

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

RESERVED ON : 6th AUGUST, 2015

DECIDED ON : 10th AUGUST, 2015

+ CRL.A. 900/2005

SONU @ HARI CHAND Appellant

Through : Mr.Vimal Puggal, Advocate.

versus

STATE Respondent

Through : Mr.Navin K.Jha, APP.

+ CRL.A. 112/2006

NOOR MOHD. Appellant

Through : Mr.Vimal Puggal, Advocate.

versus

THE STATE OF NCT OF DELHI Respondent

Through : Mr.Navin K.Jha, APP.

+ CRL.A. 28/2006

BIRJU Appellant

Through : Mr.Vimal Puggal, Advocate.

versus

STATE

..... Respondent

Through : Mr.Navin K.Jha, APP.

AND

+

CRL.A. 113/2006

THAKUR

..... Appellant

Through : Mr.Vimal Puggal, Advocate.

versus

THE STATE OF NCT OF DELHI

..... Respondent

Through : Mr.Navin K.Jha, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellants are aggrieved by a judgment dated 19.09.2005 of learned Addl. Sessions Judge in Sessions Case No. 12/04 arising out of FIR No. 354/02 PS Nangloi by which they were held guilty for committing offences under Sections 376(2)(g) & 452/34 IPC. The appellant – Birju in addition was convicted under Section 323 IPC. By an order dated 22.09.2005, various prison terms with fine were awarded to them.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on the night intervening 21/22.04.2002 in between 02.00 to

03.00 a.m. at L-248, Camp No.3, J.J. Colony, Nangloi, Delhi, the appellants in furtherance of common intention after committing house tress-pass committed gang rape upon 'X' (assumed name). She was also beaten by the appellant – Birju. The police machinery swung into action on receipt of Daily Diary (DD) No.8A (Ex.PW-3/C) at 11.17 hours on 22.04.2002 at PS Nangloi to the effect that there was a quarrel with 'X' resident of L-248, Camp No.3, J.J. Colony, Nangloi, Delhi, and a wrong act had been committed. The investigation was assigned to SI Sudesh Ranga who with Const.Jitender went to the spot. After recording X's statement (Ex.PW-1/E), the Investigating Officer lodged First Information Report by making endorsement (Ex.PW-14/A) over it. 'X' was medically examined. Statements of the witnesses conversant with the facts were recorded. The accused persons were arrested and medically examined. Exhibits collected during investigation were sent for examination to Forensic Science Laboratory. Upon completion of investigation, a charge-sheet was filed against all the appellants in the Court for committing the aforesaid offences. To establish its case, the prosecution examined fourteen witnesses. In 313 Cr.P.C. statements, the appellants pleaded false implication and denied their complicity in the crime. They did not examine any witness in defence. The trial resulted in their conviction as

mentioned previously. Being aggrieved and dissatisfied, the above said appeals have been preferred.

3. I have heard the learned counsel for the parties and have examined the record. Appellants' conviction is primarily based upon the sole testimony of the prosecutrix. Admitted position is that the prosecutrix, a widow, aged around 38 years; lived at L-248, Camp No.3, J.J. Colony, Nangloi, Delhi, along with her four children; one of them was married. 'X' and the accused persons were acquainted with each other before the incident as they lived in her neighbourhood.

4. On scanning the evidence in its entirety, it is not possible to draw a reasonable conclusion that 'X' was gang raped by the appellants. The prosecution version as projected by 'X' is highly improbable.

5. The occurrence in which the prosecutrix was allegedly ravished forcibly against her wishes took place on the night intervening 21/22.04.2002 in between 02.00 to 03.00 a.m. Neither the prosecutrix nor any of her family members lodged report with the police soon thereafter. Intimation about 'a quarrel and wrongful act' was received at PS Nangloi on 22.04.2002 at around 11.17 hours. DD No.8A (Ex.PW-3/C) was based upon the information given by an 'unknown' informer. The Investigating Officer was unable to verify and confirm as to who was the 'informer' and

from where the call was made. 'X' did not give plausible explanation/ reason as to why she herself did not move the police machinery. Rukka (Ex.PW-14/A) was sent for lodging FIR at 01.30 p.m. on 22.04.2002. Apparently, there is a considerable unexplained delay in lodging the FIR. The investigation is also not up to the mark. No incriminating article giving tell-tale of the incident was recovered from the spot; even the bed-sheet was not taken into possession.

6. The victim gave detailed account in her statement (Ex.PW-1/E) implicating the appellants by name. She, however, did not accuse any of them for committing unnatural sex / act. In her Court statement as PW-1 she made vital improvements and deviated from the statement (Ex.PW-1/E) lodged at the first instance. She improved her version deposing that Birju had committed rape twice upon her; appellant Sonu had put his male organ in her mouth asking her to suck; all the accused persons had given beatings to her. Though duly confronted in the cross-examination, she was unable to give any justification for raising additional allegations against the appellants. She even deposed that Birju had demanded ₹ 10,000/- before committing rape.

7. The prosecutrix has given divergent and conflicting versions on various relevant and material circumstances. In her statement (Ex.PW-

1/E), she did not explain as to what had prompted her to open the door of her room when she was suspicious of the appellants' movement around her house at that odd hours. Earlier she was sleeping outside her house along with her son Chand aged around 16 years. When she found that the appellants were roaming near her house, due to fear, she went inside the house and bolted it. She further disclosed that after the occurrence, she was under fear and did not come out. On the next morning, when she along with her son Chand went to Sultanpuri at her mother's house, she took them to the Police Station. In her Court statement, she disclosed that her two sons aged around 14 and 12 years were sleeping on the roof of the house. Accused Birju had a blade kept under his tongue. He gave fist blow on her stomach as a result of which she passed out. After commission of rape, the accused persons went away threatening to return after about one month. Next morning, she went to the Police Station after her mother came to her. In the cross-examination, she revealed that her son Chand was sleeping in the back portion on the road outside the house. He woke up after the door was repeatedly knocked. Three individuals from the neighbourhood had collected but did not dare to intervene as they were scared and were abused by the appellants. She further deposed that she went to the Police Station at 08.00 a.m. Her son Chand was not present at

the spot as he had gone to call her mother. Chand had received injuries on his legs but was not medically examined. Her mother arrived at the Police Station directly. She stayed at the house of her mother for about eight days. She had not informed about the occurrence to her sons Tara and Dharmender. Her clothes were not torn during the incident. She did not raise any protest during commission of rape as she was given severe beatings by the appellants and was not in a position to protest. She admitted that she had dispute of insignificant nature with accused Birju before the incident.

8. Major infirmities, improvements and discrepancies have emerged in her statement. Divergent version has been given by her if her mother had arrived at the spot and she had accompanied her to the Police Station from there or she had directly gone to the Police Station where 'X' met her. Contradictory statements have appeared if 'X' had accompanied her mother to Sultanpuri to stay with her for eight days directly from the Police Station or first they had come to X's house and from there had gone to Sultanpuri. X's mother was not examined to corroborate as to when and from whom she got the information about the incident and whether she arrived at the spot or at the Police Station and at what time. No reasons have been given by the Investigating Agency for not

associating and producing her in evidence. Adverse inference is to be drawn against the prosecution for withholding this material witness. It has come on record that Chatur Pradhan was acting behind the scene and only at his instigation the accused Birju and others had committed tress-pass. Chatur Pradhan's role has not been investigated. He was neither implicated as an accused nor cited as a witness.

9. 'X' along with her children used to live there for the last about 18 years. Nothing has emerged if there was any serious strained relation between her and the appellants to target her for sexual assault in the presence of her children; Chand aged around 16 years was sleeping along with her. It is unclear if any hue and cry or alarm was raised by the prosecutrix at the time of commission of crime. The appellants had allegedly stayed for about two hours in the house. Many neighbours had collected at the spot; none of them was associated or joined in the investigation and examined. It is not believable that after hearing cries and alarm allegedly raised by the prosecutrix at the time of crime, no one from neighbourhood would inform the police. Nothing has come on record to show if the appellants were desperate criminal to create real apprehension in their mind to flee from the spot and to desist from informing the police. Admittedly none of the assailants was armed with any deadly weapon to

scare 'X' and neighbours. The prosecutrix has improved her statement to allege that a 'blade' was under the tongue of appellant Birju. No such blade was recovered. No such blade was used to inflict injuries to the prosecutrix or her son. After the appellants had withdrawn from the spot and the neighbours had collected at the crime spot, there was no reason for the prosecutrix not to report the incident to the police. It is unbelievable that after this horrible crime 'X' would sleep and to wait arrival of her mother to lodge the complainant in the morning.

10. PW-8 (Chand), X's son, has not supported the prosecution in its entirety. He deposed that when he was sleeping outside his house at L-248, Camp No.3, J.J. Colony, Nangloi, Delhi, the accused Birju knocked at the door at night and it was opened by her mother. Birju started given beatings to her mother. He ran away and did not know what had happened thereafter. Apparently, X's version has not been corroborated even by her son. He did not speak arrival of all the assailants at the crime spot. Learned APP cross-examined him after seeking Court's permission as he had resiled from his previous statement given to the police. He did not claim if he was given beatings or was injured in the incident. He did not state if he was sleeping along with his mother outside the house or that her mother had gone inside after finding the appellants roaming in suspicious

circumstances around the house. He denied the suggestion of the learned APP that neighbours collected at the spot were threatened by the accused or they went away due to their fear. He disclosed that he had gone to bring her maternal grand-mother but she was unable to come due to her old age and arrived in the morning. He named Arjun, Kali and Choteylal who had reached the spot but none of them was examined or produced in evidence. He contradicted his mother stating that she had accompanied him from the Police Station to the house. After lodging the report, her mother and maternal grand-mother had stayed in their house for two days. It is unbelievable that finding 'X', his mother, in danger, PW- Chand would not raise alarm and conveniently go to her grand-mother to bring her.

11. If the victim is unwilling to yield to sexual intercourse, she is expected to receive injuries on her person. 'X' was medically examined at 04.35 p.m. vide MLC (Ex.PW-2/A) on 22.04.2002. Names of the assailants were not disclosed to the examining doctor. No visible injuries were found on her private parts. On local examination, hymen was found torn (old healed). There was no fresh injury and active bleeding. It is highly unbelievable that a woman ravished forcibly by four young individuals turn by turn would not sustain any injury whatsoever on her private parts.

12. It is true that as per FSL reports (Ex.PX & Ex.PY), human semen was detected on '1a' (Lady's shirt); '1b' (Salwar) and '2' (Cotton wool swab). However, it does not reveal if group 'AB' detected on it matched with any of the appellants' semen. It is not clear if all the assailants had the same 'AB' group.

13. It is difficult to accept that Tara and Dharmender, X's other sons present on the roof would not come to know about the horrible crime and won't have any reaction. It is unclear when X's married son was informed and he arrived at the spot. None of them has been examined to corroborate X's version.

14. Settled legal position is that conviction can be based upon the sole testimony of the prosecutrix provided it is reliable and is of sterling quality.

15. 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.

16. 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.”

17. 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 calibre, 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.”

18. 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.”

19. In the instant case, due to inherent infirmities statement of the prosecutrix cannot be taken on its face value. No cogent and clinching evidence has come on record to prove beyond reasonable doubt that ‘X’ was sexually assaulted / gang raped by the appellants forcibly in the manner claimed by her. Possibility of a minor quarrel ensuing between the prosecutrix and Birju over some petty issue cannot be ruled out. The appellants’ implication seems to be the result of that animosity.

20. In the light of above discussion, conviction and sentence awarded to the appellants cannot be sustained. The appeals are allowed and conviction and sentence awarded by the Trial Court are set aside. Bail bonds and surety bonds of the appellants stand discharged.

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

(S.P.GARG)
JUDGE

AUGUST 10, 2015 / *tr*