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

Date of decision: 25.09.2019

+ CRL.A. 1009/2018

KUSUM SHARMA

..... Appellant

Through Mr. Braham Singh with Mr. Rohit
Vidhudi, Mr. M.S. Vidhudi and
Ms. Manju, Advs.

versus

STATE & ANR.

..... Respondents

Through Mr. Hirein Sharma, APP for State.
Adv. for R-2 (appearance not given)

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (O R A L)

1. Vide the present appeal, the appellant seeks direction thereby to set aside the final judgment dated 07.10.2017 passed by the learned court of Additional Sessions Judge, Special, Fast Track Court, South-East, Saket Courts, New Delhi in Session Case No. 1553/2016, Case FIR No. 419/2014, punishable under sections 376/328/323 of Indian Penal Code, registered at Police Station- Jaitpur, New Delhi, whereby the accused/respondent no.2 has been acquitted by the learned Trial Court.

2. Case of appellant herein is that the appellant is a house wife and is residing alongwith her husband and two sons. She unfortunately became the victim of faith imposed upon a so-called priest/respondent no.2. The appellant's family was preparing for the solemnization of marriage of their elder son. The respondent no.2 used to reside in the neighbourhood of the appellant's as they reside in the same locality. The Respondent no.2 used to perform pooja and other rituals and religious functions in the house of the parents and brother of the appellant and due to that reason the respondent no.2 was known to her family also. The appellant, after taking cellular phone number of the respondent no.2 from her brother's family, contacted him on his mobile phone number on 04.06.2014 to know and fix an auspicious date for marriage of her elder son. The respondent no.2 deliberately and intentionally asked the appellant to come his house No.23, Gali No.7/2, Shakti Vihar, Meethapur, Police Station-Jaitpur, New Delhi on 05.06.2014 at about 8 PM. After making call at the mobile of the respondent no.2 i.e. 9312846907, the appellant at the given date and time reached at his house. The respondent no.2 called her inside his house and asked her to sit on the sofa and offered her a glass of water mixed with some intoxicating/stupefying substance to drink. After taking the said sedative

water offered by the respondent no.2, the appellant started becoming unconscious and she became nervous and unable to control her body and movements. After seeing the appellant's condition, the respondent no.2 committed rape upon her against her will. The appellant tried to stand up and run away and also resisted the sexual assault made by the respondent no.2. She was also physically assaulted by him thereby causing grievous injuries to her. After sexual assault and sustaining grievous injuries by the respondent no.2, the appellant became semi unconscious. On seeing the serious condition of the appellant after sexual assault and causing grievous injuries, the respondent no.2 through his son called the brother of the appellant to remove her from his house. The brother of the appellant being called by the respondent no.2 through his son reached at the house of the respondent no.2 and moved the prosecutrix to her house and thereafter, to Holy Family Hospital, New Delhi. The prosecutrix in an unconscious condition was admitted in intensive care unit (ICU) at Holy Family Hospital, New Delhi with the complaints of three episodes of GTCS with tongue bite, uprolling of eyeball and postictal confusion, in gasping state with labored breathing. The Medical Legal Report (MLC) of the appellant was prepared in Holy Family Hospital, New Delhi and the doctor opined "Patient was

admitted in ICU with the complaints of 3 episodes of GTCS with tongue bite, uprolling eyeball and postictal confusion. The patient was brought to casualty in gasping stage with labored breathing so was immediately intubated and put on mech. Ventilation. Later on she was shifted to ICU. In examination she had pallor with b/l flexor pantars. NCCT Head and later MRI was done which showed left sigmoid-transverse venous thrombosis, culture left with Mech. Ventilation, muscle relaxants, BZDs, antibiotics, atacids, antiemetics, antiepileptics and other symptomatic and supportive management.”

3. Further case of the appellant is that the condition of appellant became bad to worse and started deteriorating in Holly Family Hospital, New Delhi. Thereafter, on the life support system, she was shifted and admitted in Max Super Speciality, New Delhi. In the said hospital, the doctors diagnosed *"CEREBRAL VENOUS THROMBOSIS (LEFT SIGMOD SINUS AND TRAVSVERSE SINGUS) WITH ACUTE LEFT PCA TERRITORY INFARCT WITH HEMORRHAGIC TRANSFORMATION WITH CLACIFIED GRANULOMA RIGHT FRONTAL REGION WITH SEIZURES, FIBROD UTERUS WITH PV BLEED"*, and it was further diagnosed that MRI Brain – *"with venogram contract (7/6/14) revealed Thrombois of deft*

transverse and sigmoid sinuses temporo-occipital territory infract with hemorrhagic transformation." In Max hospital, the doctors concerned further gave the details of the course in hospital and opined that Patient was admitted for the same above mentioned complaint. Her examination shows "E2VTM5, pupils - b/l normal size and reacting to light, plantar=bilateral flexor. Patient was on ventilator and was treated with LMWH (clexane), IV mannitol, inj. Levetiracetam. She responded to treatment but she developed PVT bleed & her ultrasound abdomen showed fibroid uterus. She was seen by gynecologist, biopsy was done, report awaited. Patient responded well to the treatment and is now being discharged in stable condition."

4. Further case of the appellant is that on 30.06.2014, the appellant on regaining her consciousness, recollected the incident of rape by giving her sedative water and grave injuries caused by the respondent no.2. She immediately narrated the entire incident to her husband. The husband of the appellant after hearing the gruesome incident of rape and deadly attacks and assault and giving poisonous and sedative water to her by the respondent no.2 in his house on 05.06.2014, immediately rushed the appellant to Police Station Jaitpur, New Delhi and reported the matter to police and consequently the present case FIR No.419/2014 was registered.

5. Learned counsel appearing on behalf of the appellant submits that the investigating agency got the appellant medically examined in All India Institute of Medical Science vide MLC No. 11932/14 and the doctors opined; she is slightly drowsy; a little stirring of speech; patient is keeping her eyes closed and also opined; 1X1 cm scale lesion on (R) anterior aspect. During the course of investigation, the prosecutrix was produced in the court before learned Metropolitan Magistrate, New Delhi and her statement under Section 164 of the Code of Criminal Procedure, 1973 was recorded. During investigation, the investigating agency sealed the "*pyajami*" of the prosecutrix, which she was wearing at the time of incident of rape and deadly assault on 05.06.2014 and also collected the blood samples of the respondent no.2. The investigating agency sent "*pyajami*" of the prosecutrix and blood samples of the respondent no.2-accused to Forensic Science Laboratory, Rohini, Delhi for DNA analysis. On biological examination and DNA analysis, the Forensic Chemical Examiner concluded that "DNA profiling (STR analysis) performed on the exhibit P-1 (Payajami of the victim) and P-2 (Blood gauze of accused) are sufficient to conclude that DNA Profile generated from the Exhibit-2 (Blood gauze of Accused) is matching with the DNA profile generated from the source of exhibit "1")

(Pyajami). The Forensic Science Laboratory report was duly exhibited during the course of prosecution evidence as Ex. PW 14/A. After thoroughly investigating the crime, the investigating agency filed the charge-sheet against the respondent no.2 and after compliance of mandatory provisions the case was committed for trial to the court of session and the trial court framed the charges against the Respondent no.2 for offences punishable under Section 323/328/376 IPC.

6. During the course of trial, the prosecution examined 15 witnesses to prove its case and charges against the respondent no.2 and the prosecutrix/appellant was examined as PW-6. After prosecution evidence, the statement of accused/respondent no.2 under Section 313 Cr.P.C. was recorded before the learned Trial Court.

7. Learned counsel further submits that the prosecution has proved its case against the respondent no.2 by material and clinching oral and medical evidence but the learned Trial Court despite of the clinching material and documentary and medical evidence against the respondent no.2, acquitted him from the offences by giving him benefit of doubt vide impugned judgment dated 07.10.2017.

8. Learned counsel further submits that the learned Trial Court has ignored the clinching evidence and the statement of prosecutrix recorded under section 164 Cr.P.C. by the Magistrate. Learned counsel submits that the learned Trial Court has not considered that the doctors in their report of Holy Family Hospital has opined that immediately after the occurrence of incidence i.e. on 06.06.2014 the patient was admitted in hospital with the complaint of 3 episodes of GTCS with tongue bite, uprolling eyeball and postical confusion and patient was brought to causality in gasping state with labored breathing so was immediately untubated and put on Mech. Ventilation. However, the learned Trial Court has not considered the opinion of the doctors in Max Super Speciality Hospital and treatment taken by the prosecutrix.

9. On the other hand, counsel for respondent no.2/accused submits that since no substantive evidence was adduced by the prosecutrix, therefore, there was no option left for the learned Trial Court but to acquit the respondent no.2 from the offences mentioned above. Moreover, FSL report is persuasive only, but not a conclusive piece of evidence as per settled principles of law.

10. Heard. Learned counsel for the parties and perused the material on record.

11. The fact remains that as per MLC prepared at Holy Family Hospital, Ex.PW8/B, the prosecutrix was brought in the hospital on 06.06.2014 at 11:30 p.m. by her husband. The police was also informed on the same day at 2:45 p.m. As per the history recorded in the MLC, '*some panditji*' (respondent no.2) had given water/liquid to the prosecutrix in his house on 05.06.2014 at around 8:30 p.m. Although the IO/PW-13 did not collect the complete record of the treatment of the prosecutrix from the hospitals concerned but the prosecutrix while claiming the compensation u/s 357A(3) & (4) Cr.P.C. had filed the documents. As per the documents, she was discharged from Holy Family hospital on 07.06.2014 upon medical advise. She was diagnosed, "Venous thrombosis-left sigmoid sinus & transverse sinus; Acute infarct of left PGA territory with hemorrhagic transformation; Calcified granuloma in right frontal region (on mech. ventilation); There was history of 3 episodes of GTCS with tongue bite and post-ictal confusion." She was then taken to Max Hospital at Saket. She was discharged on 17.06.2014, there, she was diagnosed, "Cerebral venous thrombosis (left sigmoid sinus\ and transverse sinus) with acute left PCA

territory infarct with hemorrhagic transformation with calcified granuloma right frontal region with seizures; Fibroid uterus with PV bleed.” As per the history, there was recurrent seizure and altered sensorium. She had difficulty in breathing. However, when she was discharged, she was stable and advised follow-up.

12. It is pertinent to mention here that PW-6 (appellant/prosecutrix) has deposed that after committing rape, accused hit on her head with some object and she fell unconscious and when regained consciousness, she found herself in Max hospital.

13. PW12 has deposed that at about 10:00 p.m., son of the accused came at his shop and informed him that his sister/prosecutrix was lying unconscious in his house. Accordingly, he reached there and asked the accused about his sister. He told him that she was in the ‘Gali’ (Street) having a lota in her hand. He came out and saw the prosecutrix standing near the wall of ‘Awana Farm House’, Tunkey road. She was unable to stand and walk properly and making gesture of vomiting. She was crying by putting her hand on her head, but he did not notice injury mark on her head. His wife sprinkled water on her face. On inquiry, she told them that the accused had given her some intoxicated water as a result her condition deteriorated.

He then called PW-11. They took the prosecutrix to her house and on the next day, she was got admitted in Holy Family Hospital. He has further deposed that he had found his sister at a distance of 400 meters from the house of the accused. At that time, people were coming and going.

14. Whereas, PW-11 has deposed that when he reached at the house of PW-12, her mother was lying unconscious. He with the help of PW12 brought her in his house. When she did not regain consciousness till 10:00 a.m. and he noticed blood stains on her face, he informed his father about the same who took her to the Holy Family Hospital.

15. In view of above, question arose in the mind of the Trial Judge that when the prosecutrix had become unconscious in the house of the accused, how she covered the distance of 400 meters. There is inconsistency whether the prosecutrix was fully or partially unconscious when she was standing in the *gali*. Further question arose in the mind of the Trial Court that when she was unconscious on the precious day, why she was taken to the hospital on the next day at about 10:00 a.m.

16. PW6 has deposed that the accused had given her water in the glass and PW-12 has stated that the prosecutrix was holding a *lota* in her hand. Accordingly, further question arose, how the 'Lota' came in the hand of the

prosecutrix and why she was carrying that 'Lota'. It is not in dispute that the said 'Lota' was not seized during investigation.

17. I note, learned Trial Court has observed that the 'gastric lavage' of the prosecutrix was sent to the FSL. As per the report dated 24.12.2014 which is admissible in evidence u/s 293 Cr.P.C., no ethyl & methyl alcohol, alkaloids, barbiturates and tranquilizers were detected in the gastric lavage. Thus the FSL report rules out the possibility of mixing of sedatives or intoxicants in the water allegedly given to the prosecutrix by the accused.

18. The undisputed facts of the case are that the instant matter was reported to the police on 30.06.2014 i.e. after about 13 days from the date of discharge of the prosecutrix from the Max hospital. PW-4 has deposed that when he reached Holy Family hospital on receipt of DD no.26A, he had met the attending doctor and he had not declared the prosecutrix unfit for statement.

19. It is important to note that during investigation, his statement (Ex.PW4/DA) was recorded where he had stated that the relatives of the prosecutrix had disclosed him that 'kisi ne pilaya' but he failed to disclose the name of that relative. PW-II has stated that the prosecutrix was in her

house from 17.06.2014 to 30.06.2014 but she was not fully conscious and was recovering.

20. PW-6 (Prosecutrix) has deposed that after discharge from the hospital, she started feeling better and regaining consciousness and recollecting the facts. On 30.06.2014, she narrated the incident to her husband. However, the prosecution did not examine the husband of the prosecutrix. He was the material witness in this case as he was the person who had taken the prosecutrix to the police station on 30.06.2014. He himself is a practicing doctor. From his testimony, it could be known as to what was the condition of the prosecutrix during the period from 17.06.2014 to 30.06.2014.

21. PW-12 deposed that when he took the prosecutrix to his house, she was making gesture of vomiting. His wife sprinkled water on her face. On inquiry, she told him that the accused had given her intoxicated water as a result of which her condition deteriorated. She had also asked him to call PW-11. Whereas, PW-6 has deposed that she had told her bhabhi (wife of PW-12) that the accused had given her something and she was feeling giddy. She had also asked her bhabhi to call PW-11 to take her to her house.

22. It is not out of place to mention here that before 30.06.2014 when the report was lodged, PW-6 never alleged that the accused molested her, committed sexual intercourse with her forcibly and inflicted blow on her head with some object. Accordingly, the learned Trial Court has observed that what had prevented the prosecutrix from disclosing the other incidents, caused to her by the accused, to her brother/PW-12, bhabhi and her husband.

23. It is difficult to understand why the family members of PW-6 waited for the whole night to take PW-6 to the hospital though it had already come in the notice of her husband that PW6 was given some intoxicant by the accused as appearing in her MLC Ex.PW8/B.

24. The fact remains that PW-6/prosecutrix has stated that at the time of incident, she was wearing kurta, chunni and pajama. Due to the impact, she sustained injury on her head and the blood had oozed out from her head and right leg. She does not know who changed her clothes when she was taken to Holy Family hospital or who had taken her to the hospital. When she regained her senses, she was wearing hospital dress. She has further deposed that she did not hand over her kurta and chunni to the police during the investigation. On 30.06.2014, she narrated the incident to her husband and asked him about her clothes which she was wearing at the time of incident.

Her husband then brought her pajami. She has admitted that she did not hand over her pajami to the doctor at Holy Family Hospital or at Max Hospital. As per the FSL report Ex.PW14/A, blood was detected on the pajami of the prosecutrix and the blood in gauze of the accused. Semen was also detected on the pajami of the prosecutrix. However, DNA profile of the accused matched with the DNA profile generated from the pajami. The report shows that the blood was detected on the pajami but there is no report whether the blood was of the accused or of the prosecutrix on the pajami as no analysis was made in this regard. In the instant case, the exhibits of the accused and the prosecutrix were collected on 01.07.2014 and 02.07.2014 but they were sent on 19.09.2014 after the gastric lavage was sent. However, no explanation came why the exhibits were sent so late.

25. In view of above, learned Trial Court opined that it assumes significance because it remained a mystery under what circumstances, the pajami of the prosecutrix was seized/collected.

26. The testimony of PW-14/Sr. Scientific Officer shows that the accused was never brought before him nor the samples were taken in his presence. Accordingly, learned Trial Court opined that in these circumstances, it is difficult to rely on the FSL report.

27. It is further important to note that before 30.06.2014, the prosecutrix did not tell anyone that she was raped by the accused. Her clothes were not seized either by the doctor or the police when she was admitted in Holy Family Hospital or Max Hospital. She herself had handed over her pajami to the doctor when her MLC was prepared at AIIMS. Accordingly, a question arose in the mind of the learned Trial Court that what made the family members of the prosecutrix to preserve her pajami only in that very condition and did not wash the same and why the other clothes of the prosecutrix were not preserved with the pajami. No plausible answer came from the side of the prosecutrix in this regard.

28. It is not the case that the prosecutrix when she was being taken to the hospital in an unconscious condition had murmured that accused had molested her or committed sexual intercourse with her. As per PW-6, her husband had brought the pajami. Since her husband is not examined, so it remained unanswered from where he had brought the pajami or who had preserved it before it was given to the doctor at AIIMS. Thus, the prosecution even failed to prove that the pajama was of the prosecutrix.

29. In addition to above, testimony of PW-6 reveals that she had contested the election for Municipal Corporation. A case vide FIR

no.59/2009 punishable u/s 302 IPC at the police station Sunlight colony was registered against her husband. The police had also inquired her regarding her involvement in the said case and in this regard, a press release was made by the Asst. Commissioner of Police.

30. However, version of the accused is that the family of the girl side had broken the engagement with her son when they came to know about the involvement of her husband in the murder case and her son eloping with his Mami (maternal aunt), the prosecutrix and her family had suspicion on respondent no.2 that he had informed the girl side about it. They were having grudge against him and on that day, the prosecutrix, her brother and son beat him. This version is substantiated by the defence witnesses DW-1 and DW-2 who used to live in the same locality. They have deposed that at about 9:00 p.m., in gali no. 7, they saw a crowd. The prosecutrix, her brother and son were beating the accused. They intervened in the quarrel and DW-2 took the accused to his house on his motorcycle.

31. On perusal of the judgment, learned Trial Court has believed DW-1 & DW-2. The ***Hon'ble Supreme Court in Ram Singh case Crl. App. No. 932/2009*** held that the evidence tendered by defence witness cannot always be termed to be tainted one. The defence witness is entitled to equal term

and equal respect as of the prosecution. The issue of credibility and trustworthiness will also to be attributed to the defence witness at par with that of the prosecution.

32. In the case of ***Dudh Nath Pandey vs. State of UP AIR 1981 SC 911***, the Hon'ble Supreme Court has held that defence witnesses are entitled to equal treatment with those of the prosecution and the Court ought to overcome their traditional instinctive disbelief in defence witnesses.

33. Learned Trial Court while writing the impugned order was conscious of the legal proposition that the conviction in such like cases can be made on the sole testimony of the prosecutrix even without any medical corroboration and the version of the victim in rape commands great respect and acceptability. But, if there are some circumstances which cast doubts in the mind of the court about the veracity of the victim's evidence then it is not safe to rely on the uncorroborated version of the victim of rape.

34. In the case of ***Rajoo Vs. State of MP: AIR, 2009 SC 858***, it is held as under:

"It cannot be lost sight that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication"

35. Keeping in view the facts discussed above and the settled legal position, I am of the considered view that there is no illegality and perversity in the impugned order passed by the learned Trial Court whereby respondent no.2/accused has been acquitted.

36. I find no merit in the present appeal and the same is accordingly dismissed.

(SURESH KUMAR KAIT)
JUDGE

SEPTEMBER 25, 2019
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