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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : JULY 16, 2015

DECIDED ON : JULY 27, 2015

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CRL.A. 679/2003

SUKHBIR YADAV

..... Appellant

Through : Mr.K.Singhal, Advocate.

VERSUS

STATE

..... Respondent

Through : Mr.Navin K.Jha, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is to a judgment dated 22.04.2003 of learned Additional Sessions Judge in Sessions Case No.163/99 arising out of FIR No.339/97 registered at Police Station Vikas Puri whereby the appellant Sukhbir Yadav was convicted under Section 376 IPC and was sentenced to undergo RI for seven years with fine ₹25,000/-

2. Briefly stated the prosecution case as set up in the charge-sheet was that on the night intervening 10/11.06.1997, at about 12 night, at House No.E-166, Om Vihar, Phase-V, Delhi, the appellant committed rape upon 'X' (assumed name) without her consent after criminally intimidating her. The First Information Report was lodged on 12.06.1997 after recording victim's statement (Ex/PW-2/A) in which 'X' implicated the appellant for committing rape upon her at night time when her husband was away on his place of work. She gave detailed account as to how and under what circumstances, the appellant gained entry inside the house and sexually assaulted her. During investigation, the prosecutrix was taken for medical examination; the accused was arrested and medically examined. Statements of witnesses conversant with the facts were recorded. Exhibits collected were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. The prosecution examined seven witnesses. In 313 statement, the appellant denied his involvement in the crime and pleaded false implication. DW-1 Sham Sundri appeared in defence. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file. Admitted position is that 'X' and her husband lived in a rented accommodation belonging to the appellant. 'X's mother along with her husband used to live in the adjoining room. The appellant along with his wife and four children also lived in the said premises. 'X's husband used to go on duty during night at Peera Garhi.

4. The occurrence alleged took place on the night intervening 10/11.06.1997, at about 12 night. However, the matter was reported to the police after a delay of two days i.e. on 12.06.1997. No reasonable and plausible explanation has been offered by the prosecutrix and her family members for not narrating the incident to her parents who lived in the said premises promptly. Her husband PW-4 (Duryodhan) arrived at home at about 2.00 a.m. on the same night. Strange enough, 'X' did not exhibit abnormal behaviour and avoided to apprise him of any such incident. In rape cases delay in lodging the FIR is not always fatal. At the same time the Court has to seek an explanation for delay and test the truthfulness and plausibility of the reasons assigned. No satisfactory explanation has been offered for the delay. I am conscious that a mere delay in lodging the FIR cannot be a ground for throwing the entire prosecution case over-board. The appellant did not abscond and continued to stay with his family. He

was not armed with any weapon to create real apprehension in 'X's mind not to disclose the crime to her mother or husband. She did not give any plausible reason as to why the matter was not reported to the police that time. PW-4 (Duryodhan), 'X's husband has introduced a new story and revealed that on return to house at 2.00 a.m. that night, 'X' started weeping after seeing him. Before she could disclose anything, the accused arrived there. PW-4's version has not been affirmed by the prosecutrix or her mother. Arrival of the accused at odd hours i.e.2.00 a.m. must have created some suspicion in his mind. The appellant, who had allegedly raped the prosecutrix against her wishes forcibly could not dare to visit PW-4 (Duryodhan) in the presence of the prosecutrix after the crime. It was a fair and good opportunity for her to bring to book the appellant for the horrendous crime allegedly committed by him. Prosecutrix's conduct in not reporting the incident for about two days seems unnatural and unreasonable.

5. The occurrence took place during summer days at midnight when many residents in the adjoining houses used to sleep on the roofs. Even 'X's mother and her husband were present nearby. Nothing has surfaced to show that 'X' raised any loud alarm or hue and cry to attract their attention. She conveniently allowed the appellant to move away

from the spot after the crime and remained mute for about two days. The story presented by the prosecutrix does not inspire confidence. She had allegedly got up around 12.00 night to answer the call of nature and had gone to a toilet adjoining to her room outside. When she returned to the room, she saw the accused standing naked in her room. Nothing has been explained by the prosecutrix as to why she entered the room finding the accused in a naked condition and did not raise alarm that time. There was no reason for the prosecutrix to enter the room suspecting something foul. Nothing is on record to infer if any resistance was offered by the prosecutrix to ward off the sexual assault. At the time of her medical examination vide MLC (Ex.PW5/A), no visible external or internal injuries were found on her body. There were not struggle marks or marks of violence on her body to show if she was raped against her wishes forcibly. Even the accused did not suffer any injury on his body. There was huge gap between the age of the victim and the perpetrator of crime and it was not very easy for him to establish physical relations forcibly in case of resistance by her, she being a young lady aged about twenty years. She had no reasons to be under fear when her parents were living nearby.

6. The appellant's conviction is primarily based upon 'X's sole testimony which has remained uncorroborated. Bed sheet and salwar

which 'X' was wearing were not taken into possession. As per FSL report (Ex.PX) human semen was detected on exhibits 1a and 1b (Two broken microslides having very thin whitish smear and Ex.5 (underwear). However, semen found on the underwear Ex.5 did not match with that of the appellant. Admittedly, 'X' had sexual intercourse with her husband after the incident. It is not clear whether semen detected on Ex.5 was that of her husband or of the appellant. The serological report is of no help in connecting the appellant with the crime in question. Considering all these circumstances, possibility of consensual sex cannot be ruled out.

It is settled law fact that conviction can be based on the sole uncorroborated testimony of the prosecutrix. At the same time, the Statement of the prosecutrix is expected to be credible and reliable. In view of so many deficiencies, inconsistencies and more particularly due to delayed FIR for about two days, it would be unsafe to base conviction without looking for independent corroboration which is lacking in this case.

7. In *Abbas Ahmed Choudhury v. State of Assam* (2010) 12 SCC 115, observing that a case of sexual assault has to be proved beyond reasonable doubt as any other case and that there is no presumption that a

prosecutrix would always tell the entire story truthfully, the Hon'ble Supreme Court held:-

“Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1.

8. In another case *Raju v. State of Madhya Pradesh* (2008) 15 SCC 133, the Supreme Court stated that the testimony of a victim of rape has to be tested as if she is an injured witness but cannot be presumed to be a gospel truth.

“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.”

9. In *Rai Sandeep @ Deepu vs. State of NCT of Delhi*, (2012) 8

SCC 21, the Supreme Court commented about the quality of the sole
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testimony of the prosecutrix which could be made basis to convict the accused. It held :-

“In our considered opinion, the 'sterling witness' should be of a very high quality and caliber 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 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 correlation with each and everyone 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 similar such tests to be applied, it can 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.”

10. In *Tameezuddin @ Tammu v. State (NCT of Delhi)*, (2009)

15 SCC 566, the Supreme Court held :-

“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.”

11. In the light of above discussion, the appeal is allowed.

Conviction and sentence awarded by the Trial Court are set aside.

12. Trial Court record be sent back immediately with the copy of the order. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

JULY 27, 2015

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