

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

RESERVED ON : 1st SEPTEMBER, 2015

DECIDED ON : 1st DECEMBER, 2015

+ CRL.A. 859/2013

PRADEEP @ BALLI

..... Appellant

Through : Mr.Joginder Tuli, Advocate with
Mr.Ashu Kr. Sharma & Ms.Pooja
Arora, Advocates.

versus

STATE, NCT OF DELHI

..... Respondent

Through : Mr.Amit Gupta, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 15.05.2013 of learned Addl. Sessions Judge in Sessions Case No.06/13 arising out of FIR No. 80/09 PS Mangol Puri by which the appellant – Pradeep @ Balli was convicted for committing offences punishable under Sections 458/376/328/506-II IPC and Section 25 Arms Act, the instant appeal has been preferred by him. By an order dated 16.05.2013, he was awarded various prison terms with fine. All the substantive sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that in February, 2009 and on 06.03.2009 at House No.A-9A,

Awantika Enclave, Mangol Puri, Delhi, the appellant after committing house tress-pass and putting the prosecutrix 'X' (assumed name) aged around 16 years in fear committed rape upon her. On 11.04.2009, a country-made pistol loaded with a live cartridge lying in a car bearing No. DL-6CG-0079 parked in front of his flat No.607, pocket-A, Sector-6, Narela was recovered at his instance. On receipt of intimation of the incident on 09.03.2009, Daily Diary (DD) No. 14A (Ex.PW-16/A) came into existence at 10.10 a.m. at PS Mangol Puri. The Investigating Officer, after recording victim's statement (Ex.PW-1/A) lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent for examination to Forensic Science Laboratory. Efforts were made to apprehend the perpetrator of the crime. The appellant could be arrested on 09.04.2009. Pursuant to his disclosure statement, a country-made pistol was recovered from the car bearing No. DL-6CG-0079. Arvind Kumar (since acquitted) was also implicated for harbouring the appellant. Upon completion of investigation, a charge-sheet was filed against both - the appellant and Arvind Kumar for committing various offences. The prosecution examined thirty-three witnesses to establish its case. In 313

Cr.P.C. statement, the accused persons denied their involvement in the crime and pleaded false implication. DW-1 (Vishal Gaurav) was examined in defence. After hearing the rival contentions of the parties and on appreciation of the evidence, the Trial Court, by the impugned judgment, acquitted Arvind Kumar of the charges. It is relevant to mention that State did not challenge the said acquittal. Being aggrieved by conviction, the appellant has filed the instant appeal.

3. I have heard the learned counsel for the parties and have examined the file. Undisputably, the appellant and the prosecutrix 'X' were acquainted with each other before the incident; the appellant lived in her neighbourhood and carried out business of property-dealing nearby. The appellant had visiting terms at the prosecutrix's residence and had assisted them in solemnisation of Priyanka's marriage with her mother's step brother in December, 2008. There was no previous animosity between the parties. It has emerged that about four years prior to the occurrence a quarrel had taken place between the appellant and X's mother over a trivial issue which was settled later on. The parties had maintained their cordial relations thereafter.

4. At the outset, it may also be mentioned that X's date of birth relied upon by the prosecution is 02.08.1992. PW-24 (Anil Kumar), Sub-

Registrar (MCD) brought relevant register and proved entry at Sl.No.837 whereby birth of the prosecutrix was recorded. The registration was made in the record on 04.08.1992 vide Ex.PW-24/A. PW-20 Ms.Nirmal Bankar, Vice Principal, Govt. Co-ed School, P-Block, Sultanpuri, Delhi, also testified that as per school record, X's date of birth was 02.08.1992. She proved the relevant documents (Ex.PW-20/A and Ex.PW-20/B). The Trial Court after discussing all the relevant material came to the conclusion that X's age was 16 years, 7 months and 4 days on the date of alleged incident i.e. 06.03.2009. The appellant has not produced any document to its contrary. This date of birth recorded much prior to the occurrence when X's parents had not anticipated such an occurrence to happen can't be disbelieved.

5. Appellant's conviction is primarily based upon the solitary statement of the prosecutrix 'X' which has not been corroborated by any other independent source. Needless to say, conviction can be based on the sole testimony of the prosecutrix provided it lends assurance of her testimony. In case, the Court has reasons not to accept the version of the prosecutrix on its face value, it may look for corroboration.

6. The first incident of alleged rape took place in February, 2009. In her complaint (Ex.PW-1/A), 'X' did not reveal the exact or

approximate date when she was sexually assaulted for the first time in February, 2009. She also did not reveal if that time, the appellant was armed with any weapon or he had brought any stupefying substance or had sprayed it in the room where her parents and siblings were sleeping to make them unconscious. She did not claim if the appellant was in possession of any revolver or she was criminally intimidated on 06.03.2009 when she was ravished twice at 03.30 a.m. She did not inform if on both the occasions, her parents were administered any poisonous substance. She also omitted to disclose if the appellant had injured her hand or she was forced to write letters with her blood.

7. In 164 Cr.P.C. statement (Ex.PW-1/B) recorded on 16.03.2009, 'X' made vital improvements and disclosed that since December, 2008, the appellant had an evil eye upon her and used to tease and harass her. In February, 2009, he forced her to open the door of her room at the point of revolver. Thereafter, he sprinkled some substance on her parents as a result of which they became unconscious. She was criminally intimidated and forced to write letters after injuring her hand. She did not specifically state if on that night, the appellant committed rape upon her. Regarding the incident dated 06.03.2009, she revealed that the appellant came around 03.30 a.m. (night) and forced her to consume

liquor. He applied liquor on her vagina and committed rape upon her. She further disclosed that the accused used to administer her a 'pill' to avoid pregnancy. She blamed the Investigating Officer Prem Lata for not recording her earlier statement correctly.

8. In her Court statement as PW-1, 'X' implicated the accused for committing rape upon her in February, 2009 and on 06.03.2009. She deposed that in February, 2009 at around 03.30 a.m. someone knocked at the door of her room. When she opened it, the appellant kept the revolver on her shoulder and gained entry in the room. From that room, he entered in her parents' room and sprayed something contained in a bottle on them and told her that they won't be able to wake up. Thereafter, he committed rape upon her against her wishes. He also injured her hand, licked the blood and got some letters written from her forcibly. Again on 06.03.2009 at around 03.30 a.m. when she was sleeping in her room, the accused gained entry after removing the cooler installed in the window. He woke her up by hitting her with a 'danda'. She opened the door due to fear. Again, the accused sprayed some material in her parents' room, consumed liquor and forcibly committed rape upon her. She was raped twice or thrice in a very cruel manner that night. The appellant also forcibly administered her a tablet to avoid pregnancy.

In the cross-examination, she was duly confronted on various facts stated in her examination-in-chief which did not find mention in her initial complaint (Ex.PW-1/A). She admitted that letters (Ex.PW-1/DD, Ex.PW-1/DE and Ex.PW-1/DF) were written by her. It had taken about 5 or 10 minutes to write letter (Ex.PW-1/DD). She denied that she was in love with the accused. She admitted that she had not told the incident to her parents immediately. The accused had injured her hand on both the occasions. Her parents did not come to know about it as she used to wear full sleeve sweater. She further admitted that on both the occasions at the time of alleged incident, neither she nor the appellant had switched 'on' the lights in the room.

9. On scanning the above referred statements, it reveals that 'X' has given contradictory and conflicting versions at different stages of the investigation / trial. She is not consistent. Vital improvements have been made by her in her statement under Section 164 Cr.P.C. and in her Court deposition and she has been duly confronted on that. The story presented by the prosecutrix is quite improbable seemingly difficult to be accepted on its face value. The first rape incident allegedly took place in the second week of February, 2009 as disclosed in the cross-examination at around 03.00 a.m. (night). Appellant's entry in the room where the prosecutrix

was sleeping alone was friendly. 'X' did not raise any alarm or protest. She did not inform her parents even after appellant's departure from the crime spot. There was no occasion / compulsion for the prosecutrix to open the door for a man to whom she considered to be a man of bad character, at odd hours without taking her parents into confidence. Natural reaction of the prosecutrix would have been to immediately rush to her parents' room and inform them about the appellant's unusual presence outside the room. She did not prevent the appellant to enter inside the room and rather opened the door to provide easy access to him. The appellant thereafter allegedly sprinkled some intoxicating substance to make her parents and other family members sleep. Even that time, 'X' did not raise any alarm or try to escape. She did not get herself medically examined. She did not bother if her parents had suffered any harm due to administration of intoxicating substance. She did not even show injury suffered by her on her hand. She continued to go to her school in routine. She concealed her injuries by wearing full sleeve sweater. She was quite normal after the first incident on February, 2009. She did not consider it fit to shift to her parents' room to sleep thereafter. She continued to sleep alone in the room after the alleged horrible incident. Again, on 06.03.2009 the appellant was able to gain entry at around 03.00 or 03.30 a.m. when

X's parents were sleeping in the adjoining room. Again, the prosecutrix did not raise any hue and cry. She was ravished twice or thrice during that night. Nothing is on record to show if any resistance was offered by the prosecutrix to avoid the crime. It has rather come on record that letters (Ex.PW-1/DD, Ex.PW-1/DE and Ex.PW-1/DF) were written by her. The plea that she was forced to write these letters lacks credibility. Letter (Ex.PW-1/DD) is quite in detail and is in a natural flow. A person under fear or threat possibly can't have the handwriting as reflected in the letter (Ex.PW-1/DD). Contents of the letter show that 'X' was in love with the appellant and had invited him to reach there. Letters (Ex.PW-1/DD, Ex.PW-1/DE and Ex.PW-1/DF) show that 'X' was annoyed with her mother's conduct who had got inkling of their relationship. All these circumstances tend to show that the physical relations (if any) between the two were 'consensual'. The appellant had no reasons to injure X's hand or force her to write letters in blood. Apparently, it was done so to express his love for the prosecutrix. The prosecutrix even did not inform her parents immediately after suffering brutal rape on 06.03.2009. Only on 08.03.2009, she divulged the occurrence to them. It appears that after her parents sensed something foul, 'X' was forced to reveal the affairs and the complaint (Ex.PW-1/A) came to be lodged.

10. 'X' was medically examined vide MLC (Ex.PW-13/A). PW-15 (Dr.Surekha) found that on local examination labia majora and labia minora were normal; hymen was absent; fresh abrasion was seen on the fourchette; no bleeding was found. Apparently, the prosecutrix had not sustained any serious injuries on her body including private parts to infer forcible rape. A girl aged around 16 / 17 years having been ravished forcibly / brutally twice during the night intervening 06/07.03.2009 against her wishes is expected to sustain violent marks on her body. Nothing is on record to show if any resistance was offered to prevent the assault. No such struggle marks were found on her body. Absence of injuries on X's body give rise to an inference that she was a consenting party to coitus.

11. Various exhibits collected during investigation were sent to Forensic Science Laboratory for examination. FSL reports (Ex.PW-11/X1 and Ex.PW-11/X2) are of no benefit to the prosecution. As per these reports, no blood could be detected on Ex.1a (one white pyjama), Ex.1b (one white top / T-shirt), Ex.2 (underwear), Ex.3 (vaginal swab) and Ex.4 (bedsheet). Semen could not be detected on Ex.1a, Ex.1b, Ex.2, Ex.3 and Ex.4 also.

12. 'X' was aware that she was being administered I-pill for prevention of pregnancy. She did not complain about it to her parents. This circumstance lends credence to the appellant's plea that the prosecutrix was a consenting party. X's parents never complained before lodging of the FIR on 09.03.2009 if any poisonous / stupefying substance was administered to them as a result of which they had become unconscious. They never got themselves medically examined. No independent public witness was associated at any stage of investigation. The security guards posted in the locality; X's brother and sister were not examined. Even after the lodging of the FIR, no tell-tale of the crime were found at the spot.

13. There is unexplained delay in lodging the report. The rape incident took place for the first time in February, 2009. However, it was not reported by the prosecutrix to her family members or any other authority. Even when alleged rape incident occurred second time on 06.03.2009, the incident was not conveyed to the police promptly. Undue delay in lodging the complaint without acceptable evidence contributes to the doubts in the prosecution case when it has failed to establish it otherwise. X's post-event conduct is unnatural and unacceptable. Till 08/09.03.2009, she maintained complete silence and did not implicate the

appellant. At the time of incidents admittedly X's parents and brothers were present in the adjoining room. 'X' being a matured sixteen years old girl sleeping in between the comfort and safety of her parents in her house did not alert them on both the occasions. Even if she had voiced a single word or even whispered, her father-mother sleeping next to her would have woken up. Even after the appellant's departure from the crime spot, she remained mum and even did not bother to enquire about her parents' well-being.

14. Recovery of country-made pistol on 11.04.2009 after two days of his arrest in the presence of co-accused - Arvind Kumar is suspect. It was not found in appellant's possession at the time of his arrest. Allegedly, it was recovered from car bearing No. DL-6CG-0079 at his instance. The Investigating Officer did not collect any evidence as to whom the said car belonged. Nothing has surfaced as to from where the revolver was procured. In her initial statement, the prosecutrix did not disclose if the appellant was armed with any such weapon. Key of the car was not provided by the appellant. It was alleged with Arvind Kumar who has already been acquitted by the Trial Court.

15. In view of vital infirmities, inconsistencies and improvements in the statement of the prosecutrix coupled with her

unnatural conduct, X's testimony cannot be accepted on its face value. It is true that in case of rape, 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.

16. For the above reasons, I am of the considered view that the prosecution has failed to bring home any of the charges against the appellant beyond reasonable doubt. Accordingly, judgment dated 15.05.2013 and Order on Sentence dated 16.05.2013 are set aside and the appeal filed by the appellant is allowed.

17. The appellant, who is already on interim bail till the disposal of the appeal, need not to surrender in jail. 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

DECEMBER, 01, 2015 / *tr*