her and raped her. He also threatened her to face dire consequences if she disclosed the incident to any person and left thereafter. She called Police Control Room. She was taken to Hindu Rao Hospital where she was medically examined.

5. During investigation, the appellant was arrested and after completion of investigation, chargesheet was filed against the appellant for committing the offences punishable under Section 376/506 IPC.

6. After trial, believing the testimony of the Prosecutrix, the appellant was convicted for committing the offence punishable under Sections 376/506 IPC and sentenced in the manner state above.

7. Mr.S.B.Dandapani, learned counsel for the appellant from DHCLSC has submitted that Prosecutrix had been working with the appellant for the past many years. She was having illicit relationship with the appellant and his cousin Ashok Kumar. Earlier she had blackmailed Ashok Kumar by calling the police but thereafter she settled with Ashok Kumar after taking money from him. He has further submitted that on the date of incident the Prosecutrix had consensual physical relations with the appellant. But thereafter she demanded ₹50,000/- for which the appellant refused as he was not having that much money at that time. She threatened to inform the police. On failure of the appellant to pay the amount as demanded immediately, she has falsely implicated him in this case though the illicit relations of the appellant and Ashok Kumar with the Prosecutrix had been for past many years. It has been further submitted that the Prosecutrix had been even visiting and staying at the house of Ashok Kumar in Rohtak. The appellant and Ashok Kumar had also attended the marriage of daughter of the Prosecutrix in Lucknow. While giving the details of her children, she deliberately withheld the fact of having a married daughter. It has been contended that it is a case of having illicit relationship with the Prosecutrix with her consent and in such circumstance, no case under Section 376/506 IPC could be said to have been proved against the appellant hence he may be acquitted.

8. Mr.Kewal Singh Ahuja, learned APP for the State has submitted that the Prosecutrix in this case was threatened with a knife which was lying there. The appellant was employer of the Prosecutrix and while she was working, he committed rape on her under the threat to kill her with the knife and left thereafter. She called the PCR herself and had it been a case of

consent, there was no question of PCR being informed by her. He has further submitted that in this case, statement of PW-6 Shabnam who was residing at the 5th Floor also shows that the Prosecutrix visited her and informed about the rape being committed by the appellant. Thus, there is no reason to disbelieve the testimony of the Prosecutrix and the appeal may be dismissed.

9. I have considered the rival contentions. The first question that arises for consideration is whether it is a case of Prosecutrix having illicit relationship with the appellant or rape being committed by the appellant on his employee.

10. The MLC Ex.PW2/A of the Prosecutrix was prepared on 27.03.2014 at 7.15 pm at Hindu Rao Hospital. The history given by her is to the following effect:-

'Pt. gives h/o of sexual assault by her owner at work place named Rajender at around 5 pm today when she was working at her workplace.

According to her, he grabbed, gagged her mouth with cloth, torn her salwaar and has raped the victim.

*Pt. has not changed her cloth or taken a bath since
No h/o loss consciousness, vomiting.*

*LMP – 5 months back
(premenopause)'*

11. The Prosecutrix was also examined by Gynecologist who has recorded that patient is fit for giving statement and does not need hospital admission. The MLC does not record any injury being suffered by the Prosecutrix and records that 'no injury seen'.

12. PW-1 'VS' – the Prosecutrix in her examination-in-chief has narrated the incident as under:

'On 27.03.2014 I went to my place of work and reached at 10 AM. On that day, accused was present there, but at about 4 PM he left for some place and returned at about 4.30 PM. At that time, I was doing my work of stitching. At about 4.50/5.00 PM, he pulled me from behind and I fell on the floor on the jute sheet which was lying. Accused stuffed the Dupatta which I was wearing in my mouth when I tried to raise an alarm. He picked up a knife which was lying nearby and which was used for cutting the jute sheets. He threatened to kill me with that knife in case I raise any alarm. Thereafter, accused cut the string of my Salwar with that knife and pulled down my salwar till my knees. Thereafter accused committed rape upon me. At that time, the door were closed but not bolted from inside. Some children, who were playing outside opened the door while playing and then the accused left me. Thereafter accused fled away from the spot. I went to the 5th floor, where one lady namely Shabnam lives there. I narrated the entire incident to her and then I made a call at 100 number.'

13. Since the Prosecutrix did not depose about any threat being given by the appellant while leaving after committing the rape, the learned APP put a leading question to her in this regard. In her cross examination by learned defence counsel, she has admitted about her daughter being got married about 1½ year back in Lucknow but denied that the appellant and his cousin Ashok attended the wedding of her daughter. She admitted that she had been working with the appellant even 7-8 years prior to the incident but left in between due to birth of her youngest son and thereafter again resumed her work with the appellant. She denied having physical relations with the appellant for past 10 years or knowing Ashok or staying at his house for ten days. She admitted having made PCR call in the year 2013 before Diwali complaining about Ashok and police arriving at the spot. She admitted that Ashok was doing the work of stitching of plastic bags in the gallery in front

of place where she was working stating as under :-

'It is correct that the said brother of accused used to do work of stitching plastic bags for accused in front of aforesaid place of incident in the gallery. (Vol. He did this work only for about 5-10 days). I do not know if the name of this person is Ashok.'

14. Regarding the place of incident being accessible to the occupants of 4th and 5th floor and the door being not bolted at the time of commission of rape, she has admitted that there is a toilet after three rooms and the occupants of the 4th Floor and 5th Floor come to use the same toilet. She has also admitted that physically in comparison to her, the appellant was shorter in height and of small built. She also admitted that she did not show the *nada* of her *salwaar* to PW-6 Shabnam which was cut by the appellant with the help of knife. She stated that she made call from the 5th Floor of the Building. She remained with Shabnam for about 2-3 minutes and came down after making the call. She has also admitted having not sustained any injury when she was pushed from behind when she fell on the floor on jute sheet. She also admitted that her *salwaar kameez* did not get torn though the knife used by the appellant was sharp enough to cut the jute sheets. She also stated that she did not change the *salwaar* after the appellant cut his *nada* and only tuck the belt of the *salwaar* on her waist.

15. The *salwar* of the prosecutrix has not been found torn which fact she has admitted in her statement before the Court. Before the doctor, she did not state that her *chunni* was used for gagging her mouth, rather she referred to some cloth. Even if she meant *chunni*, in that case some marks by her teeth could have been noticed. It is relevant to record here that before the doctor who prepared her MLC she has not made any reference of knife being

used either to threaten her or to cut her *nada* and then pulling her *salwar* upto knees.

16. After going through the testimony of the Prosecutrix and her MLC, this Court directed for production of the case property in the Court. The clothes of the Prosecutrix as well the knife used for cutting *nada* were produced and seen. The size of the knife, as per the site sketch, was 31.7 cm long (2.3 cm long blade and 11.5 cm long handle) and 2.3 cm wide. The edge of the knife is very sharp as it was meant for cutting '*taat patti*'. The two ends of *nada* were not showing any traces of being cut with a sharp edges knife as the threads on both the ends were prominently visible ruling out the *nada* being cut with any sharp edged knife.

17. When the testimony of the Prosecutrix is examined, I find that her testimony is wholly unreliable. Had it been a case of rape, the Prosecutrix who was having knife which she was using for cutting the '*taat patti*' having very sharp edge, she could have used the same to defend herself especially when admittedly she was physically taller and stronger than the appellant. The MLCs of the prosecutrix and appellant show no sign of even scratch marks or nail marks or injury on any part of the body of the Prosecutrix or appellant. It is Prosecutrix's own version that after committing the offence, the appellant left that place. As per the FIR she called the PCR from the place of incident itself and there is no mention of visiting 5th Floor complaining PW-6 Shabnam. There is no explanation as to how the Prosecutrix was able to put back and tie her *nada* if it had been cut by the appellant. After both the ends got loose and *salwaar* pulled upto knees, the *salwaar* could not have been tied by her unless the *nada* is changed or the same *nada* is again put in the *salwaar* with some object. Tucking of *salwar*

without nada could be possible temporarily and not for hours. At the time of her medical examination though the clothes have been seized there is no observation that the Prosecutrix was wearing *salwaar* by tucking it on her waist. Otherwise also when the incident is stated to have taken place at 5.00 pm and MLC has been prepared at 7.15 pm and examination by the Gynecologist at 12.00 am in the midnight, the *salwaar* could not have remained tucked for such a long time.

18. No doubt, the statement of the prosecutrix is sufficient to base the conviction if it is creditworthy. At the same time, there is no presumption that in all rape cases her testimony should be considered as gospel truth. If judgment is needed, reliance can be placed on ***Pratap Misra & Ors. Vs. State of Orissa*** (1977) 3 SCC 41, in para 8 it was held as under :-

“8. In the first place, the admitted position is that the prosecutrix is a fully grown up lady and habituated to sexual intercourse and was pregnant. She was experienced inasmuch as she had acted as a midwife. It is true that the learned Sessions Judge was impressed with the demeanour of this witness, but that itself is not sufficient to prove the case if the opinions of medical experts show that it is very difficult for any person to rape single-handed a grown up and an experienced woman without meeting stiffest possible resistance from her. In the instant case, according to the evidence given by PW-1, A-1 entered the room and committed sexual intercourse with very great force and violence against her consent. Indeed if this was so, we should have expected the stiffest possible resistance from her resulting in injury over the penis or scrotum of the accused or abrasions over other parts of the body caused by the nails of the prosecutrix. The accused were examined by PW-9 who did not find any injury over the penis or scrotum and he does not say that he found any injury on any part of the body. This is rather an important circumstance which negatives the allegation of rape. The prosecutrix knew fully well that the

appellant had entered the room with evil intention from the fact that her husband was dragged away to the verandah and the door was bolted by A-1. In these circumstances, we fail to see why the prosecutrix should have silently abided to have the intercourse with the appellant without putting up any resistance, except shouting, particularly when the prosecutrix was a fully grown up lady and experienced not only in sexual intercourse but also in the art of midwifery. She knew that she was pregnant and if any violence was caused to her it may lead to abortion. This circumstance would naturally impel her to put up the stiffest possible resistance against A-1 who was single-handed and was not armed with any weapon which may have silenced the prosecutrix. The theory pronounced by the learned Sessions Judge was that as the appellants were N.C.C. students and sturdy persons the prosecutrix may have found it futile to put up any resistance and may have decided to submit to the onslaught on her. Such a course of conduct is wholly improbable, particularly in the case of grown up and an experience lady like PW-1. Taylor, in the Principles and Practice of Medical Jurisprudence, Vol. II, dealing with the cases of rape on a grown up woman observes as follows :

Unless under the influence of drink and drugs or asleep or ill, a fully grown girl or adult woman should be able to resist a sex assault. We should expect to find evidence of a struggle to avoid sexual contact or penetration, and may well feel uncertainty about the real nature of an alleged assault in its absence.

A false accusation of rape may sometimes be exposed by marks of violence being wholly inadequate or absent.

Bruises upon the arms and the neck may be considered to constitute some evidence of a struggle; and impressions of finger nails are also significant. Bruises or scratches about the inner side of the thighs and knees may be inflicted during attempts to abduct the legs forcibly, and

care must also be taken to examine the back, for the victim may have been pinned against the wall or floor. It is important to record these in detail, and to say, if possible, how fresh they are. The ageing of bruises is, as was indicated in Volume-1, a matter of some uncertainty in the absence of microscopy.

Strong corroborative evidence of a struggle might be obtained from an examination of the accused for similar marks of bruises or scratches about the arms or face, and possibly even about his penis, though this is less likely.

Though injury is most unlikely to the penis, a man may have had his face scratched or have been bitten during a sex assault. The clothing may bear some contact traces of the woman – hairs, vaginal secretion or blood, and, though of less significance, seminal stains.

The medical evidence, therefore, clearly discloses that the prosecutrix does not appear to have put up any resistance to the alleged onslaught committed on her by the appellants. From this the only irresistible inference can be that the prosecutrix was a consenting party which would be reinforced by other circumstances to which we shall refer hereafter.

19. In the case **Abbas Ahmad Choudhary V. State of Assam** 2010 Cri.L.J. 2060 it was held as under:-

“We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully.”

20. Taking into consideration the entire facts and circumstances, I am of the opinion that it was a case of having sexual intercourse with her employer with consent. Otherwise, there would be telltale sign on the body of Prosecutrix as well on the appellant. Further keeping in view that the incident has allegedly taken place in a gallery on the 4th Floor but the door was not bolted knowing fully well that the toilet of that floor could be used by the occupants of 4th Floor and 5th Floor any time, the appellant could not have sexual intercourse with the Prosecutrix without her consent. The version of the Prosecutrix about being raped, being improbable, the circumstances suggest her to be a consenting party. Thus, her testimony is not considered sufficient to sustain the conviction.

21. Accordingly, the appeal is allowed. The appellant is acquitted of the charges framed.

22. The appellant be released forthwith if not wanted in any other case.

23. TCR be sent back alongwith copy of this order.

24. A copy of this order be sent to the concerned Jail Superintendent for information and necessary compliance.

PRATIBHA RANI, J.

MAY 31, 2016

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