

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

RESERVED ON : 23rd SEPTEMBER, 2015

DECIDED ON : 8th DECEMBER, 2015

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CRL.A.314/2015

STATE

..... Appellant

Through : Mr.Amit Gupta, APP.

versus

BRIJ DEV TIWARI @ PANDIT

..... Respondent

**Through : Mr.Ritesh Khare, Advocate with
Mr.Sumit R.Sharma, Advocate.**

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 29.08.2011 of learned Addl. Sessions Judge in Sessions Case No.09/11 arising out of FIR No.443/10 PS Dabri by which the respondent – Brij Dev Tiwari @ Pandit was acquitted of the charges, State has preferred the instant appeal. It is contested by the respondent.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 18.12.2010 at 10.00 p.m. at House No.A-83, ground

floor, gali No.19, Bharat Vihar, New Delhi, the respondent committed rape upon the prosecutrix 'X' (assumed name) aged around eight years and criminally intimidated her brother Rajesh Kumar. The incident was reported to the police on 20.12.2010 and Daily Diary (DD) No.10A (Ex.PW-12/A) came into existence at 09.30 a.m. The investigation was assigned to SI Anil Kumar who with Const.Mahender Singh went to the spot. After recording statement of the victim's brother – Rajesh Kumar (Ex.PW-8/A), the Investigating Officer lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. The accused was arrested and medically examined. Upon completion of investigation, a charge-sheet was filed against the respondent for commission of offences punishable under Sections 376/506 IPC. The prosecution examined twelve witnesses to establish respondent's guilt. In 313 Cr.P.C. statement, the respondent denied his involvement in the crime and pleaded false implication. The trial resulted in his acquittal. Being aggrieved and dissatisfied, the State has come in appeal.

3. I have heard the learned counsel for the parties and have examined the file. In the complaint (Ex.PW-8/A) the complainant –

Rajesh Kumar informed that on 18.12.2010 at around 10.00 p.m. when he returned to his house and went up-stairs, he heard X's voice from inside the respondent's room on the ground floor. The room was half-closed. When he saw inside the room, he found that the accused was attempting to commit rape upon 'X'. On seeing him, the respondent became perplexed, put 'on' clothes and fled the spot. He brought 'X' up-stairs and informed about the incident to his wife Manju. After some time, the respondent returned and threatened to kill him. Due to fear, he did not lodge report that day. In his Court statement, the complainant as PW-8 introduced a new version quite inconsistent and contradictory to the initial statement (Ex.PW-8/A) given to the police. He deposed that on 18.12.2010 at about 10.00 / 10.15 p.m., when he returned from his place of work and went to his room, he did not find 'X' there. On enquiry from his wife, he came to know that she might have gone to toilet. However, 'X' was not there in the toilet. He came down-stairs and made enquiries from Seema, a tenant on the ground floor. Her son aged around 4 – 5 years informed him that 'X' was in the respondent's room. He knocked at the respondent's room for about 15 – 20 minutes and when it was opened he found the prosecutrix in his room. He brought her up-stairs and she informed him that the respondent had committed rape upon her. He asked his wife to

check the prosecutrix after removing her panty. After examining the prosecutrix, she informed him that there was 'blood' on her panty. He came down-stairs and informed Seema about the incident. Next morning, his landlord came at around 08.00 a.m. and he apprised him of the occurrence. He assured to get the room vacated from the respondent. At about 06.00 p.m. next-day, Manoj, his landlord's son on mobile threatened him to kill if he reported the incident to anyone. As the witness had made vital improvements, the learned Addl. Public Prosecutor cross-examined him after seeking Court's permission. He was confronted with the statement (Ex.PW-8/A) on various facts which were not stated that time. The witness did not explain as to why all these facts stated in the examination-in-chief were omitted to be recorded in his initial complaint (Ex.PW-8/A). About X's panty, he informed that it was left in the Indica car of his brother-in-law - Kamal on return from the police station.

4. PW-5 (Manju), Rajesh's wife also gave inconsistent and conflicting statement. In her deposition before the Court, she disclosed that 'X' had gone to watch TV at Seema's house on the ground floor. At around 10.00 p.m., she accompanied her husband to search 'X' but she could not be located. Seema's son told her husband that 'X' was sitting in respondent's house. It was knocked for about 15 – 20 minutes but the

respondent did not open it. Seema's younger son switched off the electricity connection. After the respondent opened the door, 'X' was found inside the room. She again said that 'X' had come out of the house and was in normal condition. She was taken up-stairs. 'X' told her that the respondent had committed rape upon her after removing his pant. She saw blood on X's panty. She and her husband came down-stairs and apprised Seema about the incident. She advised them not to raise the issue and she will inform the landlord who would talk to the respondent. When the landlord did not get the room vacated, they lodged the report with the police. She was also cross-examined by learned Addl. Public Prosecutor as she did not support the prosecution in its entirety. She was confronted with her statement (Ex.PW-2/DA).

5. Initially, on PW-8, Rajesh's statement (Ex.PW-8/A), the police had registered a case for 'attempt to commit rape'. Rajesh had claimed to have witnessed the incident while going up-stairs to his room. Subsequently, upon completion of investigation, the respondent was charged for committing 'rape' upon the prosecutrix 'X'. PW-5 (Manju) and PW-8 (Rajesh) in their Court statements did not claim if at first instance 'X' was seen in the respondent's room or he was found attempting to commit rape upon her. The prosecution has not offered any

plausible explanation for material and vital deviation from the initial version.

6. The prosecutrix 'X' is a child witness. Her age has been described as eight years on the day of incident. The Investigating Agency, however, did not collect any document whatsoever to ascertain her age. Her ossification test was also not conducted to find out the approximate age. The Trial Court while recording her Court statement noted that she appeared to be aged around 5 – 6 years. Her statement was recorded in question and answer form. Initially, she was reluctant to disclose anything. After PW-5 (Manju) was called to provide her moral support, she answered queries of the Court. Her statement is inconsistent. At some stages, she has informed that certain facts were tutored to her by her brother Rajesh. At one stage, she merely deposed that she was taken to his room by the respondent and was confined there. She was made to lie and her 'kachhi' was taken off. Then her brother arrived there and the respondent put a piece of cloth in her mouth. Her brother took her upstairs and saw that there was blood on the 'kachhi'. At other stage, she was categorical to state that the respondent has inserted his organ meant for urinal in her female organ. Settled position is that the Court must be extremely cautious and careful in placing reliance on the testimony of

a child witness. A child witness is prone to tutoring and hence the Court should look for corroboration particularly when the evidence betrays traces of tutoring. In the instant case, testimony of the baby gives a clear impression that she was coached and tutored before she gave the statement and it is clear from the number of questions she had answered in the cross-examination. Her statement has not been corroborated by any other independent source. Medical evidence also proves the respondent's innocence. 'X' was medically examined vide MLC (Ex.PW-9/A) on 20.12.2010. PW-10 (Dr.Parul Mehra)'s statement is crucial. She deposed that at the time of her medical examination, there were no external injuries on X's body. She did not find any external injuries on her vulva and thighs. Her hymen was torn, however, her hole was very small that even a little finger could not be allowed inside. There was no bleeding at that time. In an answer to a Court question, she was of the view that it did not appear to be case of 'rape' as there were no external injuries. She revealed that in case a minor child of the said age is raped, the injuries suffered would take a week's time to heal. The reason of small hole in the hymen could be that the child was active in playing. The hole did not appear to be a fresh injury. Apparently, the evidence of 'penetration' in the instant case

is lacking. PW-8 (Rajesh) in his initial version given to the police merely complained of 'attempt to commit rape'.

7. FSL report Ex.PX is of no relevance as human semen detected on Ex.1a (Cotton wool swab on a stick kept in a test tube), Ex.1b1 & 1b2 (Two micro slides having whitish smear), could not be ascertained to be of 'A' group of the respondent.

8. Delay in lodging the FIR has remained unexplained. PW-5 (Manju) did not support her husband if any threat was ever extended by the respondent not to lodge the report with the police. She informed that the threat extended was by the landlord or his son. The prosecution examined PW-6 (Satpal), the landlord. He did not reveal if any threat was extended by him or his son Manoj to X's brother to not lodge the report. In the cross-examination, he disclosed that only from the police, he came to know about the incident. Material prosecution witnesses were not examined or associated. Manoj against whom there was specific allegation of criminal intimidation was not joined during investigation or was produced as a witness. Seema and her son were not examined to corroborate the prosecution version that they had intervened and advised the complainant not to lodge the report. They were material witness to prove if the prosecutrix was last seen at the respondent's residence or on

the information given by Seema's son, the complainant had gone to the respondent's house. Relatives with whom the complainant had discussed to lodge the report on 20.12.2010 have also not been examined. Contradictory statements have emerged as to the circumstances and manner in which the respondent was arrested. Apparently, he did not abscond from the spot. The Trial Court has discussed all the evidence on record minutely. Though the defence does not inspire confidence regarding false implication for non-payment of ₹12,000/-, the prosecution cannot take advantage of it. The onus to establish its case beyond the reasonable doubt is upon the prosecution.

9. Settled legal preposition is that the appellate court has to be more cautious while dealing with the judgment of acquittal. Under the Indian criminal jurisprudence, the accused has two fundamental protections available to him in a criminal trial or investigation. Firstly, he is presumed to be innocent till prove guilty and secondly, that he is entitled to a fair trial. Both these facts attain even greater significance where the accused has a judgment of acquittal in his favour. A judgment of acquittal enhances the presumption of the innocence of the accused. The appellate court would be justified in interfering with the judgment of acquittal only when there are very substantial and compelling reasons to

discard the verdict of court below. In the instant case, the State has not been able to make out that the Court below has completely fallen in error of law or that the judgment in relation to the respondent was palpably erroneous, perverse or untenable.

10. In the light of above discussion, the appeal preferred by the State against the respondent's acquittal is devoid of merits and is dismissed. Trial Court record be sent back immediately with the copy of the order.

(S.P.GARG)
JUDGE

DECEMBER 08, 2015 / *tr*