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

Date of Decision: 18th May, 2015

+ **CRL.A. 1322/2013 & CrI.M.B.2103/2013 (suspension of sentence)**

SALIM @ AMIR S/O LATE MUSTAFA Appellant
Through: Mr.Sushant Mehra, Advocate

versus

THE STATE (GOVT. OF NCT) DELHI Respondent
Through: Mr.O.P.Saxena, Additional Public
Prosecutor for the State alongwith SI
Suresh Pal from Police Station Jama
Masjid, Delhi.

CORAM:
HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgment dated 10.07.2013 and order on sentence dated 12.07.2013 vide which the appellant Salim alias Amir was convicted for offence under Section 376 IPC and was sentenced to undergo rigorous imprisonment for a period of 7 years in addition to payment of fine of Rs.5000/- in default, to undergo simple imprisonment for one year.

2. The prosecution case, as borne out from the chargesheet, is that on

14.02.2011 at about 10.15 pm on receipt of information about commission of rape upon a girl ASI Pushpa alongwith Constable Santveer reached LNJP Hospital where they met ASI Mohd.Usman and Constable Shiv Pal. ASI Mohd. Usman handed over DD No.24A dated 14.02.2011 to ASI Pushpa. Statement of victim 'F' was recorded. After her medical examination she disclosed about commission of rape upon her by one Amir. The statement of prosecutrix culminated in registration of FIR No.09/2011 under Section 363/376/511 IPC. Ossification test of the prosecutrix was conducted wherein her age was determined to be 16 years with margin of six months on either side. Accused was arrested at the instance of prosecutrix whose name was revealed as Salim alias Amir. Pursuant to the disclosure statement of accused Amir, accused Arman and Mehfuz were also arrested and Section 120B was added later on. After completing investigation, chargesheet was submitted under Section 363/376/120B IPC. Charge for offence under Section 376 IPC was framed against accused Salim alias Amir whereas accused Mehfuz Ahmad were charged with offence punishable under Section 109 IPC read with Section 376 IPC to which they pleaded not guilty and claimed trial. Accused Arman was discharged vide order dated 07.06.2011.

3. In order to substantiate its case, prosecution relied upon the testimony of 27 witnesses. All the incriminating evidence was put to both the accused in their statement recorded under Section 313 Cr.P.C which was one of denial simplicitor. Both of them alleged false implication and claimed innocence. They did not prefer to lead any evidence in defence. After perusing the evidence led by the prosecution and on hearing learned counsels for the parties, vide impugned judgment dated 10.07.2013 accused

Salim alias Amir was convicted under Section 376 IPC however Mehruz was acquitted of the charge levelled against him.

4. Feeling aggrieved, present appeal has been filed by accused Salim alias Amir. Assailing the findings of the learned Trial Court, learned counsel for the appellant submitted that the chargesheet was submitted under Section 376/511 IPC. As per the ossification test, the prosecutrix was reported to be 16 years of age and six months margin was to be given on either side. That being so, benefit has to be given to the accused. There is contradiction regarding identity of the accused in as much as in the MLC, the prosecutrix did not name any person who committed rape on her. At other stages also, she was referring to the offender as Amir only. There is nothing in the MLC to show that the prosecutrix was subjected to rape. In her first MLC, the pregnancy test gave negative report. After one month another pregnancy test was conducted which gave positive report and, therefore, charge under Section 376 IPC was framed. When at the earliest juncture the hymen of the prosecutrix was found intact and pregnancy test was negative then it is clear that in between the first MLC and second MLC the prosecutrix had sexual intercourse with some other person which resulted in her pregnancy. Prosecutrix herself has not supported the case of prosecution and as such, was declared hostile. There is no evidence to conclusively connect the accused with the crime. Jamila at whose house the prosecutrix is alleged to have gone has not been examined. Under the circumstances, it was submitted that prosecution has failed to bring home the guilt of the accused beyond reasonable doubt. The impugned judgment cannot be sustained and the same be set aside.

5. Controverting the submissions of learned counsel for the appellant, learned Additional Public Prosecutor for the State supported the findings of the learned Additional Sessions Judge and submitted that mere fact that the hymen was found intact is no ground to arrive at a conclusion that the prosecutrix was not subjected to rape in as much as even slight penetration is sufficient to constitute rape. Moreover, no reason has been assigned by the accused as to why he will be falsely implicated in such a serious offence by the prosecutrix with whom he is not alleging any animosity. That being so, it was submitted that the appeal is bereft of merits and be dismissed.

6. I have bestowed my considerable thoughts to the respective submissions of learned counsels for the parties and have perused the record.

7. The star witness of prosecution is the prosecutrix herself. This witness has unfolded that on 13.02.2011 she had gone to the house of her aunt Jamila who lives near Daiwali Masjid. She was returning to her house at about 6.30pm. When she reached at the corner of Chitlikabar at Durga Chowminwala near Suiwalan she saw accused Salim selling clothes at footpath. She asked him to show clothes. He told her that better quality clothes are kept in the godown. She told him to show the clothes at that place only however he took her to godown. He took her to a place which looked like a hotel behind Machliwala Hospital near one khatta. Accused took her to a room inside this hotel type building. Three persons were already present in the room who came out of the room. Accused pushed her forcibly inside the room and then bolted the room from inside. He removed his clothes and also removed her clothes and thereafter committed rape on her. Accused had beaten her on her left cheek during that act. When she

resisted he threatened to kill her. She came out of that place and called her aunt Shazia on phone. She came and took her to hospital. Police came to the hospital. With the permission of the Court certain leading questions were put to the witness. She however denied that the accused was arrested by the police in her presence. She was thereafter cross-examined by learned Public Prosecutor for the State. She admitted having made a statement Ex.PW10/A before the Metropolitan Magistrate. She did not depose anything regarding accused Mehfuz.

8. Pursuant to an application moved by the Investigating Officer of the case, statement of prosecutrix was recorded under Section 164 Cr.P.C (Ex.PW22/B) by PW-22 Sh. Deepak Dabas, Metropolitan Magistrate wherein she reiterated the averments made by her in her initial complaint Ex.PW10/A. She was cross-examined by learned counsel for the appellant however despite cross-examination, nothing material could be elicited to discard her testimony which remained unimpeachable. It is now well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the

prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.

9. Testimony of prosecutrix being cogent, consistent, reliable and credible is sufficient to sustain conviction. Even if as a matter of prudent any corroboration is required, same is also available.

10. After the incident, the prosecutrix informed her Bua PW-1 Shazia about the incident who in turn informed the PCR. However since PCR did not reach the spot, she took her to Irwin Hospital where PCR and local police met them. There, statement of prosecutrix was recorded by the police and she was medically examined. Factum of narrating the incident to her Bua immediately after the incident by the prosecutrix becomes relevant as subsequent conduct under Section 157 read with Section 8 of the Indian Evidence Act.

11. In ***Emperor vs. Phagunia Bhuran***, AIR 1926 Pat. 58, it was observed as under:-

“If the girl went to her relatives straight after the occurrence and complained on her own initiative, there is no doubt that her conduct would have a direct bearing upon and connection with the occurrence itself”.

12. In ***Rameshwar Kalyan Singh v. State of Rajasthan***, AIR 1952 SC 54 also, it was observed that where the raped girl instinctively ran home to her mother, but not finding her there, she went to sleep and when the mother returned four hours later, the girl told her what had happened, the statement made to the mother fell within the ambit of Section 157 read with Section 8

illustration (J) of the Evidence Act.

13. ***Nagam Gangadhar vs. State***, 1998 CrL.J. 2220 considered the similar situation, where a child of four years was raped. Hon'ble Apex Court observed as under:-

"It is then contented that PW3 is a child witness and no importance can be attached to that evidence. It is true that the evidence of PW3 cannot be given the same weight as a grown up victim in a case of rape, the reason being that she is aged four years at the time of occurrence. However, she appears to have communicated to her parents that the revision petitioner has committed an act due to which she was getting pain in her private part. PW-1 as well as PW-2 have sworn to the fact that PW-3 disclosed the said act, even if the testimony of PW-3 is to be ignored, the circumstances set out supra are, in view of Hon'ble Apex Court, sufficient to bring home the guilt of the revision-petitioner."

14. In ***Syed Pasha vs. State of Karnataka***, 2004 Cr. L.J. 4123 also the child informed her mother about the incident and the person, who had committed rape upon her. It was held this information was admissible in evidence and it points out to the guilt of the accused.

15. Similar view was taken by this Court in, ***Nannu Gupta @ Bablu v. State***, 2010 II AD (Delhi) 117 and in ***Hari Om v. State*** 2010 Cr.L.J.1281, where it was held that previous statement of prosecutrix are admissible in evidence under Section 157 of the Evidence Act and this proposition of law was recognized by Hon'ble Apex Court in ***Madan Lal vs. State of J&K***, AIR 1998 SC 386, where statement made by the prosecutrix to her mother soon after the incident was accepted to be corroborative piece of evidence.

16. Her testimony regarding giving bites on her left cheek by the accused at the time of commission of rape find corroboration from the MLC as small 1x1cm bruise over left cheek and small superficial bruise behind left ear was found on her person.

17. Testimony of prosecutrix also find corroboration from report of FSL

Ex.PW27/K as per which human semen was detected on cotton wool swab two micro slides having faint wheatish colour and one lady shirt having blood stains.

18. Contention of learned counsel for the appellant that the prosecutrix has stated the name of accused as Amir only in her complaint Ex.PW10/A as well as in her statement under Section 164 Cr.P.C Ex.PW22/B and the Investigating Officer admitted that the prosecutrix had named the accused as Amir and not as Salim alias Amir therefore, identity of accused is not established, deserves rejection. The Investigating Officer, ASI Pushpa (PW-27) in her cross-examination explained that the name of accused as Salim was revealed during the course of investigation and he had also mentioned his name in the disclosure statement as Salim alias Amir. In any case, when the prosecutrix appeared in the witness box she identified the accused by name as well as by specifically pointing out at him. Under these circumstances, the fact that the prosecutrix named him merely as Amir in her initial complaint Ex.PW10/A as well as in her statement recorded under Section 164 Cr.P.C Ex.PW22/B is not fatal to the case of prosecution. Moreover, the accused has nowhere denied that his name is not Salim alias Amir.

19. Much stress was laid by learned counsel for the appellant for submitting that the chargesheet was submitted under Section 376/511 IPC. As per MLC dated 14.02.2011 Ex.PW13/A, the hymen of the prosecutrix was found to be intact and her urine pregnancy test was also found negative. It was only when her second MLC was conducted on 09.03.2011 at that time as per report Ex.PW2/A hymen of the prosecutrix was found to be torn and urine pregnancy test gave a positive report. On that basis, the Investigating

Officer deleted Section 511 IPC. In her initial complaint Ex.PW10/A although the prosecutrix claimed that the accused tried to commit rape upon her but at the same time she stated that she experienced pain in the said process which clearly implies that there was penetration, though slight, which clearly amounts to rape within the meaning of Section 375 IPC and as per the explanation appended to this section. There are catena of decisions to the effect that even slight penetration is sufficient to make out the offence of rape as held in **Wahid Khan vs. State of MP** (2010) CrL.L.J 517 and **Aman Kumar vs. State of Haryana** AIR (2004) SC 1497. The absence of any external injury or rupture of hymen is not indicative of the fact that prosecutrix was not raped. In **Madan Gopal Kakkad v. Naval Dubey & Anr** (1992) 3 SCC 204, it was held that slightest penetration without rupturing hymen is rape. Similar view was taken in **Ranjit Hazarika vs State Of Assam**, (1998) 8 SCC 635 where it was held that non-rupture of the hymen or the absence of injuries on her private parts, does not belie her testimony as she nowhere stated that she was bleeding per vaginal. Similarly, in **B.C. Deva @ Dyava vs. State of Karnataka**, (2007) 12 SCC 122, it was held that merely because there were no injuries on the persons of the victim and hymen was intact does not lead to a corollary that there was no coitus. In **Aman Kumar and another vs. State of Haryana**, AIR 2004 SC 1497, it was held that to constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law.

20. In view of the subsequent MLC whereby the hymen of the prosecutrix

was found to be torn and urine pregnancy test gave positive report there is a possibility of sexual act in between 14.02.2011 and 09.03.2011 but that will not absolve the accused from the offence of rape committed by him upon the prosecutrix on 13.02.2011.

21. The submission that non-examination of Jamila at whose house the prosecutrix is stated to have visited is fatal to the case of prosecution is devoid of substance as it is a settled law that it is the quality and not the quantity of number of witnesses which matters. In ***Sunil Kumar vs. State of Govt. of NCT of Delhi***, (2003) 11 SCC 367, Hon'ble Supreme Court repelled a similar submission observing that as a general rule, the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony, the courts will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The view was reiterated in ***Namdeo vs. State of Maharashtra***, (2007) 14 SCC 150 and ***Kunju @ Balachandran vs. State of Tamilnadu***, AIR 2008 SC 1381.

22. Moreover, Jamila was not an eye witness of the incident, therefore, even otherwise there was no occasion for the Investigating Officer to have examined her as a witness.

23. Last but not the least, the accused has absolutely not given any explanation as to why he will be falsely implicated in such a serious offence

at the instance of the prosecutrix as he is not alleging any enmity, ill will or grudge against the prosecutrix or the police officials for which reason he would be involved in such a case. Moreover, by levelling such allegations against the accused, the prosecutrix is also putting her own reputation at stake. In *Bharwada Bhoginbhai Hirjibhai vs State of Gujarat*, AIR 1983 SC 753; it was held that why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The court described the following reasons for accepting testimony of the prosecutrix:-

- (1) A girl or a woman in the tradition bound non-permissive Society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred;
- (2) She would be conscious of the danger of being ostracised by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours;
- (3) She would have to brave the whole world;
- (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered;
- (5) If she is unmarried, she would apprehend that it would be, difficult to secure an alliance with a suitable match from a respectable or an acceptable family;
- (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself;
- (7) The fear of being taunted by others will always haunt her;
- (8) She would feel extremely embarrassed in relating the incident to others being over powered by feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo;
- (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family

honour is brought into controversy;

- (10) The parents of an unmarried girl as also the husband and members of the husband's family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour;
- (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocence;
- (12) The reluctance to face interrogation by the investigating agency, to face the court, to face the cross examination by Counsel for the culprit, and the risk of being disbelieved, acts as a deterrent.

This view was reiterated in *The State of Punjab vs Gurmit Singh & Ors*, (1996) 2 SCC 384; and even in *Tameezuddin @ Tammu vs. State of (NCT) of Delhi*, 2009 15 SCR 80, relied upon by the learned counsel for the appellant.

24. Under the circumstances, the testimony of the prosecutrix which finds substantial corroboration from the scientific evidence, prosecution had succeeded in establishing its case beyond reasonable doubt. The appellant has been convicted by the learned Additional Sessions Judge by a well reasoned judgment which does not call for any interference. That being so, the appeal being devoid of merit is dismissed. Pending applications, if any, also stand disposed of.

Trial Court record be sent back along with the copy of the judgment.

Appellant be informed through Superintendent Jail.

(SUNITA GUPTA)
JUDGE

MAY 18, 2015
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