

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

Judgment Reserved on: July 26, 2017

% *Judgment Delivered on: August 02, 2017*

+ **CRL.A. No.111/2017**

SANTOSH

..... Appellant

Through: Mr.M.L.Yadav, Advocate.

versus

STATE

..... Respondent

Through: Ms.Kusum Dhalla, APP for the
State with SI Neeraj PS South
Rohini.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

1. The appellant has filed this criminal appeal under Section 374 CrPC assailing the judgment and order on sentence dated 6th December, 2016 and 21st December, 2016 respectively whereby he has been convicted for committing the offence punishable under Section 376 IPC and sentenced to undergo RI for seven year with fine of ₹30,000/- and in default of payment of fine, to undergo RI for one-and-a-half year.

2. In brief, the case of prosecution is that on 16th September, 2013 at about 6.50 am, DD No.12-A was recorded at PS South Rohini about a wireless message being received that the Contractor (*thekedar*) had done '*galat kaam*' during night time with the wife of the informant. The DD was assigned to SI Ravi for necessary action. SI Ravi reached

the spot and inquired about the incident. Thereafter he apprised the SHO who sent W/SI Khushboo alongwith W/Ct.Mukesh to the spot. W/SI Khushboo recorded the statement of prosecutrix/complainant 'G' (name withheld to conceal her identity) and sent the rukka for registration of FIR. Crime team was also called at the spot and prosecutrix was sent to Baba Saheb Ambedkar hospital for medical examination.

3. On the basis of the statement Ex.PW11/A made by the prosecutrix 'G', case FIR No.269/2013 under Section 376 IPC was registered at PS South Rohini. Appellant/convict was arrested on the same day and also got medically examined at the same hospital. Statement under Section 164 CrPC Ex.PW11/B was also recorded by the learned Magistrate on the same day i.e. on 16th September, 2013 when the complainant was produced for getting her statement under Section 164 CrPC.

4. The crime team inspected the spot and the bedding on which the rape was committed was also seized. After completion of investigation, the appellant was sent for facing trial for committing the offence punishable under Section 376 IPC.

5. The appellant pleaded not guilty to the charge and claimed trial. The prosecution has examined 18 witnesses in all to prove its case. During examination under Section 313 CrPC, the appellant admitted having physical relations with the complainant but pleaded that it was with consent. He also stated about having dispute with the husband of the prosecutrix over payment of wages to thirty labours engaged by her husband who wanted their payment not through the husband of the

prosecutrix but directly from him. He has also examined one witness namely Sh.Ballabh Prasad Yadav (DW-1) who was residing close to the jhuggi, of the prosecutrix to prove the distance of the jhuggi of the prosecutrix from the toilet and also from the place of occurrence through photographs Ex.PW11/D1 to Ex.PW11/D11 so as to rule out the possibility of she being forcibly taken by him from near the toilet.

6. On the basis of evidence adduced and material placed on record by the prosecution, the learned Trial Court, vide impugned judgment and order on sentence, convicted and sentenced the appellant for committing the offence punishable under Section 376 IPC for the following reasons:-

- (i) The prosecutrix and her husband both have denied that she was having any affair with the appellant. No evidence was led in defence to prove the affair between the two.
- (ii) The contradiction in the testimony of the prosecutrix and her husband as to whether the husband reached the place of occurrence on hearing her cries or she informed him about the incident after returning to her jhuggi, does not change the core of the offence. In both the cases unwillingness of the prosecutrix is evident as she informed her husband immediately after the incident.
- (iii) Failure of the prosecutrix to raise alarm immediately on coming out cannot go against her in view of the social and cultural reality of the stigma attached to the victim of rape.
- (iv) Delay in reporting the matter was also not considered having any adverse effect on the trustworthiness of the prosecutrix and her

husband as stigma attached to the victim and the range of emotions including anger, shame and guilt may cause delay.

7. Mr.M.L.Yadav, learned counsel for the appellant has submitted that the prosecutrix was an adult married lady. Her MLC shows that she has not suffered any injury on any part of the body. She did not raise any alarm when she was allegedly dragged to the vacant room where the offence was committed. From the photographs Ex.P1 to P5 placed on record by the prosecution and photographs Ex.PW11/D1 to PW11/D11 placed on record by the defence, it is proved that the place of occurrence was an under construction site and the room where the offence was stated to have been committed, was also under construction. It is also proved that the distance between the jhuggi of the prosecutrix and the toilet is just a few paces. Learned counsel for the appellant has further submitted that had she not being a consenting party, the alarm raised by the prosecutrix would have been heard by all the labourers residing in the jhuggi close to the place of occurrence. DW-1 has proved that he was sleeping outside his jhuggi even on that night. He has not heard any cries or alarm raised by the prosecutrix which could have been only in case of consensual sex and not rape. Learned counsel for the appellant has submitted that under pressure of her husband, false allegation of rape was leveled against the appellant.

8. Ms.Kusum Dhalla, APP for the State has submitted that there is ample material in the form of oral and documentary evidence against the appellant. It has been submitted that minor contradictions in the testimony of the prosecutrix and her husband is not fatal and that as the police was informed at about 7.00 am i.e. after a few hours from

the time of occurrence, there is hardly any delay in reporting the matter to the police as in a case of rape the honour of the family is involved and there is always some kind of deliberations as to whether the matter should be reported to the police. The evidence of the prosecutrix (PW-11) is very clear and cogent who stated that appellant had raped her and when her husband came on hearing her cries, the appellant fled away from the spot by jumping through the window. Learned APP has further submitted that sole testimony of the victim of rape is sufficient to base conviction and in the instant case her testimony is trustworthy. The appellant has admitted that he had physical relations with the prosecutrix which is also supported by their medical examination and FSL report. Hence, the appeal may be dismissed.

9. I have considered the rival contentions and carefully gone through the Trial Court Record.

10. Since the appellant is not disputing the factum of having physical relations with the prosecutrix on the night of 16th September, 2013 at about 2.00/2.30 am, FSL report does not require any detailed discussion. The only question that arises for consideration is whether on the night of 16th September, 2013 at 2.00 or 2.30 am the physical relation between the prosecutrix and the appellant was with her consent or it was a forcible sexual intercourse.

11. There are material variations in the complaint Ex.PW11/A, statement of the prosecutrix recorded under Section 164 CrPC Ex.PW11/B and her deposition before the Court as PW-11 as regards to whether she was dragged when she was going to the toilet or

returning from the toilet and whether her husband reached the place of occurrence on hearing her cries or she informed him after returning from the said room. It is relevant to refer to the three version given by the prosecutrix i.e. in the complaint Ex.PW11/A, in the statement Ex.PW11/B recorded under Section 164 CrPC and in the deposition before the Court as PW-11 and also the statement of her husband PW-12 Sh.Kedar.

Version of the prosecutrix as per complaint Ex.PW11/A made before the police on 16th September, 2013.

12. In her complaint Ex.PW11/A dated 16th September, 2013 recorded by SI Khushboo Yadav, the prosecutrix 'G' has stated that for the past 6-7 months she alongwith her husband was residing in jhuggi meant for labourers at Barat Ghar, Mangolpur Kalan. The Barat Ghar was under construction where her husband was working and she joined him about two months prior to this incident. On 16th September, 2013 at about 2.00/2.30 am she woke up to go to the toilet which is behind the Barat Ghar. When she was going to the toilet, on the way *thekedar* Santosh i.e. the appellant caught her hand and dragged her towards a vacant room in the Barat Ghar where a bedding (*Bistra*) was already laid. She started raising alarm by taking the name of her child but before her husband could reach, the *thekedar* forcibly put her on the bed and after lifting her saree upward, committed rape on her. When she was raising alarm, he also put his hand on her mouth. In the meantime, her husband reached there in search of her and also to save her. On seeing him, *thekedar* jumped out through the window. She narrated the incident to her husband but

due to fear they did not inform the police immediately. In the morning, her husband called the PCR and thereafter she made the complaint of being raped by the appellant during night time and requested for legal action against him.

Version of the prosecutrix in her statement recorded under Section 164 CrPC Ex.PW11/B before the Magistrate on 16th September, 2013.

13. In her statement under Section 164 CrPC Ex.PW11/B, the prosecutrix has stated that she is 7th Pass. She got married about three years back (from the date of recording her statement) and has a child aged about 1 year. About 1-2 months ago she came to Delhi with her husband to work as labourer. They were residing in the jhuggis near Police Line Mangol Puri where a Barat Ghar was under constructions. On that date (16th September, 2013) at about 2.00/2.30 am, she left for going to the toilet and the child was left by her with her husband. A temporary toilet has been constructed at some distance. There the appellant Santosh caught her and took her to an under construction room and did '*jabardasti*' with her. She raised alarm but by the time her husband reached, the appellant had already done '*galat kaam*'. On seeing her husband, he fled from there. One old labourer also reached there. Santosh also resides there near the jhuggis. In the morning, when he came he was caught and her husband informed the police telephonically.

Version of the prosecutrix when examined as PW-11 before the Court

14. PW-11 'G' – the prosecutrix has stated that she alongwith her husband and one year old son as well her brother was residing in a jhuggi at the site of a Barat Ghar which is under construction. The appellant was the Contractor and her husband was a *Mistry* there. She stated that she is illiterate and it was second day of the month of the year 2013 but she did not remember which month it was. At about 2.00/2.30 am, she got up to ease herself and went to bathroom situated behind the Barat Ghar. When she came out of the bathroom, the Contractor came at that place and took her to a room at the back portion of the Barat Ghar where a bedding was already laid. There he did '*jabardasti*' by which she meant that physical relations made between husband and wife. She screamed and on hearing the same, her husband came. On seeing her husband, the Contractor Santosh away by jumping out through the window. She informed about the conduct of Santosh to her husband but did not disclose to any other person. In the morning, her husband informed PCR and thereafter she made her statement Ex.PW11/A. she was sent for medical examination and thereafter the bedding was seized by the police. She was also produced before the Magistrate on the same day and her statement under Section 164 CrPC Ex.PW11/B was recorded. She has identified the clothes Ex.P1 to P4 which she was wearing on the date of occurrence as well the bedding and the dari Ex.P5 and P6.

15. During her cross examination, the prosecutrix has admitted that the incident was in summer. The make shift toilet was constructed on the extreme corner on the left side if one enters the under construction Barat Ghar. She has also admitted that at a little distance of about 15

paces away from the toilet, there are jhuggis of labourers. The prosecutrix was shown eleven photographs Ex.PW11/D1 to D11 of the site which she admitted to be correct as per the construction site and that in the jhuggis shown in the photographs, her jhuggi is at the fifth place. She has stated that jhuggi of appellant was across the gallery away from the jhuggis of the labourers. She has also been confronted with her two different versions as to whether she was going to the toilet or returning from the toilet when she was allegedly dragged by the convict to the vacant under construction room. When she was questioned as to how she resisted the attempt by the appellant, she stated that she caught his hand and in the process his shirt was also torn. She also stated that she called her husband when she was being dragged by the appellant. In her cross examination, she has stated that from the time she was dragged by the appellant till her husband reached on hearing her screams, it must have taken about 10-15 minutes to half-an-hour. She stated that the appellant left the spot after wearing his clothes and that except her husband, no other labourer reached the place of occurrence. She denied that she was having extra marital relations with the appellant and on that day also she had established physical relations with her consent. She has admitted that the distance from the place she was dragged till the room i.e. the place of occurrence, is about 10-12 steps.

16. PW-12 Sh.Kedar is the husband of the prosecutrix and his statement is of lot of significance for the reason that as per the complaint, on hearing her screams, her husband reached the spot and on seeing her husband, the appellant jumped through the window and

fled. PW-12 Sh.Kedar has has stated that he was working at the construction site of Barat Ghar and was living alongwith his wife and son of tender age. The appellant was the Contractor at the site. He stated that the date was 16th and year 2013 but he did not remember the month, he was sleeping during the night. At about 2.00/2.30 am his wife i.e. the prosecutrix went out to ease herself in the bathroom situated at a distance of about 25-30 steps from the jhuggi where he was sleeping. He could not hear the screams of his wife due to distance. When his wife returned to the jhuggi, she informed him that the Contractor Santosh had taken her to his room/jhuggi situated in the same Barat Ghar and after pressing her mouth, committed '*galat kaam*' with her. In the morning, he informed the PCR and his wife reported the incident. His wife was taken to the hospital by the police and the appellant Santosh was also arrested from the Barat Ghar.

17. Since PW-12 Sh.Kedar failed to fully support the prosecution's case, he was cross examined at length by learned Addl. PP for the State and again he denied the suggestion that he reached the place of occurrence on hearing the screams of his wife or that he had seen appellant committing rape on his wife. He had also denied that on seeing him, appellant Santosh ran away by jumping through the window. He denied having made any statement to the above effect before the police.

18. The MLC of the prosecutrix Ex.PW4/A prepared at Dr.Baba Saheb Ambedkar Hospital on 16.09.2013 at 10.30 am records her medical condition as under:-

P/A soft, No tenderness

*L/E : NAD No c/o injury marks
P/V : Ut normal size ANP, No tenderness*

*No visible sign of external injury on body
B/L Breast soft, no sign of injury
L/E NAD, No c/o bleeding'*

19. The appellant was also medically examined at Dr.Baba Sahed Ambedkar Hospital on the same day i.e. on 16.09.2013 at 1.50 pm. As per his MLC Ex.PW2/A, no sign of any fresh external injury was seen at the time of his examination.

20. The prosecutrix in this case is a married woman, mother of a child and living in a nearby jhuggi alongwith her husband. The place of occurrence is at a short distance from her jhuggi. The season was summer and the occupants/labourers were sleeping outside their jhuggis as deposed by DW-1 Sh.Ballabh Prasad. The jhuggi of the appellant is also on the other side of the construction site of Barat Ghar. The prosecutrix has stated the distance of the toilet from her jhuggi to be 15 paces from where she was dragged to the under construction room where a bedding was already laid on the platform of bricks and wooden planks. The appellant would not have come to know about the time when the prosecutrix would get up to go to the toilet during night time so as to wait for her near the toilet and drag her. The time of 2.00/2.30 am in the night is when almost everybody is fast asleep after whole day of labour. As per statement of prosecutrix, she handed over her child aged about one year to her husband before going to the toilet at 2.00/2.30 am. The photographs filed by the prosecution Ex.P1 to P5 and filed by the defence

Ex.PW11/D1 to Ex.PW11/D11 show that the construction side is full of building materials lying scattered everywhere and even for walking there is no smooth surface or footpath. On such a site, if any attempt is made to drag a fully grown up married lady with intention to commit rape on her, not only she is likely to suffer bruises and injury in the process of resisting the attempt of the appellant to drag her raising alarm by her was bound to wake up not only her husband but also other labourers sleeping inside/outside their jhuggis which were just a few paces away from the toilet.

21. As per the version of prosecutrix, she remained in the room where rape was committed upto half-an-hour. Only in a case of consent, a lady could have remained present for such a long time in the room without putting any resistance. The place where prosecutrix was assaulted was an under construction room without any door thereby accessible to everyone in case an alarm is raised. The complaint Ex.PW11/A shows that the prosecutrix raised alarm and by the time her husband could reach, '*galat kaam*' had already been done. When the place of occurrence is just a few paces away, her cries for help when she was being dragged from near the toilet could not have remained unheeded by her husband or other labourers.

22. It is also not out of place to mention here that there is material discrepancies in the version given by the prosecutrix and that of her husband. As already noted, as per PW-11 – the prosecutrix 'G', her husband reached the spot on hearing her cries to save her but on seeing her husband, the appellant jumped from the window after wearing clothes. However, the version of PW-12 Sh.Kedar -

husband of the prosecutrix, is that it was the prosecutrix who informed him about the rape being committed after she returned to the jhuggi. PW-12 Sh.Kedar – husband of the prosecutrix though cited as an eye witness, has not supported the prosecution case to that extent.

23. The above discrepancy cannot be treated as insignificant or minor contradiction not touching the material aspect of the case.

24. The statement of husband of the prosecutrix is also contradictory to the version given by the prosecutrix vide her statement Ex.PW11/A which formed basis of registration of the case. The police was informed by the husband of the prosecutrix and the version recorded by the police about the manner in which the offence was committed and at what time, the husband came to know about she being raped were mentioned by her immediately after the occurrence. The statement of the prosecutrix does not find any support from even her husband.

25. In the case Tameezuddin @ Tammu v. State (NCT of Delhi) (2009) 15 SCC 566, the Supreme Court held as under :

‘It is true that in a case of rape the evidence of the Prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.’

26. 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.

27. No doubt, there is no legal impediment in basing the conviction of an offender on the basis of solitary statement of the prosecutrix provided it inspires confidence of the Court but at the same time the judicial forums have been insisting on some corroboration to the statement of the prosecutrix in cases where despite being well built and not under influence of any intoxicant she had not suffered any injury during the act of being subjected to rape.

28. The question that arises for consideration in this case is whether the prosecutrix was a willing party or she was forcibly subjected to sexual intercourse. In this regard, it is noteworthy that as per MLC of

the prosecutrix as well as MLC of the appellant, none of them have suffered any injury either on private part or on any other part of the body. The prosecutrix was medically examined a few hours after the offence was stated to have been committed.

29. Accordingly to Modi's Medical Jurisprudence and Toxicology (Twentieth Edition) Page 206 the abrasions are red at first, but during the next three days they appear blue, bluish black, brown or livid red, and become greenish from the fifth to the sixth day, and yellow from the seventh to the twelfth day. The yellow colour slowly fades in tint till the fourteenth or fifteenth day when the skin regains its normal appearance.

30. In the instant case, despite the prosecutrix being dragged on a rough surface littered with building material, being raped on wooden planks placed on bricks, she does not have even a scratch on her body or caused any scratch by nail or otherwise on the body of the appellant in her attempt to resist the forcible sexual intercourse. Thus, the version of the prosecutrix that she put resistance is not supported by the medical evidence.

31. The prosecutrix was a married lady from rural background and mother of a child. She remained with the appellant in that under construction room for about half-an-hour without any resistance and it appears to be a case of consent.

32. The trend of the testimony of PW-11 'G' – the prosecutrix and that of her husband PW-12 Sh.Kedar and the variations, infirmities and inconsistencies noted herein prove that it was a case of the prosecutrix being consenting party. The learned Trial Court while

ignoring inherent infirmities in the testimony of the prosecutrix which was not even corroborated on vital points by her own husband or by medical evidence, erroneously came to the conclusion that her testimony was reliable to base the conviction of the appellant for committing the offence punishable under Section 376 IPC. Therefore, the finding of the learned ASJ holding the appellant guilty for the offence punishable under Section 376 IPC is liable to be set aside.

33. Accordingly, the impugned judgment and order on sentence are hereby set aside.

34. The appeal is allowed. The appellant is acquitted of the charges framed.

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

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

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

38. As prayed, a copy of the order be also given dasti to learned counsel for the appellant under the signature of Court Master.

PRATIBHA RANI
(JUDGE)

AUGUST 02, 2017

'st'