

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

RESERVED ON : 6th AUGUST, 2015

DECIDED ON : 13th AUGUST, 2015

+ CRL.A.786/2006

GAUTAM KHANNA

..... Appellant

Through : Mr.Alok Bhachawat, Advocate
with Ms.Swati Ghildiyal &
Mr.Rajnish K.Jha, Advocates.

versus

THE STATE (NCT OF DELHI)

..... 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 22.07.2006 of learned Addl. Sessions Judge in Sessions Case No. 24/04 arising out of FIR No.334/02 PS Pahar Ganj by which the appellant – Gautam Khanna was held guilty for committing offence under Section 376 IPC and by an order dated 24.07.2006, he was sentenced to undergo RI for seven years with fine ₹ 5,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on the night intervening 12/13.06.2002 at 11/43, Tilak

Nagar, New Delhi, the appellant committed rape upon the prosecutrix 'X' (assumed name) after she was administered some stupefying, intoxicating substance in milk by his wife Divya (since acquitted). Both the appellant and Divya were sent for trial. However, the prosecution was unable to substantiate its case against Divya as a result of which she was acquitted by the impugned judgment. It is relevant to note that State did not challenge the said acquittal.

3. On 01.07.2002, 'X' went missing from her house and could not be located. PW-3 (Joginder Singh), her father, lodged 'missing person report' (Ex.PW-1/A) on 03.07.2002 suspecting the involvement of the appellant and his wife in her kidnapping. The Investigating Officer lodged First Information Report on 03.07.2002. Subsequently, 'X' was recovered from Patel Nagar. She was medically examined; she recorded her statement under Section 164 Cr.P.C. The accused persons were arrested. 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 the entire investigation, a charge-sheet was filed against both of them for committing offences under Sections 328/365/376/34 IPC. The prosecution examined fourteen witnesses to substantiate its case. In 313 Cr.P.C. statements, the accused

persons denied their involvement in the crime and pleaded false implication. The trial resulted in appellant's conviction as aforesaid while the accused Divya was acquitted of the charges. Being aggrieved and dissatisfied, the appellant has filed the instant appeal.

4. I have heard the learned counsel for the parties and have examined the file. Appellant's conviction is primarily based upon the sole testimony of the prosecutrix. Her statement, however, was found deficient or scanty to base conviction of co-accused Divya. On scrutinising the entire case and the statements of the witnesses examined before the Court, it transpires that number of discrepancies, infirmities and improvements have emerged therein making it unsafe to base conviction.

5. The prosecutrix and her family members were acquainted with the appellant and his wife Divya before the incident. In the statement (Ex.PW-1/A) lodged on 03.07.2002, PW-3 (Joginder Singh) informed that on 08.06.2002, he had sent her daughter 'X' along with his son Jasdev Singh aged around 17 years to stay at the appellant's house for some days to cure her ailment. Since there was an urgent piece of work, at home, he called back Jasdev Singh and 'X' remained in the company of the accused persons. On 11.06.2002, he received a telephone from Divya to take back 'X' as they were going to Amritsar. When he went there, 'X' was found in

an unconscious state. On enquiry, Divya @ Maata informed him that 'X' had consumed some pills empty stomach. He brought her back but she did not regain consciousness for three days. On 01.07.2002 in the morning she went missing.

In his Court statement, PW-3 disclosed that his son Jasdev Singh had returned on 10.06.2002 after leaving 'X' at Divya's house. On 03.07.2002, 'X' apprised him on phone that the appellant had committed rape upon her during her stay at Divya's house and she was going to Amritsar to seek revenge from him. On that very day, the police along with PW-12 (Rinkle Arora) took him to Amritsar for her search. In Amritsar, both the accused persons were apprehended on his identification after about four days. Subsequently, 'X' was recovered from Patel Nagar in Delhi.

In the cross-examination, he admitted that after regaining consciousness after three days, 'X' did not say anything incriminating against the accused persons. He did not lodge 'missing person report' for two days. He was unaware about the address of the accused persons at Amritsar and volunteered to add that it was revealed by PW-12 (Rinkle Arora). He disclosed that when 'X' was unconscious, he had taken her to

Dr.S.K.Mahajan's clinic in Pahar Ganj. However, he was unable to produce any paper showing any specific treatment taken by her there.

6. The above version spoken by PW-3 (Joginder Singh) has not been corroborated by PW-2, the prosecutrix 'X'. She has given conflicting and contradictory statements at various stages of the investigation / trial. Indisputably, she was major on the day of incident. Despite coming to know about the alleged incident of rape on 13.06.2002 itself, she did not report it to her parents or the police promptly or soon thereafter. In fact, no FIR whatsoever was lodged by her any time. It was PW-3 (Joginder Singh), her father, who lodged report with the police on 03.07.2002 when he made unsuccessful attempt to find her. Before that, he had no inkling of any sexual assault upon 'X'. In her statement under Section 161 Cr.P.C. (Ex.PW-2/A) recorded on 04.07.2002, for the first time, 'X' gave detailed account of sexual assault. The dates mentioned in Ex.PW-2/A seem to have been 'incorporated' subsequently. It appears that the spaces in the statement (Ex.PW-2/A) were left blank to fill the dates subsequently.

In statement (Ex.PW-2/A) 'X' disclosed that on 08.06.2002 Divya brought her and her brother to her residence for her treatment after seeking permission from her parents. On 10.06.2002, she, Rinkle, Divya and Neha had gone to Kamla Market for outing and returned at around

09.30 p.m. After her brother returned to his residence at Pahar Ganj on 11.06.2002, she remained at Divya's house. On 12.06.2002 at around 11.00 p.m. she was forced to consume milk by Divya as a result of which she fell sleep. When she woke up at around 04.00 a.m. she found herself semi-conscious. At 04.15 a.m. Divya and Rinkle went to Gurudwara; she had seen the time in the watch. Neha, Divya's niece aged around 8 – 10 years was lying with her. At around 04.25 a.m. the appellant came downstairs and switched off the light in the 'Varrandah'. He came inside her room, bolted it and laid by her side. Thereafter, he put off her clothes. She could not resist being under intoxication. At 05.30 a.m. after coming to senses, she found that there was no piece of clothe on her body and the appellant was lying naked by her side. Before she could say anything, the appellant went away putting 'on' clothes. Since she was feeling pain, she went to sleep. On 13.06.2002, Rinkle and Divya took her to a hospital where she was administered glucose. A quarrel took place between Divya and the appellant at home. After some time, her parents arrived there and brought her to Pahar Ganj. After two weeks, she got her urine tested and found that she was pregnant. On 30.06.2002 after reading an advertisement in a newspaper, she made a telephone call to the owner of the house No.25A, OCS Apartment, Phase-I, Mayur Vihar for rented

accommodation to which he agreed. Before that, Divya had made a telephone call asking her to come to her on 01.07.2002 at around 05.00 a.m. at Hari Nagar Bus Stand. When she went there, Divya did not meet her. She took a rented accommodation at Mayur Vihar and stayed there. She gave her name as 'Pooja' to the landlord. Thereafter, she made a telephone call from Ambala to her parents informing that the appellant had committed rape upon her and she was going to Amritsar for search of the appellant and Divya. On 02.07.2002, she got a job at Channel 71. She informed her whereabouts to her mother from the said office and she arrived there.

7. In her 164 Cr.P.C. statement (Ex.PW-10/A), she disclosed that her brother Jasdev Singh returned on 11.06.2002 from Divya's house. On 12.06.2002 after she was forced to consume milk at around 11.00 p.m. she went to sleep at 12.00 night. On 13.06.2002 at around 04.00 a.m. Divya went to Bangla Sahib Gurudwara and did not take her as assured. She had taken her foster brother Rinkle to the Gurudwara. At around 04.15 a.m. when she got up, she saw the lights in the room and 'Varrandah' 'on'. She could not get up to switch off the lights. At 04.25 a.m. she saw the appellant switching off the lights of the court-yard. He also switched off the lights of her room and thereafter bolted it. Before she

could enquire from the appellant anything, she fell asleep to get up at 05.30 a.m. She found that her clothes were missing and the appellant was lying by her side. Thereafter, the appellant went on the roof after putting 'on' clothes. At around 05.45 a.m. Divya came back and asked her to sleep. When she again got up at 08.00 a.m., she narrated the occurrence to Divya. At about 12.00 or 01.00 p.m. on 13.06.2002, Rinkle, Divya and Bhola took her to a hospital and after glucose was administered to her, they brought her back. After some time, the appellant made a telephone call to her parents to take her back and on the next day, the appellant with Divya went to Amritsar. After sixteen days when she got herself checked, she found herself pregnant and informed Rinkle about it. Thereafter, she got a telephone call from Divya to come to her for abortion. On 01.07.2002, she left her parents' house on her own and lived in a rented accommodation at Mayur Vihar. Rinkle had provided the said accommodation to her. On 04.07.2002, she had a talk with her mother and informed her that she was working as receptionist at West Patel Nagar. Her boss Ajay Mehra made a telephone call to her mother and asked her to meet her. Thereafter, her mother came and brought her back to the house. She further disclosed that a day before, she had taken Regulin Fort for abortion and she suffered it.

8. In her Court statement as PW-2 without disclosing any specific date about her visit to the appellant's house, she deposed that her parents had sent her and her brother Jasdev Singh to their house. She stayed there for four days and on the 3rd day, her brother returned after leaving her there. On the night intervening 12/13.06.2002, she was persuaded to take milk by Divya and she agreed to it. After consuming milk, she slept. On that day, Divya's ex-husband and her three children were present in the house. At about 04.30 a.m. when she woke up, she was not able to get up from her bed. She was not able to switch 'off' the lights of the room and Varrandah. Then she saw the appellant entering and switching 'off' the lights. When she woke up at 06.30 a.m., she found that she was not wearing any clothes. She noticed that blood and some water like substance was coming out of her vagina. She concluded that the appellant had committed rape upon her. After wearing clothes, she again went to sleep. When she again woke up, she narrated the incident to Divya in the presence of her husband and that of her foster brother Rinkle. Divya and Rinkle got her admitted in the hospital where she was administered glucose and given other treatment. Her parents brought her from the appellant's house. She got her urine tested to ascertain pregnancy, it was found positive. She did not disclose it to her parents. Then she made a call

to Divya but there was no response. She contacted Rinkle on his mobile who informed her that Divya and the appellant had left Delhi permanently. She informed Rinkle about her pregnancy after 2 or 3 days. He in turn informed Divya. At Divya's instance, she reached Bus Stand, Mayur Vihar for abortion. However, she did not come there. Rinkle met her and told that Divya and the appellant would come after 2 or 3 days. He arranged a room where she stayed for two days. During her stay there, she consulted a doctor who gave her an oral pill for abortion. After consuming the pill, she started bleeding and felt that pregnancy stood terminated. She returned to her parents' house. On reading an advertisement in a newspaper, she took up job on the same day. Her boss telephonically informed her parents and they brought the police and took her from there. She was sent to Jalandhar at her Nani's house. Since some pieces of foetus had remained in her body as noticed in ultrasound, she was given medicine to ensure that the abortion was complete.

9. In the cross-examination, she revealed that she got urine test conducted from Dr.S.K.Mahajan near her house. She further admitted that she lived in a rented accommodation at Mayur Vihar from 01.07.2002 to 04.07.2002. She was evasive to disclose the name of the company where she got employment and also who was its 'boss'. She denied the

suggestion that she loved the appellant and wanted to marry him. She disclosed that on 30.06.2002, she had informed Rinkle about her pregnancy telephonically. She further admitted that on the date of occurrence, Divya's children were sleeping in the said house.

10. On scanning the testimony of the prosecutrix referred above, it transpires that she has changed her version at different stages of the investigation and trial and is not at all consistent. In her Court statement, she was not emphatic to claim that the appellant had put off his clothes and had committed sexual intercourse to her view as disclosed in her statement before the police. She merely suspected the appellant to have committed rape upon her as she had found him switching off the lights of the room / Varrandah. She did not raise alarm or hue and cry that time and opted to remain mum for a considerable time. Even after meeting her parents, she did not apprise them of any such physical assault. Her post-event conduct is unnatural and unreasonable. She went alone for urine test to ascertain if she was pregnant. She left her parents' house on 01.07.2002 without informing them and stayed alone in a rented accommodation for about three days. During this period, she even admitted to have got her pregnancy aborted. She even got a job with Channel 71. She had given fictitious name as 'Pooja' while taking the room on rent. Inordinate delay

in lodging the report about the incident of commission of rape has remained unexplained.

11. PW-2 (the prosecutrix) and PW-3 (Joginder Singh) are at variance on vital facts. PW-3 (Joginder Singh) alleged that the accused persons were arrested on his identification from Amritsar. The Investigating Officer, on the contrary, has shown their arrest in Delhi. It is also not clear as to when and where the prosecutrix was recovered or whether she had gone to Amritsar to seek revenge as informed to PW-3 (Joginder Singh) on phone. No call details record was collected during investigation. Material prosecution witnesses who were conversant with the facts were not associated and joined in the investigation. The landlord of house where 'X' had taken a room on rent; the doctor from where the prosecutrix had got her urine test conducted and the employer where the prosecutrix had taken job were not examined. It is not clear as to who was the Divya's ex-husband and how he was present at the spot on the day of incident. The Investigating Agency did not examine appellant's children and Divya's niece Neha. So much so, X's brother Jasdev Singh was not produced to ascertain as to when he returned to house after leaving 'X' at the appellant's house. PW-12 (Rinkle Arora) has not corroborated the version given by PW-2 and PW-3. He merely deposed that on 03.07.2002

the police had contacted him to get information about appellant's address. He was only on visiting terms with the accused persons. He did not claim if he was present at the appellant's house on the day of occurrence and had accompanied Divya to Gurudwara in the morning on 13.06.2002. He was also conspicuously silent if any rented accommodation was arranged by him for 'X' at Mayur Vihar or that he was instrumental in getting her pregnancy aborted. In the cross-examination, he was candid to say that he did not know about rape and at the time of occurrence he was at Gurudwara Bangla Saheb. Curiously, the prosecution did not cross-examine him after getting him declared hostile.

12. Medical examination of the prosecutrix after about 20 days was of no relevance. No visible external or internal injuries were found on her body in MLC (Ex.PW-13/A). Of course, hymen was found 'not intact'. It is true that as per FSL report (Ex.PW-14/C) Ex.1 (i.e. underwear) gave positive for human 'semen'. However, the Investigating Officer did not place on record the report from the serological unit to find out origin and grouping of blood and semen. It is unclear if the human 'semen' detected on the victim's underwear was that of the appellant. This underwear was handed-over by PW-3 (Joginder Singh) to the police after lodging missing person report on 03.07.2002. It is difficult to accept that

for so long period, after the occurrence PW-3 (Joginder Singh) would continue to retain dirty underwear of the victim particularly when she had not apprised him about any incident of sexual assault. 'X' did not identify underwear to be that of her in her Court statement. On the same set of evidence co-accused Divya was acquitted of all the charges.

13. 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.

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 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.”

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. In the instant case, considering the vital discrepancies, contradictions and infirmities in the statements of the prosecution witnesses, it is not safe to convict the appellant on the sole uncorroborated testimony of the prosecutrix. 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 of the appellant stand discharged.

19. 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 13, 2015 / tr