



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

% **Reserved on: October 09, 2023**

Pronounced on: April 02, 2024

+ CRL.A.1209/2014

STATE

..... Appellant

Through: Mr. Tarang Srivastava, Additional
Public Prosecutor with Insp. Rakesh
Yadav, P.S. Bawana, Retd. ACP
Babu Lal I.O & HC Deepak
MHC(M), Bawana.

Versus

VIRENDER @ BILLU & ANR.

.....Respondents

Through: Mr. Sumeet Verma Amicus Curiae
with Mr. Mahinder Pratap Singh,
Mr. M.L. Yadav & Mr. Vinay Kumar,
Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT

SURESH KUMAR KAIT, J

1. The present appeal under Section 378 Cr.P.C. has been filed by the appellant-State against impugned order dated 14.01.2011 passed by the learned Court of Sessions, whereby the respondents-accused have been acquitted of the offences under Sections 395/376G/412 IPC in FIR No.97/2005, registered at Police Station Bawana, Delhi.

2. The case of the prosecution is that on 19.03.2005 at about 12:45 a.m. at Sankat Mochan Siddh Hanuman Mandir, Barwala Road, the respondents

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alongwith other co-accused, committed gang rape upon the prosecutrix/victim and also committed dacoity at the point of deadly weapons. In respect of the alleged incident, DD No. 5A was recorded at Police Station Bawana, Delhi by Inspector Babu Lal, who alongwith Head Constable Dharam Pal and Operator Shankar went to the spot of the crime, where they came to know that the wife of *Pandit* was already taken to MB Hospital by the PCR.

3. After recording statement of one Ram Prasad Adhikari, who was present at the spot, Inspector Babu Lal prepared the *rukka* which culminated into registration of the FIR in question.

4. Ram Prasad Adhikari, in his statement, before the police stated *that he has been residing in* Sankat Mochan Hanuman Mandir, Begumpur since 2003 alongwith his children. In 2004, he also brought his wife *i.e.* the prosecutrix, who had given birth to a daughter two months ago. On the day of the incident, while he alongwith his wife and both his children were sleeping in the room of mandir which was locked from outside, however, at midnight 5-6 persons entered into the *mandir* and pulled up his '*choti*' while he was sleeping and then awakened him. The persons were carrying pistols and guns and they threatened him by saying that if he would shout or made any noise they will fire a shot. The robbers asked him about the *galla* containing Rs.50,000/- and thereafter, they broke the lock of the *mandir* gate with the help of an iron saria, tied his hands and legs, took the keys of the room and went where his wife was sleeping.

5. As those four five persons entered the room where his wife was sleeping, upon hearing the noises, his wife and children got up and started



crying. Those persons remained in the room for a considerable time, and after sometime, they came out and untied him and thereafter, they locked him alongwith his wife and children inside the said room and flee from the spot.

6. Ram Prasad Adhikari further stated that upon asking his wife, she disclosed that four persons on the point of pistols and guns removed her clothes and one by one committed rape upon her. They also forcibly removed her ear rings, gold nose pin and silver *pajeb*s. Apart from this, they also took away three sarees and one dhoti kurta. According to the prosecutrix/victim, the age of the accused persons was about 30 to 40 years and they were all wearing turbans. Till morning, Ram Prasad Adhikari, alongwith his wife and children, remained locked in the said room. However, in the morning they shouted and then one bicycle rider stopped and opened the door of this room. Thereafter, he disclosed the whole incident to the nephew of the owner of the *mandir*, who called the police.

7. During the investigation, site plan of the crime spot was prepared, one broken lock, one button of shirt and woollen shawl of the prosecutrix were taken into possession and sent for FSL. The prosecutrix was sent for medical examination and her statement and that of other witnesses was also recorded. Besides, a plastic sheet on the *takhat*, a quilt cover was also seized and sent for FSL opinion. The investigation of the case was thereafter handed over to Inspector Gurmeet Singh.

8. On 14.04.2005, accused Sunil Kumar was arrested in another case being FIR No. 135/2005 under Section 25 of the Arms Act, 1959 registered at Police Station Alipur, Delhi and accused Virender @ Billu was arrested



for the same offences in FIR No. 136/2005. Both the accused persons in their respective disclosure statements, accepted about the present incident. Inspector Gurmeet Singh went to Police Station Alipur, collected the Disclosure Statements, Seizure memo and other documents and carried out further investigation. The case FIR was submitted before the concerned Metropolitan Magistrate. Both the accused persons refused to join TIP proceedings and they were sent to police custody. At the instance of accused Sunil Kumar, one saree and cloth, which was used at the time of the incident for wrapping his head, were recovered and seized. Thereafter, blood samples of both the accused persons were collected for DNA analysis. At the instance of accused Virender @ Billu, robbed gold earrings were recovered from his possession. All the exhibits were sent for the FSL expert opinion.

9. On the disclosure of both the accused persons, a search was conducted at the addresses of their associates namely Rajpal @ Kala, Kamal Dass @ Pappu and Krishpal, who had since absconded and were therefore, declared 'Proclaimed Offenders' by the learned Trial Court. The Investigating Officer of the case placed the DNA and FSL report on record and charge-sheet under Sections 395/376G/412 IPC was filed against the accused persons.

10. The learned Court of Metropolitan Magistrate submitted the case to the Courts of Sessions, who vide order dated 22.11.2005, framed charges against both the accused persons for the above-noted offences, against which they pleaded not guilty and claimed trial.

11. In support of its case, prosecution examined PW-1 Head Constable Rajeev, PW-2 ASI Asha Devi, PW-3 Ram Prasad Adhikari (the



complainant) and PW-4 Dr. Jai Kumar, who prepared the MLC of the prosecutrix and Dr. Sunita Sethi, who examined the prosecutrix and PW7 prosecutrix and besides, testimony of other official witnesses were also recorded, which included evidence of PW-14/A.K. Srivastava (Senior Scientific Officer), FSL.

12. Both the accused persons in their statements recorded under Section 313 Cr.P.C. claimed their innocence. However, no defence witness was examined by them. The learned Trial Court, after appreciation of the testimony of the witnesses recorded and the material placed before it, *vide* impugned judgment dated 14.01.2011 held as under :

“65. On the basis of above discussion and observation, the prosecution has failed to bring home the guilt of both the accused persons for commission of offence u/s 376G IPC. However, prosecution has succeeded in proving its case against both the accused persons in respect of commission of offence punishable u/s 395 IPC. Accordingly both the accused persons are acquitted of charges framed against them u/s 376G IPC. However, both the accused persons namely Virender @ Billu and Sunil Kumar are convicted for commission of offence punishable u/s 395 IPC. Accused Sunil Kumar is further convicted u/s 412 IPC. Accused Virender @ Billu is given benefit of doubt and is acquitted of charge u/s 412 IPC. The evidence led in this case shall be read against proclaimed offenders Rajpal @ Kalu, Kamal Dass @ Pappu and Krish Pal as per Section 299 CrPC as and when they are arrested.”

13. The learned Trial Court *vide* impugned order on sentence dated



17.01.2011 further held as under :-

“4. Accused persons are involved in a gruesome incident of dacoity and gang rape but only offence of dacoity has been proved against both the accused persons. Convict Sunil Kumar is also convicted of offence punishable u/s 412 IPC. Hence, keeping in view the facts and circumstances of the case, I award sentence to convict Sunil Kumar to undergo rigorous imprisonment for a period of six (06) years and to pay a fine of Rs. 5,000/- u/s 395 IPC. In default of payment of fine, he shall undergo simple imprisonment for a period of six months. I further award sentence to convict Sunil Kumar to undergo rigorous imprisonment for a period of one (01) year u/s 412 IPC.

6. Further I award sentence to convict Virender @ Billu to undergo rigorous imprisonment for a period of six (06) years and to pay a fine of Rs.5,000/- u/s 395 IPC. In default of payment of fine, he shall undergo simple imprisonment for a period of six months.”

14. Aggrieved against the aforesaid judgment and Order on sentence, the present Appeal has been preferred by the appellant/State on the ground that the prosecutrix (PW-7), during her cross examination, had correctly identified both the accused persons. However, the learned Trial Court has erroneously rejected her testimony. Also, Ram Prasad Adhikari (PW-3), who is the husband of the prosecutrix, had also stated that four five persons had entered the temple and threatened him to kill on point of pistol, guns and edged weapons and had taken gold articles of his wife and had also correctly identified both the accused persons. However, the learned Trial



Court has not appreciated it. Also, the learned Court of Sessions wrongly discarded the testimony of the prosecutrix stating that it is a very weak identification and the same cannot be relied upon.

15. Further submitted that the learned Court of Sessions has not considered that both the accused persons had refused to join TIP proceedings, which was proved by the testimony of PW-28. The learned Sessions Judge has wrongly rejected the scientific corroboration through PW-14 (AK Srivastava), who had proved DNA analysis of accused persons.

16. Further challenge is also made on the ground that the application of the prosecution under Section 311 Cr.P.C. for recalling certain witnesses was rejected by the learned Trial Court *vide* order dated 14.01.2011. Lastly, it is averred that the learned Trial Court has accepted the prosecution case in part and convicted the accused persons for the offences under Sections 395/412 IPC but had acquitted the respondents under Section 376G IPC despite the fact that all the offences were committed by the same accused persons.

17. To the contrary, learned Amicus Curiae appearing on behalf of the respondents disputed the contentions raised by the learned Additional Public Prosecutor for State and submitted that the impugned judgment passed by the learned Trial Court, is well merited and is based upon the testimony of the witnesses recorded, and therefore, it calls for no interference by this court.

18. We have gone through the impugned judgment as well as the testimony of the witnesses recorded before the learned Trial Court. The allegation against the respondents/accused are that they, in connivance with



the other associate- accused, committed rape upon the prosecutrix and also committed dacoity and looted gold earrings (*bali*), nose pin, silver paijeb, three sarees, kurta and dhoti at the point of deadly weapon from the prosecutrix/victim, who is the wife of the complainant Ram Prasad Adhikari.

19. The prosecution examined as many as thirty witnesses in support of its case.

20. PW-1 Head Constable Rajeev and PW-2 ASI Asha Devi are the official witnesses, who upon the receipt of the information with regard to the alleged incident, had recorded the DD entry.

21. PW-3 is the husband of the prosecutrix/victim and is also the complainant of the FIR in question. He, in his examination in chief, narrated the incident that being the *pandit* of the temple, he was sleeping near the idol, while his wife and daughter were sleeping in the bedroom adjoining to the temple. He was in deep sleep when someone pulled his *choti* and on the point of gun, pistol and some sharp edged weapon, the accused persons threatened to kill him if he would not tell about the *galla* containing amount of Rs.50,000/-. Since he could not tell where the *galla* was, they abused him and gave slaps on his ears. He asked them to take away whatever they wanted but they tied his hands and legs with the cloth and dropped him behind the temple. The accused collected the keys of the room, which was under his pillow and went to the room where his wife was sleeping and searched for the valuables of the temple. He heard the cries of his wife and daughter. His brother-in-law Keshav Raj was also present there and was sleeping. The accused persons came out of the room after 1½ or 2 hours and



warned him not to shout. They had taken her gold earrings, one gold nose pin and one silver pajeb. After they left, his wife told him that they had raped her at the gun point. He narrated the entire incident to the nephew of the owner of the temple, who informed the police.

22. This witness PW-3 identified the assailants present in Court as Virender and Sunil Kumar. He also identified the Saree (Ex-P2) and stated that his wife was wearing the saree at the time of the alleged incident, which was taken in possession by the police. This witness also stated that the earrings produced in Court were not of gold but of similar shape which had been taken away by the assailants. PW-3 also identified the plastic sheet (Ex P-3) and cover of quilt (Ex P-4). During his cross-examination, PW-3 stated that after the alleged incident, he had gone to the house of Joginder alongwith the Chowkidar, who then came to his house (temple) and besides him, no other public person was present.

23. PW-3 witness accepted that on the day of the alleged incident, the idol of Hanuman ji was wearing gold articles, however no articles of the temple were looted. He also accepted that on the day of the alleged incident, he was sleeping in the temple otherwise he used to sleep with his wife. PW-3 has stated that accused person tied his hands with his waist and legs with his *pajama* and he was thrown on the back side of the temple. However, after raping his wife and looting her, the accused persons untied him, made him free and locked him inside the room, however, took the cloth with them. PW-3 accepted that he had not informed the police that he had gone to Joginder alongwith the Chowkidar.

24. PW4, Dr. Jai Kumar, is the Medical Officer from MB Hospital, who



in his testimony recorded before the learned Trial Court, stated that he had medically examined the prosecutrix and prepared MLC (Ex PW-4/A) with the alleged history of sexual assault on the night of 18.03.2005 and referred her to Gynaecology Emergency for detailed examination and expert opinion.

25. PW-5 Dr. Sunita Kumari deposed that she had prepared her notes on MLC (Ex PW-4/A) which were written by Dr. Rashmi on her instructions. She stated that *“Patient was conscious. General condition was fare. Vitals were stable. Per abdomen soft. No external injury found over cheek, neck, breast or private parts. One scratch mark linear approximately 5-6 cm, 10 cm above left wrist joint was found. No bleeding PV was found. Episiotomy wound healthy, slight discharge PV present. Per vaginal examination, hymen was found ruptured, uterus normal size, anteverted mobile, fomices free. Two vaginal smear slides taken. Pubic hair taken. Clothes of the victim packed, sealed and handed over to 10. She was advised antibiotics, urine for pregnancy test and report to the Gynae OPD. I can elucidate on the medical aspect of this case.”*

26. PW-6 Dr.Vinita Wadhwa, Baba Saheb Ambedkar Hospital, who had brought the accused Virender @ Billu to the hospital and stated that *“the patient was conscious, oriented. Vitals were stable. There were no external injuries. On examination of external genitalia, it was found to be fully developed male adult gentilia with no injuries. There was nothing to suggest that Virender @ Billu was incapable of performing sexual act.”*

27. This witness PW-6 had also examined the other accused Sunil Kumar and stated that *“On examination, the patient was conscious, oriented. Vitals were stable. There were no external injuries. On examination of external*



genitalia, it was found to be fully developed male adult gentilia with no injuries. There was nothing to suggest that Sunil Kumar was incapable of performing sexual act.”

28. The testimony of PW-7- prosecutrix was recorded through Interpreter Sh. Dil Chatribahadur, who interpreted the testimony of the witness/prosecutrix/victim, since belonged to Nepal. PW-7 prosecutrix/victim, in her examination-in-chief, stated that she did not remember the date of the incident. However, at around 1:00 a.m. in the midnight, the accused persons first entered the temple where they tied her husband and thereafter, came to her room. One of them took her daughter and switched off the light of her room. When she tried to cry, her mouth was gagged, her saree was removed and she was subjected to the sexual intercourse. She stated that she had offered them Rs.50,000/- but they did not spare her. The accused persons alongwith their associates raped her one by one due to which she became unconscious. All the accused persons were having pistols in their hands and they had removed her gold earrings, gold nose pin and silver payal. She stated that she could not identify the assailants as the light of her room was switched off by them. Since she had resiled from her statement given under Section 161 Cr.P.C., she was cross-examined by the learned Public Prosecutor and she stated that both the accused present in Court were involved in the alleged incident and they had committed sexual intercourse upon her without her consent. She identified the plastic sheet (Ex P-3), cover of quilt (Ex P-4) and the earrings (Ex P-5), which she was wearing at the time of the incident. She also identified the saree (Ex PW-2) and the bedsheet (Ex PW-7).



29. During her cross examination, she admitted that she was raped and was taken to the hospital for medical examination and that her husband had accompanied her to the hospital. She stated that she had told in Nepali language that she was raped by four persons.

30. PW-9/Shri Mandip, in his examination-in-chief, stated before the learned Trial Court that he was the owner of *the Sankat Mochan Hanuman Mandir, Delhi* and *Ram Prasad Adhikari* was appointed by his wife as *pujari* since 2003. He stated that Ram Prasad Adhikari used to reside in the room of the mandir. On 20.3.2005 at about 7/8 a.m. son of his sister-in-law informed him of dacoity in mandir and he rushed at the spot at around 3-4 p.m. This witness stated that he is working as Assistant Sub-Inspector in Delhi Police and his statement was recorded on the spot and he did not remember if thereafter any statement was recorded. He also stated that victim/prosecutrix was residing with *pujari* for the last six months and she was the third wife of *pujari*.

31. During his cross examination, PW-9 stated that his duty hours were 9:30 p.m. to 5:00 p.m. and on the said day, he was on rest but was called in the office. He further stated that he is not involved in the activities of the mandir and his wife manages the affairs of the mandir, who alone had knowledge of the affairs of the mandir. This witness stated that he, in his statement recorded under Section 161 Cr.P.C., had stated that this mandir belong to his wife and he has been confronted with the testimony of Ex PW-9/DA wherein it is not so recorded. Also, in his statement under Section 161 Cr.P.C., he had stated that he had gone to the hospital whereas in his statement Ex PW-9/DA it has also not been recorded. In such circumstances,



learned Additional Public Prosecutor cross examined this witness as he had resiled from the earlier statement on the point of date of incident and was suppressing the truth. However, he could not get any material to support the prosecution case.

32. PW-10 Constable Dalbir Singh, who is brother-in-law of Sandeep (PW-9), who is the owner of Sankat Mochan Siddh Hanuman Mandir, in his examination in chief stated that on 19.03.2005 at about 7:00 a.m., Ram Prasad Adhikari had come to their house and told them that four five persons forcibly entered in the temple and committed rape on his wife in the intervening night of 18.03.2005 and 19.03.2005 and robbed his wife earrings and some cash. He stated that in his presence, a plastic sheet and a cover of quilt were kept in *pullanda* and were seized *vide* seizure memo Ex. PW-9/A. The witness identified the same in court.

33. During his cross examination, PW-10 stated that his brother-in-law was working in Delhi Police. He stated that he had gone to the police station on 19.03.2005, 20.03.2005 and 21.03.2005, however, his statement was not recorded. His statement was ultimately recorded on 23.03.2005 when Ex P3 and P4 were taken into possession.

34. PW-13 A.K. Srivastava, Senior Scientific Officer, FSL, Delhi in his examination in chief stated that as per the biological report dated 27.05.2005 (Ex PW-13/A) all the exhibits were examined by him and observed as under:

*“Result of analysis ; semen could not be detected on Ex. 1
i.e. bed sheet.*

DNA REPORT:

*On 21.04.2005, 22.03.2005 and 24.03.2005 parcels were
received in FSL Delhi in connection with case FIR No:
97/2005 ,PS Bawana for DNA Analysis.*

**RESULT OF EXAMINATION;**

1.The DNA profile of the source of exhibit 2b (i.e. area 1 on salwar of victim Smt. Kamla) is of male origin.

2. The DNA profile of source of exhibit 2b (i.e. area 2 on salwar of victim Smt. Kamla) is of mixed DNA profile of different male persons.

3. The DNA profile of source of exhibits 4b (micro slides from the victim Smt. Kamla) is of mixed DNA profile of different male persons.

4a. DNA profile of the source is Ex. 1 (i.e. Shri Virender Singh) is matching with the DNA profile of the source of exhibit 2b (area 1 on salwar of victim Smt. Kamla)

4b. The DNA profile of source is Ex. 1 (i.e. Shri Virender Singh) is also matching with the mixed DNA profile of the source of exhibit 2b (area 11 on salwar of victim Smt. Kamla). And source of exhibit 4b(micro slide from the victim).

CONCLUSION:

The DNA profile (STR analysis) performed on the exhibits provided sufficient to conclude that biological fluid present on the source of exhibit 2b (area 1 and area 2 on salwar of victim Smt. Kamla and Ex. 4 b (micro slides from the victim Smt. Kamla is not from any of the source of exhibit PW13 1 (blood sample of suspect of Shri Ram Pd. Adhikari), Ex.2 Cblood sample of victim Smt. Kamla). Ex. 3 (blood sample of suspect Sanjeev) Ex. 4 (blood sample of suspect Rajblr) Ex.5(blood sample of suspect Shri Sukhbir Singh Ex. 6 (blood sample of Monu. My detailed report is Ex.PW13/K, and enclosures are Ex. PW13/L1 to PW13/L9 and identification form of accused persons are Ex. PW13/ M to PW13/R all of which bears my signatures at point A.



35. PW-14 Head Constable Harbeer Singh, in his examination in chief, stated that he had made an entry in the PCR call book and when he reached at the spot on 19.03.2005, he was informed by Ram Prasad Adhikari (PW-3) that 11/12 persons had come to mandir, had broken the lock, went to the room where his wife was sleeping and they committed rape upon his wife. During his cross examination, this witness stated that some public persons were not allowing to remove the victim to the hospital; however with the intervention of the SHO, she alongwith small child were taken to the hospital. He stated that he had not made inquires from any other person, however the wife of Ram Prasad Adhikari had narrated the entire facts to him.

36. PW-28 Head Constable Suraj Bhan in his examination in chief stated that he had apprehended accused Virender whereas Constable Ved Parkash apprehended Sunil Kumar. Also stated that on 13.04.2005 at about 8:40 p.m. they were on patrolling duty at Alipur road where they saw both the accused, who upon seeing them tried to run away but they chased and apprehended them. He identified both the accused persons in Court. He further stated that on formal search of accused Virender, one buttondar knife was recovered from his pant and Constable Ved Parkash had also recovered buttondar knife from the back pocket of the accused Sunil. In respect of recovery of knife from the pockets of both the accused, FIR No. 136/2005 under Section 25 of the Arms Act was registered at their instance. On the next day, both these persons were taken to the lockup and their disclosure statements were recorded. They stated that about 26 to 27 days prior, they have committed robbery in Hanuman Mandir, Barwala Road. The accused



also stated that they had committed rape upon a lady, who is the wife of the priest and had robbed jewellery articles and clothes of the lady.

37. Accused Virender disclosed that he can get recovered the *bali* of that lady from his *jhuggi*. He was taken to his *jhuggi* near Jaipur Golden Hospital from where in a polythene kept in his room of his *jhuggi*, a yellow colour *bali* was taken out and produced before the Investigating Officer. The seizure memo was accordingly prepared. This witness stated that he can identify the case property, if shown to him. During his cross examination, this witness stated that he was on patrolling on foot and the place of occurrence is half km from the police station. Nobody was present near both the accused persons when they were arrested. He stated that two three public persons had gathered there. However, they refused to tell their names and addresses and went away and hence, could not be made public witness. PW-14 stated that when accused Virender took him to his *jhuggi* one lady was also present there who left on seeing them.

38. PW-29 Inspector Babu Lal in his testimony has stated that he alongwith SI Ajit Singh, upon receiving call, had gone to the crime spot on 19.03.2005 where the complainant Ram Prasad Adhikari was present. He recorded the statement of complainant Ram Prasad Adhikari *vide* Ex. PW-3/A. He also entered the residential room where the alleged incident had taken place. He recovered one black colour button having four holes (Ex. PW-29/C), a shawl of maroon colour having some stains like semen stains (PW 29/D). He had also gone to the MB hospital to collect the MLC of the prosecutrix/victim. He handed over three sealed parcels and the parcel received from the doctor to SI Ajit Singh. He stated that prosecutrix/victim



was not well conversant with Hindi language and she used to speak in Nepali language, hence, whatever she told was translated by her husband and her statement was recorded under Section 161 Cr.P.C.

39. On 23.03.2005, he alongwith the Director, FSL visited the crime scene and according to this witness prosecutrix/victim and accused Rajbir, Sukhbir, Sanjeev and Sonu were taken to the FSL for DNA test where their blood samples were taken. This witness identified the lock, plastic sheet and quilt which were seized by him during the course of investigation. During his cross examination PW-29 stated that the statement of the prosecutrix/victim recorded under Section 161 Cr.P.C. in Hindi was at the instance of her husband. Further stated that on 19.03.2005, one or two public persons were also present in the temple and even passers-by were present. However, their statements were not recorded. On that day he did not seize the bed sheet and plastic sheet available in the room but seized it on the next day.

40. PW-30 ACP Gurmeet Singh in his examination in chief stated that both the accused persons were in judicial custody when the investigation of the case was handed over to him by Inspector Babu Lal. Both the accused persons have refused to join TIP proceedings. He alongwith ASI Karan Singh had gone to the house of accused Sunil Kumar on 21.04.2005 from where they recovered one saree of *badami* colour and one cloth, which was used by him at the time of robbery from his house. The accused persons disclosed the names of their associates as Krishpal, Rajpal and Kamal Das as they were residing near *jhuggie* of accused Sunil Kumar. However, when the raid was conducted, they could not be apprehended. PW-30 further



stated that both the accused persons were taken to FSL, Rohini for their DNA test and their blood samples were taken.

41. The learned trial court, in the light of testimony of the witnesses examined, vide impugned judgment held that the cloth (EX.P-1) and saree (Ex. P-2) which was recovered from the house of the accused-Sunil Kumar from his *jhuggi*, the case of prosecution in respect of offence under Section 395 Cr.P.C. and 412 IPC, stood proved. However, prosecution could not bring home the guilt under Section 376 (g) against the accused persons.

42. The prosecution-State has by way of this appeal challenged acquittal of the accused persons for the offence under Section 376 (g) IPC.

43. On the aspect of bringing home the guilt of accused, the Hon'ble Supreme Court in *State of Punjab Vs. Jagir Singh*, (1974) 3 SCC 277 has observed as under:-

“23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on



grounds which are fanciful or in the nature of conjectures.”

44. Relevantly, to bring-forth the guilt of offence under Section 376(g) IPC, the testimony of the prosecutrix is of prime importance. It has already been held in a catena of decisions that for the offence of rape, the testimony of the victim is crucial, based upon which conviction or acquittal of the accused can be decided.

45. On the importance of testimony of the prime witness, the Hon’ble Supreme Court in ***Rai Sandeep Vs. State (NCT of Delhi)*** has observed and held as under:-

“22. In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons



involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

46. Further, the Hon’ble Supreme Court on the question of the testimony of the prosecutrix/victim in ***Moti Lal v. State of M.P. (2008) 11 SCC 20*** has observed as under:-

“If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of



corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestation.”

47. This Court has carefully gone through the testimony of the PW-7/prosecutrix and we find that she in her statement recorded under Section 161 Cr.P.C. stated that in the night of 19.03.2005, while she was sleeping in her room and her husband was sleeping near the idol in the temple, five persons entered into her room, switched off the lights, removed her saree and she was subjected to intercourse one by one by four persons at the gun point. She, in her examination in chief, deposed that the accused persons forcibly removed her gold earrings, nose pin and a silver paje from her possession. However, she categorically stated that she cannot identify the assailants, as the light of her room was switched off by the accused persons.

48. Since the prosecutrix turned hostile, she was cross-examined by the learned Additional Public Prosecutor for State and thereafter, she identified the accused persons present in the Trial Court and also affirmed that they had sexual intercourse upon her without her consent.

49. It is relevant to note here that PW-7 prosecutrix in her examination-in-chief had at the first instance completely resiled from her statement recorded under Section 161 Cr.P.C. by refusing to identify the accused persons.

50. Relevantly, when the alleged incident of rape was committed upon PW-7/prosecutrix, no other person was present in the room except her infant



daughter and little brother, who was also sleeping. By not identifying the accused persons, she has shaken the foundation of the prosecution case as to whether the crime was committed by the respondents- accused. During her cross examination, she also admitted that photographs of the accused persons were shown to her by the police after the accused persons were arrested, which further weakens the case of the prosecution. In the considered opinion of this Court, by not identifying the accused in her examination-in-chief and by identifying them during cross-examination by the learned Additional Public Prosecutor for State , after specifically stating that the police personnel had shown her photographs of the accused after their arrest, the victim/prosecutrix has lost credibility in respect of identify of the accused.

51. Further, the Investigating Officer (PW-29) in his cross-examination deposed that statement of the prosecutrix/victim was recorded under Section 161 Cr.P.C. in Hindi, however, the prosecutrix/victim was a Nepali and she could hardly understand language Hindi and whatever was being recorded was at the instance of her husband, that is the complainant herein. In such a situation, the statement of prosecutrix/victim, which has actually not come from her mouth, casts a doubt upon the commission of crime. Even if it is taken that the statement of the victim/prosecutrix recorded under Section 161 Cr.P.C. is not admissible, however, it is worthy to note here that at the time of recording of her statement before the learned Trial Court, an Interpreter was appointed and she did not support the case of the prosecution in its true spirit.

52. On the worthiness of the statement of the prosecutrix for the



allegation of rape, the Hon'ble Supreme Court in **Raju v. State of M.P., (2008) 15 SCC 133** has observed and held as under:-

“10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

11. It cannot be lost sight of 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, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.”

53. In the light of the fact that prosecutrix has not been able to substantiate her allegations of rape against the accused person, we now proceed to examine the evidence of other witnesses.

54. This Court has also gone through the testimony of PW-3/Ram Prasad



Adhikari, who is the priest of the temple and husband of the prosecutrix/victim and we find he deposed before the learned Trial Court that usually he used to sleep in his room alongwith his wife, however on the day of the incident he was sleeping in the temple. The accused persons had tied his legs and arms and had thrown him at the back side of the temple. Before leaving they had untied him and locked him in the same room where his wife was locked.

55. It is also worthy to note here that PW-3 in his statement stated that the accused had enquired about the *galla* containing Rs.50,000/- and they broke the lock of the temple where he was sleeping. With regard to the amount of Rs.50,000/-, the prosecutrix in her statement has stated that she had offered amount of Rs.50,000/- to the accused persons requesting them not to rape her. However, it has nowhere been mentioned whether the said amount of Rs.50,000/- was actually robbed by the accused person. Even prosecution is silent on the aspect of any such recovery at the instance of the accused persons.

56. PW-3 further stated that his wife told him that the accused persons had committed rape upon her one by one by removing her saree. He stated that the accused had robbed his wife of her ear rings, pajeb and nose pin. However, when the case property recovered at the instance of accused Virender was shown to him in the Court, he deposed that the earrings were of the same design but not gold and thereby, disapproved the recovered earrings from the accused.

57. Also, PW-3 did not in any manner himself had not stated anything that he had heard any kind of hues and cries of the prosecutrix/victim when



the alleged incident of rape had occurred.

58. With regard to the scientific evidence placed on record, we find that PW-14 A.K. Srivastava in his DNA report has specifically observed that human semen was detected on Ex.2A which is a lady shirt, 2B salwar and 4a micro slides and submitted DNA analysis. He further opined that blood samples of accused Virender i.e. Ex.1 matches with DNA profile of Ex.2 i.e. the salwar of victim/prosecutrix. It also matched with the micro slide Ex. 4b. However, DNA profile of Ex. 2 i.e. Sunil Kumar did not match with the DNA profile of Ex. 2B and Ex. 4B i.e. salwar and micro slides of the victim/prosecutrix.

59. It is worthy to note here that the victim/prosecutrix PW-7 in her statement as well as PW-3/the complainant i.e. the husband of the prosecutrix in their statements recorded before the police and in their testimony recorded before the learned Trial Court have stated that the victim was wearing a saree at the time of the alleged incident. It is highly unbelievable that at the time of commission of crime, she was wearing a saree, however, the prosecution seized the salwar and shirt of the prosecutrix and sent it for FSL examination and even human semen was found upon it.

60. The learned Trial Court in such facts of the case, observed that the prosecutrix and her husband at no point of time testified that she was wearing shirt and salwar at the time of the incident and even the MLC of prosecutrix also did not mention that she was wearing a shirt and salwar at the time of incident nor that the doctor, who had seized shirt and salwar, mentioned so. Thus, prosecution has miserably failed to prove that the clothes worn by the prosecutrix at the time of alleged incident were same



which were sent to FSL and having human semen.

61. In our considered opinion, the learned Trial Court has rightly held that prosecution had failed to establish that the accused Virender and Sunil Kumar had committed rape upon the prosecutrix. With regard to involvement of other accused persons *i.e.* Rajpal @ Kala, Kamal Dass @ Pappu and Krishpal, in the alleged incident, the scientific evidence clearly stated that the DNA test was negative. With regard to the recovery of plastic sheet (Ex. P-3) and cover of quilt (Ex. P-4) and mehroon shawl (Ex. PW29/2), PW-29 has categorically stated that the same were recovered from the spot of crime on the next day of commission of crime. The worthiness of such samples sent for FSL examination after a time gap is of no importance.

62. The Hon'ble Supreme Court in ***Krishan Kumar Malik Vs. State of Haryana***, (2011) 7 SCC has held as under:-

“31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

63. In the aforementioned facts of the present case, in our considered opinion, the learned Trial Court has rightly acquitted the accused of the offence under Section 376 (g) IPC as prosecution has miserably failed to prove its case.



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We agree with the decision of the learned Trial Court and find no ground to interfere in it.

64. With observations as aforesaid, the present appeal is accordingly dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

APRIL 02, 2024

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