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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : 15th SEPTEMBER, 2015

DECIDED ON : 29th October, 2015

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CRL.A. 650/2005

SURENDER KUMAR ALIAS SHIVENDER Appellant

Through : Mr.Jai Singh Yadav with
Mr.Vikash Yadav, Advocates along
with appellant present in judicial
custody.

versus

THE STATE NCT OF DELHI Respondent

Through : Mr.Amit Ahlawat, APP.
Mr.Deepak Kr., PS Uttam Nagar.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. This appeal has been preferred against the impugned judgment dated 27.05.2005 of learned Additional Sessions Judgment in Sessions Case No.46/02 arising out of FIR No.36/02 registered at Police Station Uttam Nagar by which the appellant Surender Kumar @ Shivender was held guilty for committing offence under Section 376 IPC. By an order dated 03.06.2005, he was awarded Rigorous Imprisonment for six and a half years with fine ₹20,000/- under Section 376 IPC.

2. Briefly stated the prosecution case, as projected in the charge-sheet, was that on 17.01.2002 at about 1:00 p.m. in the upper room situated on the first floor of House No.144, Village Nawada, the appellant committed rape upon the prosecutrix 'X' (assumed name), aged around 30 years and criminally intimidated her. First Information Report was lodged after recording victim's statement (Ex.PW-1/A). 'X' was medically examined. The accused was arrested; exhibits collected during investigation were sent for examination to Forensic Science Laboratory. Statements of the witnesses conversant with facts were recorded. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. The prosecution examined nine witnesses to establish its case. In 313 statement, the appellant pleaded false implication and denied his involvement in the crime. The trial resulted in his conviction as aforesaid under Section 376 IPC. It is relevant to note that the petitioner was acquitted of charge under charge 506 IPC and the State did not challenge it.

3. I have heard the learned counsel for the parties and have examined the file. Appellant's conviction is solely based upon the testimony of the prosecutrix 'X'. Her statement has not corroborated from any other independent source. Settled position is that conviction can be

based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reasons not to accept the version of the prosecutrix on its face value, it may look for corroboration. In case, the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.

4. In the instant case, nothing has surfaced as to at what time exactly, the prosecutrix was sexually assaulted. Police machinery was set in motion when information was conveyed about the commission of rape and quarrel recorded vide Daily Dairy (DD) No.40-B (Ex.PW-7/A) at 06.10 p.m. on 17.01.2002. In her complaint (Ex.PW-1/A), the victim disclosed that she had gone to the appellant's house at around 1:00 p.m. to play with his daughters. After some time, when the girls were busy in their work, the appellant called her in the upper room of the house. She was pushed on the cot and threatened of dire consequences. The accused committed rape upon her as a result of which she became unconscious. On regaining consciousness, she returned to her house wearing her clothes and narrated the occurrence to her sister-in-law (Meena).

5. In her Court statement as PW-1 'X' made vital improvements and stated that she had gone to appellant's house at around 10:00 a.m. to

play with the girls. When she reached there, the accused asked other children to go out and pulled her inside the room. She again stated that the accused called her in a room on the upper portion of the house. When she went there, the accused bolted it from inside and made her lie on the cot. She could not resist as she was handicap; her left arm and leg were thin and weak. She got frightened and could not make noise. The accused, thereafter, committed rape upon her. After the rape incident, she went to her house and narrated her ordeal to her Bhabhi Meena. In the cross-examination, she was unable to remember the exact date of occurrence. She disclosed that five children were playing in the appellant's house that time. She denied that she on her own had gone to the appellant's room. She admitted that no threats were extended by the accused at the time of occurrence and she did not raise alarm. It was noon time (at about 12:00 o' clock) when the occurrence took place. She was kept in the room for about an hour. She denied that she was a consenting party. She further disclosed that after reaching her house at around 1:00 p.m., she narrated the incident to her bhabhi.

6. On scrutinizing the testimony of the prosecutrix in its entirety, it reveals that she was unable to state the exact time when she went to the appellant's house. She has given contradictory version about

her going to the appellant's house at around 10:00 a.m. though in the FIR time mentioned is 1:00 p.m. Admitted position is that the prosecutrix was aged around 30 years. She had voluntarily and willingly gone to the appellant's house in the absence of her sister-in-law Meena. The accused lived in the back side of the house of the prosecutrix and both were acquainted with each other. It appears that the prosecutrix has not divulged true reason to go to the appellant's house when he was alone at noon time. She did not give names of the 'girls' with whom she had gone to play. It is amazing that a girl aged around 30 years would go to the appellant's house only to play with 'girls'. No such 'girl' has been examined during investigation. There was no occasion for the prosecutrix to go upstairs when she had come to know that the appellant was alone and had directed the other children to go outside. At no stage, she raised alarm or protest. Even after the rape incident, she silently came to her house after wearing her clothes. On the way, she did not protest and complain about the appellant's conduct. There is no indication if any resistance was offered by the prosecutrix at the time of commission of rape. True, the prosecutrix was handicap but she was capable to raise alarm. Appellant's acquittal under Section 506 IPC reveals that the prosecutrix was under no fear or threat. She remained in the appellant's

company for sufficient period when her sister-in-law had gone to her place of work and the children were away to school. The children who were expected to arrive at 1:30 p.m. were not informed about the incident. Possibility of the prosecutrix to be a consenting party cannot be ruled out.

7. PW-2 (Meena), 'X's sister-in-law, was away at her work place at the time of alleged commission of rape. She informed that at about 2:00 p.m. when she returned from her place of work, she found 'X' crying. On enquiry, 'X' disclosed that the appellant had sexually assaulted her. She, thereafter, called elder members of the family and discussed with them to report the incident to the police. In the cross-examination, she disclosed that she had three children, two sons and one daughter and her elder son was aged around 13 years. Her children had returned from school at around 1:30 p.m. She discussed the matter with her husband's 'chachi' who informed the police. She further revealed that before the arrival of the police at her house, they had already locked the accused to prevent his escape. He was locked by the individuals from the locality. She further revealed that the accused had consumed liquor that day.

8. The witness was conspicuously silent to inform if 'X' had gone at the appellant's house to play with children. She also did not reveal the name of any such child who was present at the appellant's

house and with whom the prosecutrix was friendly to play. Age and other description of the children present at the appellant's house have not come on record. As per prosecutrix, she returned to her home at around 1:00 p.m. She did not state if her sister-in-law had inquired about the incident and had found her crying. Relatives to whom the witness had informed about the incident have not been examined. The elder son of the witness, aged around 13 years, was also not examined to disclose if the prosecutrix had informed about the incident to him. The individuals who had allegedly locked the appellant in the room to prevent his escape were not examined or produced.

9. Soon after the occurrence, the prosecutrix was medically examined vide MLC (Ex.PW-4/A) on 17.01.2002 at around 10:00 p.m. As per MLC proved by Dr.Aruna Singh (PW-4), no fresh external injuries were noticed on her body. Medical evidence did not corroborate 'X's version that she was forcibly raped as there were no injuries/struggle marks on her body. As per FSL report (Ex.PW-9/C), human semen was detected on Ex.1a and 1b (Two microslides having thin whitish smear). However, nothing has come on record that it was that of the appellant.

10. Delay in lodging the FIR has not been explained. The matter was discussed with the elders and only at 6:10 p.m., information was

conveyed to the police about the commission of rape and quarrel vide DD No.40B (Ex.PW-7/A). Again 'X' was medically examined at about 10:00 p.m. PW-9 (Ajay Kumar Singh), the Investigating Officer, did not corroborate PW-2's version that the accused was arrested from the room where he was already locked.

11. Considering the basic infirmities in the statement of the prosecutrix, it would not be safe to base conviction on her sole testimony without independent corroboration. The appellant deserves benefit of doubt.

12. The appeal is allowed. Sentence and conviction of the appellant are set aside. The appellant be released forthwith if not required to be detained in any other case.

13. Trial Court record be sent forthwith along with the copy of the order. Copy of the order be also sent to the Superintendent Jail for information.

(S.P.GARG)
JUDGE

OCTOBER 29, 2015/sa