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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : JULY 29, 2015

DECIDED ON : OCTOBER 20, 2015

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CRL.A.512/2004

SAMEER

..... Appellant

Through : Mr.Dinesh C.Mathur, Sr.Advocate,
with Ms.Utkarsha Kohli, 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 14.07.2004 of learned Additional Sessions Judge in Sessions Case No.190/2000 emanating from FIR No.510/93 registered at Police Station Paschim Vihar by which the appellant Sameer was held guilty for committing offences punishable under Sections 366/376 IPC. By an order dated 19.07.2004, he was sentenced to undergo Rigorous Imprisonment for five years with fine ₹3,000/- under Section 366 IPC and Rigorous Imprisonment for seven years with fine ₹5,000/- under Section 376 IPC. Both the sentences were to operate concurrently.

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2. Briefly stated the prosecution case as projected in the charge-sheet was that on 16.09.1993 at about 11:00 a.m., the appellant and Bhupender Singh (Proclaimed Offender) in furtherance of common intention abducted the prosecutrix 'X' (assumed name), aged around 15 years and committed gang rape upon her in a room at Krishan Vihar. Daily Diary (DD) No.19B came into existence at Police Station Paschim Vihar at 10.05 p.m. that day on getting information that some Muslim criminals had entered inside House No.A-2/31, Paschim Vihar. The investigation was marked to SI Kanshi Ram who with Constable Ayub Khan went to the spot. After recording victim's statement (Ex.PW-1/A), SI Kanshi Ram lodged First Information Report (FIR in short). In the complaint 'X' disclosed that at around 11:00 a.m. when she had gone to Blue Bell Academy, Jawala Heri, for taking tuition, she was kidnapped from there by Sameer and Bhupender at the point of knife after criminal intimidation. She was taken to Krishan Vihar where they both committed rape upon her. 'X' was medically examined; she recorded her statement under Section 164 Cr.P.C. Statements of witnesses conversant with the facts were recorded. The accused persons were arrested and taken for medical examination. Exhibits collected during investigation were sent to Central Forensic Science Laboratory for examination. Upon completion

of investigation, a charge-sheet was filed against the appellant and Bhupender for committing the offences under Sections 363/366/376 IPC. During trial, Bhupender absconded and was declared Proclaimed Offender vide order dated 03.02.2000. To establish the appellant's guilt, the prosecution examined twelve witnesses in all. In 313 statement, the appellant denied his involvement in the crime and pleaded false implication. After considering the rival contentions of the parties and on appreciation of the evidence, the Trial Court convicted the appellant for committing offences mentioned previously. 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. Appellant's conviction is primarily based upon the solitary statement of the prosecutrix 'X' which has not been corroborated by any other independent source. Needless to say, conviction can be based on the sole testimony of the prosecutrix provided it lends assurance of her testimony. In case the Court has reasons not to accept the version of the prosecutrix on its face value, it may look for corroboration.

4. In the instant case, 'X' has given conflicting and contradictory versions about the rape incident at various stages of the investigation/trial which make it unsafe to base conviction on her solitary

statement. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction.

In her police statement (Ex.PW-1/A) on 16.09.1993 which formed the basis of FIR, 'X' informed that she had gone to take tuition at Blue Bell Academy at 11:00 a.m. When she came down after a while, two boys Sameer and Bhupender met; forced her to sit in the car at the point of 'knife' and took her towards Sultanpuri 'Phatak'. From there, they picked up two boys Sonu and Shiv from a shop and after thrashing, made them to sit in the car. They took all of them to a room in Krishan Vihar. She, Sonu and Shiv were beaten by Sameer and Bhupender there; they also committed rape upon her. After the incident, Sonu and Shiv saved her from their custody and left her near her house. She narrated the entire incident to her mother.

5. In her 164 Cr.P.C.statement (Ex.PW-1/C) recorded on 22.09.1993, before learned Metropolitan Magistrate, 'X' made vital improvements and presented a new version. She disclosed that on 16.09.1993 at around 11:00 noon, she had gone on foot to take tuition. After asking important questions, when she came back after about ten

minutes, two boys caught hold of her in the stairs and after pointing out knife at her forcibly made her to sit in the Maruti car. Both the assailants were not known to her though she had seen Sameer (the appellant) earlier as he lived in MIG flats in A-2 Block. She further disclosed that the assailants, thereafter, took her towards Sultanpuri 'phatak' where Shiv who also lived in MIG flats in Block A-2 had a shop. Sameer made Shiv and Sonu to sit in the car. Sameer inquired from Shiv about the availability of any 'room' ('koi kamra batao'). Shiv was beaten when he declined to disclose it. Thereafter, they took her in a house at Krishan Vihar. Bhupender had caught hold of her and Sameer had caught hold of Shiv and Sonu. She, Bhupender, Sameer and Shiv came in a room and Bhupender bolted it from inside. Sonu (Sameer's cousin) was tied with an iron chain outside the room. Bhupender and Sameer consumed lot of liquor. Thereafter, Shiv was also tied along with Sonu and two 'gundas' were deputed to guard them; there were about 90 'gundas' inside the room. Bhupender and Sameer attempted to commit rape upon her together. Since she had taken 'judo and karate' training, she gave them beatings to the extent she could do. Thereafter, she was hit on her head as a result of which she became unconscious. They both, thereafter, raped her. When she came to senses, she saw them wearing clothes. She was

beaten and tied with an iron chain along with Sonu and Shiv outside. Thereafter, they all i.e. Sameer, Bhupender and the 'gundas' started consuming liquor. During this period, they requested the two individuals who were deputed to guard to release them in consideration of money. Thereafter, they released her and Shiv. When Sonu's chain was being opened, Bhupender arrived there and started quarrelling with the said individual and he was beaten severally as a result of which he became unconscious. She untied Sonu and they all escaped from there. Hardly they had covered a short distance, when Sameer along with Bhupender arrived there while driving the car and forced them to sit in the car. After some distance, the petrol in the car stood consumed. She and Shiv were made to sit on a rickshaw by Bhupender who had a big 'knife' in his pant and he threatened to kill them if they raised alarm. Due to fear, she and Shiv silently sat on the rickshaw and came at Shiv's shop. Shiv took his scooter from there, as directed by Bhupender. The scooter was driven by Shiv and she sat in the middle of Shiv and Bhupender. When they all reached Jawala Heri market, her mother met and she narrated the entire occurrence to her. She then lodged the report with the police.

6. In her Court statement as PW-1, she deposed that when she was coming back after attending tuition at Blue Bell Academy located on

the first floor at Jawala Heri, Sameer and Bhupender who were standing on the 'road', at the point of knife, took her in a car near Sultanpuri railway crossing. From there, they picked two boys Sonu and Shiv from a shop. She was taken somewhere in Krishan Vihar. She was beaten in a room there by Sameer and Bhupender and they forcibly raped her. Bhupender, Sameer and two other boys namely Shiv and Sonu brought her back from that room in the said car. On the way, some problem developed in the car. Sameer and the other individual left from there. Bhupender and the other boy dropped her at Jawala Heri market on a two wheeler scooter. Her mother met them and made inquiries from Bhupender who was still there. He ran away after pushing her mother. She came back to her house with her mother and narrated the entire incident to her. Police was informed and her complaint (Ex.PW-1/A) was recorded. She further disclosed that Shiv and Sonu were the two individuals who were taken by Bhupender and Sonu from near Railway crossing, New Friends Colony, Sultanpuri. Bhupender and Sameer had quarreled with Shiv and Sonu in an attempt to prevent them from ravishing her. In the cross-examination 'X' disclosed that she had joined the Academy 3-4 months prior to the incident. On that day, she had not attended the tuition class due to non-availability of the teacher. The

Academy was situated on the first floor and when she came down by stairs at the point of knife, she was taken towards a car nearby. She admitted that no alarm was raised by her when she was being taken to the car due to fear. She further informed that in a quarrel with Shiv and Sonu, Bhupender had received injuries on his hand. She was struck with some heavy object on her head as a result of which she became unconscious. There was, however, no visible injury on her head. She was brought to Jawala Heri market after the occurrence by Shiv and Bhupender. The house in which the room was located was locked from outside and some people were working inside it. When she was taken to that room, one of the individuals who came out of that room quarreled with Bhupender and the altercation continued for about 20/25 minutes. The said individual became unconscious and started bleeding from his mouth. She denied the suggestion that she was not kidnapped or abducted and no incidence of rape happened. She denied herself to be more than 18 years of age.

7. On scanning the above referred statements given before police and the Courts, it reveals that vital infirmities and discrepancies have surfaced therein. 'X' has given contradictory statements whether on the day of occurrence at about 11:00 a.m., she had visited Blue Bell Academy and if so till what duration she had stayed there. It is unclear if

she had taken any tuition or had returned in the absence of the concerned teacher. The Investigating Agency did not examine any 'teacher' from Blue Bell Academy to corroborate 'X's version of her visit to the Academy that day. The Investigating Agency also did not examine any other 'student' who used to take tuition along with the prosecutrix in that group/batch. The Academy was located in a densely populated area on the first floor. There was a 'halwai' shop on the ground floor which was surrounded by various other shops. The prosecutrix did not raise any alarm or hue and cry at the time of her alleged abduction at the point of knife by the assailants. It is not clear as to where the car in which the prosecutrix was taken from the spot was parked. Registration number of the car has not been revealed by the prosecutrix. No such car used in the crime was recovered during investigation. The 'knife' allegedly used to scare the prosecutrix was also not recovered. No harm was caused by the knife to the prosecutrix or any other individual. Distance from the Academy to 'X's residence was about 15/20 minutes' walk. 'X' was expected to return home after an hour more so when she was to take her science exam on 17.09.1993. However, she did not return to house till 7:00 p.m. Strange enough, 'X's parents did not lodge any report with the police to trace her. 'X's mother (PW-2) (Parsana Devi) informed that

when the prosecutrix did not return after attending her tuition at Jawala Heri till noon, she went to inquire about her at Jawala Heri. From there, she came to know that 'X' was with her 'friends'. When 'X' did not return till 7:00 p.m. she went for her search again and saw her near a park on the back side of Jawala Heri market at around 7:00 p.m.. She was perplexed as a boy was following her. When she inquired from the said 'boy', he just pushed her and ran away. She along with her daughter came back to their house and 'X' narrated the incident to her. PW-2 in her examination-in-chief did not identify the individual i.e. Sameer or Bhupender who was following 'X' when she met her at Jawala Heri market at around 7:00 p.m. The prosecutrix in the cross-examination disclosed that they had remained at the crime spot for 2 or 3 hours. She did not claim that her mother had met her at 7:00 p.m. at Jawala Heri market. There is inconsistency as to the time when 'X' finally returned to her residence. No plausible explanation has been offered by the prosecutrix as to where and with whom she stayed till 7:00 p.m. PW-2 did not elaborate as to from whom she had come to know that 'X' was with her 'friends'.

At no stage 'X' protested her kidnapping or commission of rape upon her. She remained in the company of the assailants for

sufficient duration. Even after the rape incident, she did not complain about the appellant's conduct and behaviour to anyone. She did not make any telephone call at 100. Even when her mother met her in Jawala Heri market, the incident was not reported to the police promptly. The first information conveyed to the police was recorded vide DD No.19B at 10.05 p.m. The information conveyed to the police was that some Muslim criminals had entered inside the house. It has not been explained as to why the exact information about the rape incident was not conveyed to the police. After recording victim's statement, Rukka was sent after a considerable delay at 11:55 p.m.

8. The prosecutrix was taken for medical examination at DDU Hospital, New Delhi, MLC (Ex.PW-12/A) records the arrival time as 12:00 noon on 17.09.1993. No external injuries were found on 'X's body. PW-12 (Dr.Prathiba Nanda) deposed that there were no marks of external injury on perineum or breast. It belies 'X's statement that she was hit on head as a result of which she became unconscious and was defiled. MLC (Ex.PW-12/A) does not show if any resistance was offered by the prosecutrix at the time of alleged gang rape or she suffered any injuries due to forcible rape on her body including private parts.

9. No plausible explanation has come on record as to why the assailants had associated Shiv and Sonu and had taken them along to the spot. No incriminating role was assigned by the prosecutrix to Shiv and Sonu. She rather deposed that they were her saviors and had attempted to stop the appellant and Bhupender to commit rape upon her. She further disclosed that they were beaten by the assailants. The investigating agency, however, did not medically examine Shiv and Sonu. Nothing has come on record if any of them sustained any injury in the occurrence. PW-4 (Devinder @ Sonu) did not support 'X's version and denied his acquaintance with Shiv and Bhupender. He knew Sameer as he lived in his neighbourhood. The learned Additional Public Prosecutor cross-examined him after seeking court's permission. In the cross-examination, he denied if any such incident had happened or the prosecutrix was raped in his presence. He denied if he was taken from his shop by Sameer and Bhupender and Shiv was asked to arrange any room. Similarly PW-7 (Shiv Saini) did not support the prosecution on material facts. He expressed ignorance about the occurrence. He was cross-examined by learned Additional Public Prosecutor as he resiled from his earlier statement. He admitted that he was running a shop at Sultanpuri in the name and style of New Laxmi Tent and Light House and knew Bhupender

and Sameer as they were his neighbours. He, however, denied if they had visited his shop on 17.09.1993 and had taken him forcibly in the manner disclosed by the prosecutrix. Needless to say, PW-4 and PW-7 have turned hostile and did not corroborate 'X's version on any aspect.

10. 'X' attributed special role to Bhupender in causing injuries to an individual who dared to release them at the spot. During investigation, nothing emerged as to who was the said individual or if he had sustained any vital injuries. 'X' spoke about presence of 90 'gundas' at the crime spot but at no stage, no such person was identified. 'X' claimed that she had also given beatings to Sameer and Bhupender to resist sexual assault. However, no such injuries were noticed by PW-2, her mother, when she met one of them at 7:00 p.m.

11. 'X' has deviated from her version about the incident at various stages of the investigation/trial. It is unbelievable that after committing forcible rape, Bhupender would accompany her till Jawala Heri market to drop her there. It can be inferred that both Sameer and Bhupender were acquainted with the prosecutrix before as they all lived in A-2 Block, Paschim Vihar. Possibility of the prosecutrix to accompany them without informing her parents voluntarily cannot be ruled out. The appellant and his associates had not anticipated 'X's arrival at the

Academy to plan her kidnapping at knife point during day time particularly when he had no previous criminal antecedents.

12. In her complaint (Ex.PW-1/A), 'X' did not inform the police that Bhupender was present when her mother had met her at 7:00 p.m. at Jawala Heri or that on confrontation, he had given a push to her. Contrary to that, she disclosed that Sonu and Shiv had brought her somehow from assailants' clutches and dropped her there. She did not claim if her mother had met her at 7:00 p.m. at Jawala Heri market. 'X's father who had informed the police appeared as PW-3. He did not state if incident of rape was disclosed to him by the prosecutrix and if so at what time. He did not claim if any information was conveyed by him to the police.

The prosecutrix claimed her age 15 years in the statement (Ex.PW-1/A) without disclosing her date of birth. In the MLC (Ex.PW-12/A), her age has been recorded as 14 years. PW-2 (Parsana Devi), her mother was not aware of her exact date of birth. PW-3 (Karan Singh) brought original birth certificate issued by NDMC (Ex.PW-3/A) where her date of birth was recorded as 16.10.1977. In the cross-examination, he admitted that at the time of 'X's admission in the school, her date of birth was given as 16.03.1977. PW-6 (Ishwar Singh), Lab Assistant, Govt. Sarvondya Co-educational Vidyalya, New Delhi, deposed that when 'X'

was admitted in first standard on 13.05.1982, as per school record, her date of birth was 16.03.1977. In the cross-examination, he admitted that no documentary proof or affidavit was placed on record at the time of seeking her admission. Certificate (Ex.PW-6/A) reflects her date of birth as 16.03.1977. PW-3 has not furnished any reason as to why original birth certificate showing date of birth 16.10.1977 was not produced at the time of seeking 'X's admission and how 16.03.1977, her date of birth surfaced in school records. During investigation, ossification test was conducted to ascertain approximate age of the prosecutrix. As per PW-11 (Dr.Yashpal), the prosecutrix was aged around 16 to 17 years as on 17.09.1993 vide report Ex.PW-11/A prepared by him. The conflicting dates of birth have emerged on record. It appears that the prosecutrix was more than 16 years of age on the day of occurrence. The date of birth 16.10.1977 seems to have been asserted to establish that she was below 16 years of age on the day of incident and her consent (if any) for physical relations was immaterial.

13. The Investigating Officer was not examined. It has not been established if any incriminating article was recovered from the crime spot. The Investigating Officer did not examine any witness residing at the crime spot or nearby.

14. The Trial Court committed error when it observed that due to non-production of CFSL result, it could not be ascertained whether semen or spermatozoa was found in her vaginal swab or not. Record reveals that Additional Public Prosecutor had tendered in evidence CFSL report (Ex.PA) on 21.05.2004. As per CFSL report (Ex.PA), semen was detected on Ex.Bio/B(Black Jeans) and Ex.Bio/C (White coloured readymade underwear) only. However, no 'group' could be found on Ex.Bio/B and Ex.Bio/C. So it cannot be said with certainty if the 'semen' found on the said exhibits was that of Bhupender or Sameer or none of them.

15. FIR in the instant case was lodged on the victim's statement (Ex.PW-1/A) on 16.09.1993. The Investigating Officer moved an application to record her statement under Section 164 Cr.P.C. before the Trial Court on 18.09.1993; it was assigned to link Magistrate. The prosecutrix was sent to 'Nari Niketan' to be produced on 20.09.1993 for recording her 164 Cr.P.C. statement. On 20.09.1993, application was moved by 'X's father Karan Singh to release her on '*superdari*'. Accordingly, vide order dated 20.09.1993, 'X' was released on '*superdari*' to her father and he was directed to produce her for recording statement under Section 164 Cr.P.C. on 22.09.1993. 'X's father had executed '*superdarinama*'. Apparently, there were no sound reasons for

the learned Trial court to send the prosecutrix to 'Nari Niketan' when she had not declined to accompany her parents. It is to be noted that the prosecutrix is a victim of crime; she is not an accomplice. She is a competent witness under Section 118 of Evidence Act and is to be produced as a witness by the prosecution during trial like any other witness. The practice to release the prosecutrix on '*superdari*' to her parents/guardian on execution of '*superdarinama*' must discontinue. The prosecutrix is not a case property to be released on '*superdari*' to her parents/guardian. The Courts below shall not henceforth require the parents/guardian to execute any '*superdarinama*' at the time of handing over victim's custody to them as per law.

16. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the instant case, the non-examination of material witnesses, the testimony of the prosecutrix, her unnatural conduct, the associated circumstances and the medical evidence leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. It shows several lacunae. There are various serious

contradictions in her statement and actions, from which it can safely be concluded that she was not telling the truth.

17. 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.

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.”

18. In *Rai Sandeep @ Deepu vs. State of NCT of Delhi*, (2012) 8 SCC 21, the Supreme Court commented about the quality of the sole 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."

19. 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.'

20. In the light of above discussion, I am of the considered view that the prosecution has failed to establish its case against the appellant beyond reasonable doubt. The appellant deserves benefit of doubt. The

appeal is allowed; conviction and sentence awarded by the Trial Court are set aside. Bail bond and surety bond stand discharged.

21. Trial Court record be sent back forthwith with the copy of the order. Contents of para 15 of the judgment be circulated among all learned Judicial Officers of District Courts for information and compliance. A copy of the order be sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

OCTOBER 20, 2015

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