

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

% *Judgment reserved on :09.07.2015*
Judgment delivered on :16.07.2015

+ CRL.A.456/2013

HARISH @ CHIRAG

..... Appellant

Through Mr. Trideep Pais, Mr. Atul
Sharma, Mr. Siddharth Garg,
Ms. Vrinda Bhandari, & Mr. M. L.
Rajora, Advs.

versus

STATE OF DELHI

..... Respondent

Through Mr. Pramod Saxena, APP for the
State.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. This appeal is directed against the impugned judgment and order of sentence dated 05.2.2013 and 14.02.2013 respectively wherein the appellant stood convicted under Sections 376/363/328/506 of the IPC and had been awarded maximum sentence of RI 10 years of the offences under Section 376 of the IPC besides separate incarceration and fine for

his other convictions. The sentences were to run concurrently.

2. Version of the prosecution is that DD No.11B was lodged in the local police station Sultanpuri on the complaint of the prosecutrix (PW-13). She was a 21 year old student of Delhi University. Her version was that the appellant wanted to befriend her; on 22.10.2011 he offered her a drink; upon consuming the same she felt nauseated. She was taken to a house at Rohini where rape was committed upon her. Another incident dated 14.11.2011 was also to the effect that rape had again been committed by the appellant upon the victim. Two days later i.e. on 16.11.2011 the victim was again compelled to drink something which made her unconscious; her mother found her the following morning. On 18.11.2011 the victim, fed up with her life, decided to end it and consumed a poisonous substance. She thereafter disclosed the incident to her mother and her elder sister. She did not disclose the incident prior in time as she was under threat that her pornographic video clip had been prepared by the appellant on his mobile phone and he would disclose it. Dr.N.P.Waghmare (PW-15) had examined the mobile record of the accused and as per the data retrieved (in terms of his report

Ex.PW-15/A) pornographic pictures and a video were noted in this document.

3. The FSL report proved through PW-17 had detected human semen upon the undergarments and the mattress seized from the place where the alleged offence had taken place. SI Bharat Bhushan was the investigating officer. He had collected the gastric lavas of the victim (Ex.PW-16/A). This did not support the version of the prosecution and did not establish the presence of any poison/tranquilizer/pesticide.

4. In view of the statement of the prosecutrix as also the separate statements record of her sister (PW-7), the owner of the house (PW-8) where the alleged incident had occurred coupled with the medical evidence which included the testimony of Dr.Indermeet Singh (PW-6), Dr. Dheeraj (PW-10), Dr. Megha Purohit (PW-14), Dr.Rajesh Dalal (PW-16) and the MLC of the victim Ex.PW-6/A evidencing her hymen as torn the appellant stood convicted.

5. Statement of the accused was recorded under Section 313 Cr.P.C. He pleaded innocence. Submission being that he was pressurized by the victim to marry her; on his refusal to this proposal, he was implicated in

CrI. Appeal No. 456/2013 Page 3 of 19

this false case. Parties shared a friendly relationship and nothing beyond that.

6. No witness was examined in defense.

7. On behalf of the appellant arguments have been heard in detail. The main thrust of the argument of the learned counsel for the appellant is his heavy reliance upon Ex.PW-13/DX-1. Submission being that these facebook postings and the conversations exchanged between the appellant and the victim clearly show that this was a case of friendship and the intimate messages exchanged between the parties in fact establish that the parties were sharing a romantic interaction with one another. Submission being that it is not the version of the prosecutrix (PW-13) that these facebook accounts were under any duress or compulsion. This is a clear case where the victim being dis-satisfied by the fact that the appellant was not willing to marry her had falsely embroiled the appellant in the present case. Her version qua her statement under Section 161 Cr.P.C., her statement recorded before the M.M. under Section 164 Cr.P.C. and her version on oath in Court suffers from various infirmities and no reliance can be placed upon such

a confused witness. Her testimony is liable to be discarded. Reliance has been placed upon 2012 ACR 3007 Narender Kumar Vs. State (NCT of Delhi) to support this submission. Submission being reiterated that the testimony of such a victim has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability has to be shown to exist in view of the subject matter of the criminal charge and in the absence of which such a testimony cannot be relied upon. Submission being that there were long conversations between the appellant and the victim which depict a friendship between the parties. The version of the prosecution that on 16.11.2011 she was again made to have a intoxicating drink and on 18.11.2011 she had consumed poison and was in the hospital on that day is falsified by her call records which show that conversations were exchanged between the appellant and the victim at that point of time. Learned counsel for the appellant further submits that the record of the video clips (obtained from the mobile phone of the appellant (Ex.PW-15/A) is a piece of evidence which necessarily has to be ignored as such an electronic record cannot be admitted unless the requirements of Section 65B of the Indian Evidence Act are satisfied. There video clips / CD upon which

reliance has been placed upon by the prosecution to support their stand that certain pornographic material was depicted in the mobile clips of the phone of the appellant, have thus to be ignored. To support this submission reliance has been placed upon 2014 (6) ABR 511 Anvar P.V.Vs. P.K.Basheer. Learned counsel for the appellant further submits that a perusal of these video clips (which had been permitted to be de-sealed and permission has been granted to the appellant to view the CD in the presence of the Public Prosecutor in the Court) also do not support the stand of the prosecution that this was a porn material as it was meant for a private viewing only and related to the appellant's friendship with his ex-girlfriend. These cannot be termed as a pornographic material not having been meant for a public viewing. They cannot be termed as obscene. To support this stand reliance has been placed upon (2014) 4 SCC 257 Aveek Sarkar and Another Vs. State of West Bengal and Ors. Submission being that what might be treated as obscene at one point of time cannot be considered as obscene at another point of time. This being a private material between the appellant and his ex-friend and not meant for any public purpose cannot in any manner be said to fall within the definition of either obscenity or porn. This is a clear case of false

implication. The appellant is entitled to a benefit of doubt and a consequent acquittal.

8. Arguments have been refuted. The learned public prosecutor submits that there is no reason as to why the victim would have made a false allegation against the appellant; she has explained the incidents which had occurred on 22.10.2011 as also on 14.11.2011. Even presuming that there was a friendship between the appellant and the victim, appellant had no right to take advantage of this friendship; the victim had a right to oppose and take legal action against the wrong act committed by the appellant upon the victim. This was not a case of consent. The victim had been traumatized as her video clips had been taken by the appellant and he had threatened to expose these pictures. The victim had every reason to doubt the conduct of the appellant as there were other video CDs and clipping of another girl which had also been recovered from the possession of the appellant which speak about the conduct of the appellant. He was a casanova. He was threatening the victim which had led her to end his friendship; the appellant was in fact emotionally blackmailing her; she even had to take the dire step of

consuming poison. On no count does appellant deserves any leniency.

9. Record has been perused and the submissions and counter submissions of the parties have been noted.

10. The victim i.e. the prosecutrix was examined as PW-13. She has deposed that she was a final year student and while doing graduation from Delhi University, she had gone to the shop of one Deepak Communication near her house for rectification of her mobile. The mobile was sent through appellant Chirag @ Harish. On 16.10.2011, appellant came to her college with the mobile phone. He offered her a cold drink. On 22.10.2011 i.e. on the annual day function of their college, the appellant started speaking to her. He offered her a cold drink. On consuming the cold drink, she started feeling nauseated. He took her on his bike to a mall at Rohini and thereafter to a partially constructed house at Rohini where he forcibly committed a 'galat kaam' upon her; she clarified that 'galat kaam' means rape. The appellant showed her a video clipping of the incident which had occurred threatening to reveal it in case she disclosed this incident to anyone. The witness further deposed that the appellant continued to make phone calls

to her and she thus met him. On 14.11.2011 when she was coming back, the appellant called her and took her to the same house at Rohini where under compulsion, he committed rape upon her. On 16.11.2011, the appellant again gave her phone calls and compelled her to take drink pursuant to which she became semi-conscious. She was found lying near her house. Her mother also inquired from her. Even at that point of time, she did not disclose this incident to any person i.e. neither to her mother and nor to her sisters. On 18.11.2011 in the early morning hours at 02:30 am, PW-13 called the appellant and told him that he should stop harassing her or that she would commit suicide. She consumed insecticide after which she felt dizzy and when she gained consciousness, she found herself at the Sanjay Gandhi Hospital. On 20.11.2011, while she was in hospital, she disclosed this incident to her mother and her sister. Her statement Ex.PW-13/A was recorded pursuant to which the FIR was lodged.

11. In her cross-examination, she denied the suggestion that she was friendly with the accused even prior to 16.10.2011. She admitted that she was interacting with the appellant on face book and had become

friendly with him. Even on 14.10.2011, she had interacted with him through her face book profile. She admitted that the record Ex.PW-13/DX1 (running into 17 pages), was the face book account of the appellant containing messages sent by PW-13 to the appellant. She stated that cold drink which had been offered to her on 22.10.2011 (the date of first rape) was given to her by the appellant which he had taken out from his pocket. She did not inform about the incident to anyone as she was scared of the appellant. She admitted that her relationship with the appellant was friendly. She denied the suggestion that she is deposing falsely.

12. Learned defence counsel has vehemently relied upon Ex.PW-13/DX1 to make a submission that the victim being an adult was fully conscious of her act and was in voluntary relationship with the appellant and this is evident from the tweets exchanged between the parties and to which attention has been drawn wherein on various dates i.e. between 14.10.2011 up to 09.11.2011 several face book conversions were exchanged between the appellant and the victim. As rightly pointed out by the learned counsel for the appellant, these conversations are not

indicative of a mere platonic friendship. They were indicative of something much more. They were indicative of the fact that the parties were in fact sharing an intimate relationship and kisses were also exchanged between the appellant and the victim and this was not on one occasion but on several occasions. As per the victim, the first incident of rape was committed by the appellant under coercion on 22.10.2011. After 22.10.2011, if the victim was under threat, she would not have on subsequent dates i.e. after 22.10.2011 i.e. on 24.10.2011, 29.10.2011, 30.10.2011, 09.09.2011 and 11.11.2011 exchanged tweets and sending messages to him all of which shows that the victim was voluntarily interacting with the appellant. There was absolutely no coercion upon her and in fact this is even admitted by her in her cross-examination. She was addressing him by a pet name 'chunnu' and he was addressing her as 'jaan'. Even on 09.11.2011, the conversation between them was that they wanted to go back to the room for an intimate act. This face book account (Ex.PW-13/DX1) runs between 14.10.2011 to 11.11.2011. At the cost of repetition, the first incident of rape allegedly having been occurred on 22.10.2011 but this face book account showing no pressure whatsoever upon the victim, it cannot in any manner be said that she

continued her intimate conversions and friendship with the appellant under any kind of duress. This is white lie. That apart, the victim in her examination-in-chief has stated that on 22.10.2011 when she was made to consume the intoxicating drink, the appellant had offered it to her. This is contrary to the version of PW- 18 (Pramod).

13. The statement of PW-13 that she was under pressure of the appellant as he made a video clipping of her (in the nude) had been corroborated by Reshma (PW-7) (younger sister of the victim) who had deposed that her sister had told her that the appellant had made a video clipping of her on 22.10.2011 and also on 14.11.2011 but this fact had not been disclosed to PW-7 directly but through her elder sister Sapna. Sapna was admittedly not examined.

14. That apart, this Court notes that the mobile record of the appellant had been seized on the date of his arrest. His arrest memo Ex.PX-5 shows that he was arrested on 20.11.2011 at 05:40 PM from the Emergency Ward of the first floor of Sanjay Gandhi Hospital meaning thereby that this was a surprise arrest as he had been called at the Emergency Ward of the Hospital where the appellant had come in

apprehensive of any threat of arrest. He was however arrested at the same point of time. His mobile record was seized on the same day. Thus there was no possibility of the appellant fudging with the record.

15. PW-15 (Dr. N P Waghmare) had examined this mobile record of the appellant. He had downloaded the retrieved data and had prepared his report Ex.PW-15/A. The mobile record of the appellant at the request made by the learned counsel for the appellant had been directed to the de-sealed and the learned counsel for the appellant had examined the record in the presence of the public prosecutor in the Court. A perusal of this record shows that there is no depiction of the victim and the appellant. No such video clipping of the victim and the appellant is on record. There is a video record of a intimate relationship of the appellant with another girl. This as per the appellant was his ex girl friend. This is the version of the appellant. Even presuming that the submission of the learned public prosecutor on this count is correct and the appellant having got an intimate relationship picturized of himself with another girl reflects upon his bent of mind and he could have done the same with the victim as well; this however cannot be read against

the appellant. It is for the following two reasons. The first reason being that an electronic record not accompanied by certificate under Section 65-B of the Indian Evidence Act cannot be read in evidence. Admittedly in this case, this record was not accompanied by a certificate under Section 65-B of the Indian Evidence Act. This was conceded by the learned public prosecutor. The Apex Court in AIR 2015 SC 180 Anvar

P V Vs. P K Basheer has observed as under:-

“An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc. the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

16. In this view of the matter, this record (even otherwise not pertaining to the victim) is inadmissible. The second reason for discarding this evidence would be the submission of the learned counsel for the appellant that even presuming there was an intimate relationship viewed of the appellant and his ex-girl friend, this would not be obscene within the meaning of ‘obscenity’ as defined in criminal law. Submission being that admittedly this video was not meant for public viewing; it was a private affair only between the appellant and his ex-girl friend. It did not pass the test of ‘obscenity’. The observations of the

Apex Court in this regard laying down the Hicklin test in R.V. Hicklin

(1868) LR 3 QB 360 are relevant:-

“.... The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”

Thus on both counts, Ex.PW-15/A has to be discarded.

17. Reverting back to the version of the victim that the second incident of rape was alleged to have been committed upon the victim on 14.11.2011. On this date also, as per the victim, she was compelled by the appellant to come to the same house at Rohini where ‘galat kaam’ was committed upon her. Certain call records have also been relied upon by the learned defence counsel to substantiate his argument that even after 14.11.2011, there were telephone calls exchanged between the parties to evidence the fact that the parties continued to share a cordial relationship. However, these calls not having exhibited (although a part of the record) cannot be read in evidence.

18. The version of the victim that she had consumed poison on 18.11.2011 was not supported by medical evidence. Her gastric lavage has been seized by the Investigating Officer on 20.11.2011 and it was

sent to CFSL for examination but the report tested negative for metallic poisons, ethyl alcohol and methyl alcohol, cyanide, phosphide, alkaloids, barbiturates, tranquilizers and pesticides. This is clear from Ex.PW-16/A. In this context, it would be relevant to note that the trial Court has drawn presumptions and assumptions and has gone totally off the track while penning a discussion on date rape drugs which are used to facilitate sexual assault. Even where the report of the CFSL (Ex.PW-16/A) had tested negative on this aspect, the trial judge in lengthy paragraphs has discussed that such drinks make a person feel drugged; because of the effect of these drugs, the victim sometimes is unable to refuse sex and unable to remember what has happened. This discussion is not only wholly useless in the context of the evidence which has been collected, and where the ocular and scientific evidence had negated this aspect; testimony of the victim being that she had been asked to take a drink on 14.10.2011 interlaced with a sedator and which had been given by the appellant is again contrary to the version of PW-18 (Pramod) who had in his cross-examination stated that he had brought the cold drink when the appellant with the girl had hired the room.

19. Relevant would it be to note that PW-18 was the sweeper working with Alok Singhal (PW-8) in whose house the offence had allegedly been committed. Her version was that this room had been taken on rent by the appellant who had introduced himself as Kapil @ Harish @ Chirag. Testimony of PW-8 on this score was also to the effect that room No. 105 had been taken on hire by the appellant through PW-18. The trial Judge has travelled upon wavelength which was totally impermissible.

20. The medical reports which include the MLC of the victim show that there was no injury on her body. Her hymen was an old tear. She was admitted in the hospital on 20.11.2011. She was fit for statement at 10:30 am. Her alleged history was ingestion of unknown substance. As noted supra, this unknown substance was not a poison or a tranquilizer. This was evident from the report Ex.PW-16/A.

21. Thus that part of her version that she had taken a poisonous substance on 18.11.2011 and was found in an unconscious condition on the following day by her mother and when she regained consciousness, and was found in Sanjay Gandhi Hospital is contrary to the record. As

per this ocular version, she was found by her mother in an unconscious state on 19.11.2011. Her admission in the Sanjay Gandhi is however of 20.11.2011. Where was she on 19.11.2011? The victim had been referred for a gynecological examination on the same day. The medical doctors had also collected vulva and vaginal swab of the victim; the mattress and underwear of the victim had also been seized. The CFSL vide its report (Ex.PW-17/A) had noted human semen on the underwear of the accused and the mattress. This evidence as rightly pointed out by the learned counsel for the appellant would not be able to falsify the defence of the appellant which was that the victim was all along in a consenting relationship with the appellant.

22. Testimony of the victim is full of contradictions. It is not a credible and cogent version. To convict an accused, the prosecution must stand on its own legs. In this case, the prosecutrix has failed to discharge of being a coherent and credible witness. The Apex Court in 2012 ACR 3007 Narender Kumar Vs. State (NCT of Delhi) while evaluating the testimony of a prosecutrix had inter-alia noted as under:-

“Where evidence of the prosecutrix is found suffering from serious infirmities and inconsistencies with other material, prosecutrix making deliberate

improvements on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence.”

23. Thus, the evaluation of the evidence of the prosecution when read in totality does not inspire confidence. It would be difficult for the conscience of this Court to rely upon this testimony to convict the appellant. The prosecution has failed to discharge its onus.

24. Accordingly, while giving benefit of doubt to the appellant, he is acquitted. He be released forthwith if not required in any other case.

25. Appeal is allowed.

26. A copy of this order be sent to the Jail Superintendent for information and compliance.

INDERMEET KAUR, J

JULY 16th 2015

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