

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

**RESERVED ON : 7<sup>th</sup> JULY, 2015**

**DECIDED ON : 29<sup>th</sup> JULY, 2015**

**+ CRL.A. 361/2013**

**ANIL KUMAR YADAV**

**..... Appellant**

Through : Thakur Virender Pratap Singh  
Charak, Advocate with  
Ms.S.Parashar & Mr.Pushpender  
Singh Charak, Advocates.

**VERSUS**

**STATE NCT OF DELHI**

**..... Respondent**

Through : Mr.Navin K.Jha, APP.

**CORAM:  
HON'BLE MR. JUSTICE S.P.GARG**

**S.P.GARG, J.**

1. The appellant – Anil Kumar Yadav challenges the legality and correctness of a judgment dated 15.10.2012 of learned Addl. Sessions Judge in Sessions Case No. 20/2011 arising out of FIR No. 225/10 PS Ranhola by which he was convicted under Section 376 IPC and by an

order dated 17.10.2012 sentenced to undergo RI for ten years with fine ₹ 1,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 07.10.2010 at noon time at house No.B-224, Pardhan Chock, Vikas Nagar, Uttam Nagar, Delhi, the appellant – Anil Kumar Yadav committed rape upon prosecutrix ‘X’ (assumed name) aged around 12 years. FIR was lodged on 26.10.2010 after recording victim’s statement (Ex.PW-1/A). In her complaint implicating the appellant for sexual assault, ‘X’ gave detailed account as to how and under what circumstances, she was criminally intimidated and defiled. ‘X’ was medically examined; she recorded her statement under Section 164 Cr.P.C. The accused was arrested and taken for medical examination. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was laid before the Court; the prosecution examined fourteen witnesses to prove its case and to bring home appellant’s guilt. In 313 Cr.P.C. statement, the accused denied his involvement in the crime and pleaded false implication. 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. Appellant's conviction is primarily based upon the sole uncorroborated testimony of the prosecutrix 'X'.

4. The occurrence took place on 07.10.2010, when 'X' while playing with her brother in the street was allegedly dragged by the accused inside her house and was ravished. In her complaint (Ex.PW-1/A), she disclosed that due to fear she did not narrate the incident to her mother. She remained mum for about 18 days and purportedly informed her mother on 25.10.2010. In 164 Cr.P.C. statement (Ex.PW-1/B), she did not disclose the date of occurrence. She informed that the accused had threatened to cut her into pieces if she disclosed the incident to anyone. In her Court statement, she deviated from her earlier version and came up with the plea that on the day of incident itself, she had apprised her mother about the sexual assault at her place of work. She further elaborated that the accused had given beatings to her mother and threatened them not to disclose anything to anyone when her mother came to the house. The prosecution has failed to reconcile the two contradictory versions. The fact remains that FIR was lodged after a considerable delay of 18 days only on 26.10.2010. The inordinate delay has remained unexplained. The Court is conscious that delay in lodging the First

Information Report cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. However, it puts the Court on guard to search for and consider if any explanation has been offered and if offered, whether or not it is satisfactory. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, the delay would be fatal to the prosecution case. In the instant case, the prosecutrix 'X' continued to live with the appellant in the same very premises after the occurrence. There is nothing to show if during this period, she was criminally intimidated or was kept in isolation. Apparently, she was free to move to any place and had ample opportunity to raise hue and cry or alarm anytime. Nothing is on record to show if the appellant was armed with any weapon at the time of commission of the crime to create real apprehension in X's mind not to raise alarm. Silence on the part of the prosecutrix and her mother for long 18 days is indicative of the fact that there was something amiss in the prosecution case. It is pertinent to note that even when 'X' took her mother into confidence on 25.10.2010 and was taken for medical examination, she declined to undergo medical examination at Sanjay Gandhi Memorial Hospital, Mangolpuri. PW-3 (Dr.Kirti Verma) examined her on 25.10.2010 vide

MLC (Ex.PW-3/A). She deposed that as per the information given by 'X' accompanied by her mother, there was no history of sexual assault. No external injuries were found on her body. Patient was not willing for any gynae examination. No plausible explanation has been offered by the prosecution as to why 'X' or her mother did not report commission of rape to the examining doctor. It is a mystery as to why no FIR was lodged on 25.10.2010 when 'X' was taken by Lady Const. Suman for medical examination.

5. In her statement (Ex.PW-1/A), 'X' was conspicuously silent to inform that the appellant was her step-father. She merely disclosed that her mother had started living with the appellant in his house after a quarrel with her biological father who was deserted by her mother. In 164 Cr.P.C. statement (Ex.PW-1/B), she explained that her mother had performed Court marriage with the appellant and they all were living together in his house. Nothing has, however, come on record as to when the Court marriage took place between the two and when they all had started living together. 'X' and her mother had no objection any time prior to the registration of the FIR in question about appellant's conduct and behaviour any time. Nothing is on record to show if the accused had an evil eye upon her.

6. The prosecutrix in her Court statement informed that after the incident, she opted to stay at the house of one Lovely Chaddha for some days and was brought back by her mother at appellant's instance. Lovely Chaddha has not been cited as a witness; she was not examined before the Court to corroborate X's version. She was the proper person to inform as to how and under what circumstances, 'X' was permitted to stay at her house by her mother. Adverse inference is to be drawn against the prosecution for withholding this witness. Needless to say that even Lovely Chaddha did not lodge any complaint with the police.

7. X's plea in evidence is that soon before the incident, when she was playing in the street along with her younger brother, she was dragged inside the room and was ravished. She further disclosed that after the occurrence, her brother came weeping in the house and thereafter, they both went to her mother at her place of work. In the cross-examination though it has come that the boy was younger to 'X', however, his date of birth / age has not been described to ascertain if he was a competent witness to give rationale answers to the questions put to him. The prosecution did not examine X's younger brother or any other child playing with her in the street.

8. X's conduct is unnatural and unreasonable. The alleged incident took place at noon time when number of children were playing outside the house which was not located at a secluded place. 'X' did not raise alarm or hue and cry to attract the attention of the outsiders. Even after the appellant had withdrawn from the spot and she and her brother had gone to the place of work of their mother, no such incident was reported to anyone. No material incriminating article was seized from the spot to establish the commission of sexual assault there. 'X' was not taken for medical examination immediately or soon thereafter of the incident. When examined on 26.10.2010 after a long gap, there were no mark of violence / struggle mark on her body to infer if any resistance was offered by her at the time of commission of rape.

9. Another strange feature of the case is that on 26.10.2010 at 03.50 p.m. 'X' was again taken to Sanjay Gandhi Memorial Hospital, Mangolpuri for medical examination. This time, she changed her mind and while deviating from her earlier statement specifically named the appellant to be responsible for sexual assault on 07.10.2010. PW-2 (Dr.Pratima) who examined her vide MLC (Ex.PW-2/A) did not notice any external injuries or bruises on her body. On local examination, her hymen was found absent and introitus admitted two fingers tightly. The

FIR was lodged thereafter at 05.55 p.m. by making endorsement (Ex.PW-11/A) over Ex.PW-1/A.

10. X's mother – Meena was a very crucial and relevant witness. Despite issuance of process several times including the one through the Investigating Officer, she could not be brought for examination. Nothing has been explained by the Investigating Officer as to why sincere efforts were not made to find her whereabouts and to produce her for examination. Nothing is clear as to who is presently in possession of the premises where the prosecutrix along with the appellant and her mother lived. Apparently, investigation conducted is not fair and free from defects. In the cross-examination, the Investigating Officer admitted that he did not make enquiries to ascertain since when PW-Meena was living with the appellant in the said premises. He did not make any enquiry from X's brother or sisters; no neighbour was examined. He was unable to collect the documents showing the exact age or date of birth of the prosecutrix.

11. Various exhibits sent to Forensic Science Laboratory belatedly did not yield any fruitful result. Semen could not be detected on any exhibit [Ex.3 (strands of hair), Ex.4, 5, 6,7 & 8(cotton wool swabs)]

and Ex.10 (one underwear)]. Vaginal epithelial cells could not be detected on Ex.10 i.e. underwear.

12. What emerges is that after coming into contact with PW-9 (Maitri Magdleen Marin), NGO South West Delhi Women Association Branch All India Women Conference on 26.10.2010, where 'X' was taken by SI Raj Pal and a Lady Constable along with her mother for counselling, the police machinery came into motion. She suggested to SI Raj Pal to get 'X' medically examined again. It is unclear as to what had prompted SI Raj Pal and the Lady Constable to take 'X' to PW-9 (Maitri Magdleen Marin) for counselling when she had not lodged any First Information Report and there were no allegations of sexual assault. She herself did not lodge any report with the police when admittedly on 25.10.2010, 'X' and her mother were present in the police station for half an hour. No record was prepared at the police station about their visit that day.

13. 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 unexplained delay in FIR, the non-examination of material witnesses, the testimony of the prosecutrix, 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 certainly not telling the truth.

14. 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.*

15. 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.”*

16. 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.”*

17. 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.”*

18. It is well settled law that if two views are possible the one favourable to the accused has to be adopted. On consideration of the totality of the facts and circumstances, it can be unsafe to convict the appellant as there are so many infirmities, holes and lacunas in the prosecution version. The appellant deserves benefit of doubt.

19. In the light of above discussion, the appeal is allowed. Conviction and sentence awarded by the Trial Court are set aside. The appellant shall be released forthwith if not required to be detained in any other criminal case.

20. 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 compliance.

**(S.P.GARG)**  
**JUDGE**

**JULY 29, 2015 / tr**