

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

RESERVED ON : 8th APRIL, 2015

DECIDED ON : 2nd JULY, 2015

+ CRL.A.1146/2014

AMIT Appellant

Through : Ms.N.R.Nariman, Advocate.

VERSUS

THE STATE (GOVT. OF NCT) DELHI Respondent

Through : Ms.Kusum Dhalla, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Present appeal is directed against a judgment dated 21.02.2014 of learned Addl. Sessions Judge in Sessions Case No. 46/13 arising out of FIR No.156/12 PS Subhash Place by which the appellant – Amit was held guilty for committing offences under Sections 120B IPC; 376 IPC read with Section 120B IPC. By an order dated 22.02.2014, he was sentenced to undergo RI for ten years with fine ₹ 20,000/- under Section 376 IPC read with Section 120B IPC and RI for seven years with fine ₹ 10,000/- under Section 120B IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on or before January, 2012 at Delhi, the appellant along with Roshan (facing trial before Juvenile Justice Board), Dharmender (since PO), Kaushlander (since PO) and Narender @ Bakur (since PO) hatched a criminal conspiracy to commit rape upon 'X' (assumed name) aged 19 years. Pursuant to that conspiracy, the appellant committed rape upon 'X' in a room at JJ Colony, Shakurpur in January, 2012 during night time. Subsequently, he handed over X's custody to co-accused persons who committed gang-rape after wrongfully confining in a room throughout the month of January, 2012 besides criminally intimidating her. The police machinery came into motion when exhaustive written complaint dated 18.04.2012 (Ex.PW-15/A) was filed in PS Subhash Place by the prosecutrix. The Investigating Officer lodged First Information Report after making endorsement (Ex.PW-18/A) over it. In the complaint, 'X' gave detailed account as to how and under what circumstances, she was sexually assaulted by the appellant and his associates. 'X' was medically examined; she recorded her statement under Section 164 Cr.P.C. 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 find

out Dharmender, Kaushlander and Narender @ Bakur. However, they remained untraced and were finally declared Proclaimed Offenders. The appellant and Roshan were arrested and medically examined. Roshan claimed juvenility on the day of incident and was sent to face trial before Juvenile Justice Board. After completion of investigation, a charge-sheet was filed against the appellant – Amit for commission of aforesaid offences to which he pleaded not guilty and claimed trial. The prosecution examined eighteen witnesses to substantiate its case. In 313 Cr.P.C. statement, the appellant – Amit pleaded false implication and denied his involvement in the crime. The trial resulted in his conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. 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 'X' who specifically implicated him for establishing physical relation with her against her wishes. She further deposed that on the pretext to provide her a job, the appellant handed over her to his associates who sexually assaulted her repeatedly in their room throughout the month of January, 2012. She used to remain confined in the said room. One day, when Dharmender, Kaushlander and Narender @ Bakur had gone to their native village and Roshan forgot to lock the room, she managed to escape

from there and went to her native place. She developed medical complications and was taken to hospital for treatment. Her bhabhi Mani brought her to Delhi and she narrated the occurrence to her. Thereafter, the instant complaint was lodged with the police.

4. Admitted position is that 'X' was 19 years of age on the day of occurrence and had attained majority. She admitted in her testimony that after she came to Delhi in 2009 to work as maid, she was provided a job to work as a domestic help through Geeta Placement Agency, Shakurpur. She worked there for about one year. Thereafter, she worked in a house at Pitampura and left the job there. In 2012, she was without job. Geeta Kumari (original resident of village Amba Toli, post office Basua, Distt. Gumla, Jharkhand) running placement agency in the name and style of Geeta Enterprises was examined as PW-13 deposed that 'X' who lived near her village, came to her placement agency in 2009 as her family lived near her village. From 2009, she worked at various places in Delhi and finally went to her village. In January, 2012, she again came from her village and she employed her in a house at Pitampura where she worked for about a week. From there, she left the job and went somewhere without informing anyone. After 10 – 15 days, she telephonically informed her that she had met 'someone' known to her and

was going to her village. In February, 2012 one Mangal who was X's brother in relation and had brought 'X' to Delhi approached her to get payment of the balance amount of X's salary. He apprised her that 'X' was in her native village. None of them contacted her thereafter. These facts remained unchallenged and uncontroverted in the absence of any cross-examination.

PW-16 (Mani) aged 25 years distantly related to 'X' came to Delhi to work as domestic-help. She also informed that previously 'X' was employed in some kothis through a placement agency where she worked for about two years. Thereafter, she went to her village and returned in March, 2012. From 'X' she came to know that she was working in a house at Rohini but had left the job.

Apparently, 'X' was not a stranger to Delhi. She was in Delhi since 2009 and had worked at various places as domestic-help. Earlier, she had worked through Geeta Placement Agency. Detail of the places where she had worked for any particular duration has not come on record. It appears that lastly before the incident in question, she worked in a house as maid at Rohini / Pitampura for about a week. She did not divulge as to what forced her to leave her job at Rohini / Pitampura after a week. 'X' did not elaborate if she were to collect any dues from her previous

employer PW-13 (Geeta Kumari) and if so, what was its quantum and to which period the said dues pertained. Nothing has emerged to infer if 'X' had ever demanded her dues from Geeta Kumari. Indisputably, the appellant – Amit was acquainted with her since 2009. She clarified that during her employment with Geeta Placement Agency, she used to go to the appellant's 'rehri' to take food i.e. Cholley Bhature which he used to sell. 'X' had no complaint about the appellant's conduct and behaviour any time prior to the occurrence.

5. Neither 'X' nor PW-16 (Mani) gave exact date when 'X' had gone to Geeta Placement Agency to collect her dues. 'X' disclosed that when in the end of winter season of 2011 - 2012, she had gone to Geeta Placement Agency to collect her dues, she felt hungry and went to the appellant as usual to take Cholley Bhature. In response to the appellant's query if Geeta had paid her salary, she informed that she had not paid her salary for about one year. The accused offered that he would arrange money and also some job for her. Thereafter, he took her in a park. From there, she was taken to a jhuggi behind Samrat Cinema where the accused committed rape upon her twice that night. On the next morning, he handed over her to a placement agency of Dharmender, Kaushlander, Roshan and one more person known Bakur. 'X', however, did not disclose in her

statement as to for which period her dues were payable by Geeta. It is also unclear if Geeta had declined to pay her dues for any specific reason. PW-13 (Geeta Kumari) in her deposition did not claim if she was to pay any dues to 'X' or she had come to collect her dues in January, 2012. Since 'X' had left the job provided through Geeta Placement Agency within a week, there was least possibility of any dues to be collected by her from PW-13 (Geeta Kumari).

6. 'X' did not claim that the appellant forcibly committed rape upon her against her wishes. Apparently, she had accompanied the appellant to the jhuggi with her free consent. At no stage, she raised alarm / hue and cry. In the cross-examination, she admitted that distance between the 'rehri' and the place of incident was about 2 – 3 minutes walk; there were other jhuggies adjacent to the appellant's jhuggi. She admitted that she did not raise alarm at the time of incident of rape. She reasoned that the appellant had told her to keep quiet else he would throw her out of the room. She did not inform anyone about the incident on the next morning. She remained in the company of the appellant throughout the night in the room. No visible injuries were found on her body. Subsequently, she remained at the house of Dharmender, etc. for about one month. Even after she allegedly escaped from there, she did not report

the incident to the police. She remained at her native place for sufficient duration but did not opt to apprise her parents or other family members about the alleged rape. Only when she developed problems due to medial infection in her private part, she was taken for medical examination and thereafter she came to Delhi. Even at her native place, she did not lodge any report with the police. After a considerable delay of about more than four months 'X' opted to lodge a detailed complaint at Delhi. It is unclear as to who was author of the complaint as 'X' was illiterate. No plausible explanation has been given for inordinate delay in lodging the report with the police.

7. The appellant was acquainted with the prosecutrix much prior to the incident and his offer to get employment through some other placement agency can't be suspected. He had arranged a job for her with Dharmender Placement Agency and she had joined it without any demur. Nothing has come on record to infer if the appellant was in constant touch with co-accused persons any time to hatch a conspiracy to commit rape upon 'X'. X's arrival at his 'rehri' on the day of incident was not anticipated or expected as allegedly she had visited Geeta Placement Agency to collect her dues and when she felt hungry, she went to the appellant's 'rehri' to take Cholley Bhature. The Investigating Agency did

not collect any cogent evidence if co-accused persons used to run any placement agency i.e. Dharmender Placement Agency. It has, however, come on record that they all lived at Shakurpur. PW-14 (Hem Raj), their landlord who lived at E-183, Shakurpur, JJ Colony, along with his wife and three children deposed that house No.193/194, JJ Colony, Shakurpur was in his wife's name. Two rooms were let out on the 5th floor of the said accommodation to Dharmender where he along with 3 - 4 boys and a girl to whom he described his 'wife' used to live. In February, 2012, he got the said premises vacated as Dharmender wanted to start a placement agency there. PW-14 (Hem Raj) identified 'X' by pointing at her in the Court and disclosed that she was staying with Dharmender and was introduced to him as his 'wife'. PW-14 (Hem Raj)'s testimony falsifies X's claim that she was wrongfully confined against her wishes for about a month in the room by Dharmender and his associates. 'X' did not object when Dharmender had introduced her to PW-14 (Hem Raj) as his 'wife'. PW-14 (Hem Raj) did not depose if any time 'X' had complained to him about the conduct and behaviour of Dharmender and his associates staying with her. Merely because the appellant had introduced 'X' to Dharmender and his associates allegedly running a placement agency, no fault can be found for that act. 'X' did not state if during her stay in the said house

with Dharmender and others, the appellant had ever visited them or he used to remain in constant touch with them. Nothing has surfaced if any money transaction took place and X's custody was handed over to Dharmender and his associates for any consideration. Apparently, the appellant was ignorant as to what was happening with 'X' in the said accommodation and also if it was with her consent or against her wishes. Even after clandestine escape out of the said accommodation in the absence of Dharmender and his associates, 'X' did not visit the appellant to protest his action or to lodge report against him in the police station. She conveniently went to her native place and stayed there for more than two months before coming to Delhi again. 'X' did not examine any of her family members to substantiate her version. In the cross-examination, she admitted that during her stay with Dharmender and others for about one month, police officials had visited there on 2 or 3 occasions. She had seen those police officials but admittedly did not raise alarm or inform them of her distress. From the unreasonable and unnatural conduct, it can safely be inferred that she was not in wrongful confinement in the said house. The police officials visiting the said place did not notice any foul activity there. At no stage, 'X' informed about the incident to them or other neighbours.

8. 'X' has given divergent and conflicting versions in the statements recorded under Section 164 Cr.P.C. and the one before the Court. PW-16 (Mani) has even stated that 'X' returned to Delhi in March, 2012. The happening of incident in January, 2012 is suspect. 'X' even did not take into confidence her relation PW-16 (Mani) and went to her native place without informing her of the alleged incident. The Investigating Agency did not collect any Call Details Record to ascertain the exact location of the prosecutrix at the relevant time. The Call Details Record was essential to ascertain with whom and for what duration, 'X' used to remain in conversation during the period she was allegedly confined forcibly. Adverse inference is to be drawn against the prosecution for withholding this material electronic piece of evidence. The prosecutrix was medically examined on 28.04.2012 and no external visible injuries were found on her person. DNA report sought during investigation did not implicate the appellant. Apparently, the prosecutrix has not presented true facts. Physical relations if any with the appellant were obviously with her free consent.

9. 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.

10. 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.

11. 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.”

12. 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 caliber 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."

13. 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.'

14. X's testimony is wholly unreliable due to inherent infirmities referred above and cannot be relied upon to base conviction for the grave and serious offence.

15. In the light of above discussion, the appellant succeeds and the appeal preferred by him is allowed. Conviction and sentence awarded by the Trial Court are set aside. The appellant shall be released forthwith if not required to be detained in any other criminal case.

16. 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 compliance.

(S.P.GARG)
JUDGE

JULY 02, 2015 / *tr*