

\$~R-44 & 44A

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

% *Judgment reserved on : 13.8.2015*
Judgment delivered on : 19.8.2015

+ CRL.A. 1419/2013 & Crl.M.B.No.3292/2015

SANDEEP @ SONU & ORS. Appellants

Through Ms.Ushma Malik, Amicus Curiae

versus

STATE GOVT. OF NCT OF DELHI Respondent

Through Mr.Kusum Dhalla, APP

+ CRL.A. 1232/2014 & Crl.M.B.No.10432/2014

RAVINDER @ CHAND SINGH Appellant

Through Mr.Chetan Lokur, Amicus Curiae

versus

STATE GOVT. OF NCT OF DELHI Respondent

Through Mr.Kusum Dhalla, APP

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1. This appeal is directed against the impugned judgment and order of sentence dated 29.7.2013 and 07.9.2013 wherein the appellants

before this Court (Sandeep @ Sonu, Dhanwant and Ravinder @ Chand Singh) were convicted under Section 376(2)(g) of the IPC and each of them had been sentenced to undergo RI for a period of 10 years and to pay a fine of Rs.5000/- in default of payment of fine to undergo SI for 1 month. Benefit of Section 428 of the Cr.P.C had been granted to them. Nominal roll of appellant Sandeep reflects that as on 22.4.2015 he has undergone incarceration of 4 years 2 months and 5 days besides remissions earned of 4 months meaning thereby as on date he has completed about 5 years. Nominal roll of appellant Ravinder reflects that as on 15.11.2014 he has undergone 3 years 6 months and 28 days besides remissions earned of 3 months 17 days meaning thereby as on date he has undergone 4 years and 9 months.

2. The version of the prosecution is that DD No.28A was registered on 16.02.2011 at police station Mehrauli qua the act of gang rape having been committed upon a lady. Statement of the victim "S" (PW-3) was recorded under Section 161 Cr.P.C. which had formed the basis of the FIR. She was medically examined. In view of the allegations levelled against the accused persons who were arrested just a few hours after the incident, the accused were charge sheeted and on the basis of the

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evidence led before the Trial Judge both oral and documentary the accused persons were convicted and sentenced as aforesaid.

3. On behalf of the appellants arguments have been addressed by the learned Amicus Curiae. It has been pointed out on behalf of the appellants separately, that the identity of the appellants has not been established. Admittedly the accused persons were strangers to the victim. No TIP had been conducted. There is no explanation for the same. The statement of the victim under Section 164 Cr.P.C. has also not been recorded for which there is no explanation. The arrest of the accused is doubtful. The witnesses qua arrest have all given different versions and from where each of the three appellants were arrested is conflicting. Benefit of doubt has to be given to the appellants. They are accordingly entitled to an acquittal.

4. Needless to state that these arguments have been refuted. Learned APP for the State pointed out that PW-3 was not cross-examined but her version has to be read under the provisions of Section 33 of the Indian Evidence Act. Her testimony was corroborated by the report of the FSL wherein semen was detected on the salwar of the victim. There was no reason for the victim to have falsely implicated the appellants. In this

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background impugned judgment calls for no interference

5. The star witness of the prosecution was the prosecutrix herself. She was examined PW-3. She was examined on two occasions but thereafter unfortunately because of her demise she could not be cross-examined. Her testimony was read under Section 33 of the Evidence Act and rightly so. Section 33 of the Indian Evidence Act reads as under:

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.—Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable:

Provided— that the proceeding was between the same parties or their representatives in interest; that the adverse party in the first proceeding had the right and opportunity to cross-examine; that the questions in issue were substantially the same in the first as in the second proceeding. Explanation.—A criminal trial or inquiry shall be deemed

to be a proceeding between the prosecutor and the accused within the meaning of this section.

6. This witness had been examined in chief but unfortunately could not be cross-examined before her demise. Her testimony is admissible under Section 33 of the Indian Evidence Act. However, the probative value of the testimony of the witness casts a greater duty on the court to examine her testimony with a greater circumspection and a close scrutiny. The rule of caution must be applied to such a testimony. Testimony of PW-3 shall be examined in this background.

7. PW-3 on the date of incident was 14 years old. She was living in her brother's house. She deposed that she was living separately from her husband. She had some dispute with her brother and on 16.02.2011 because of this tension she left the house at 1.00 a.m. (midnight) for her Mama's house at Ghaziabad. She reached the bus stand of Lado Sarai near T.B.Hospital on foot, and there two persons met her and they caught hold of her and took her forcibly inside the Park near T.B.Hospital and there, those two boys gave beatings to her and committed rape upon her. In the meantime third person also came there and he also committed rape upon her. They beat her and threatened her

not to disclose the incident to anyone otherwise she would be killed. They thereafter abandoned her. She reached the Delhi Jal Board Office. She met a person who was present in the office. He made a call at 100 number. Police reached the spot. They apprehended one person in her presence and two persons were apprehended from near Bhul Bhuliya (Mehrauli). They were brought to the police station. She was taken to AIIMS hospital for her medical examination.

8. As noted supra this witness was not cross-examined because of her demise. It is this version which had weighed in the mind of the Trial judge to convict the accused persons.

9. PW-15 (Prem Chand) was the person who was working as a Beldar in the Office of the Delhi Jal Board from where the PCR call had been made. This witness had deposed that one lady had come to his office and had made a call to police at 100 number when he was on duty at that point of time. His testimony was, however, in conflict with PW-3 who stated that this call had been made by PW-15 whereas PW-15 deposed that this call had been made by PW-3.

10. Be that as it may, this Court notes that this contradiction in the version of PW-3 and PW-15 is not relevant.

11. The version of the prosecution is that the accused persons were strangers to the victim. They were not known to her. Before examining the testimony of the arresting officers it would be relevant to note the site plan. This has been proved as PW-3/H. "X" is the point i.e. the DDA park where the alleged offence had been committed. The Delhi Jal Board Office from where the call to the PCR was made is after the DDA park and a jungle. The site plan does not depict the entire distance and this court is unable to know what exactly would be the distance of the Delhi Jal Board Office from the DDA park. Unfortunately no cross-examination on this score had also been effected of the Investigating Officer WSI Pratibha Sharma examined as PW-17.

12. Version of the PW-3 in the light of the site plan discloses that after the offence had been committed upon the victim the accused persons had abandoned her and thereafter she went to the office of the Delhi Jal Board and made a call to the police. Her further submission is that after that police reached and apprehended one person out of the three persons and remaining two persons were apprehended from near the Bhul Bhuleya (Mehrauli). Mehrauli is on the other side of the Road.

Again this Court has lost sight of the fact that this has not been depicted

in the site plan as noted supra but has since been cross-examined on this score.

13. PW-11 Jagdish Prashad had received this PCR call at 2.50 a.m. His deposition is that when he reached there. He met PW-3 and she told him that three persons had dragged her inside the park and committed rape upon her. She further told them that the accused persons were still in the park. The victim was taken in the PCR van to the park where one boy was running. He was apprehended. He disclosed his name as Ravinder. He disclosed that two co-accused namely Sonu and Dhanwant would be found in Dhona near Mehrauli where they consume 'Sulfa'. On reaching there, Dhanwant was arrested and thereafter the local police had reached to the third accused Sandeep who was arrested near the bus terminal Dhona.

14. PW-10 H.C.Zakir Hussain has given a different version. He had on oath stated that he was on an emergency duty from 8.00 p.m. to 8.00 a.m. He received a DD no.28A. He reached the Delhi Jal Board office where a PCR van was already present. PW-11 was also present. Prosecutrix and one accused Ravinder were also present there. The prosecutrix told them that other two persons were still hiding in the

park. Another PCR van reached there. The two persons inside the park were arrested. As per the version of PW-10 after the arrest of Ravinder who was already apprehended by the police PW-10 reached the spot and the two other persons namely Sandeep @ Sonu and Dhanwant were apprehended from inside the same park. This version of PW-10 is contrary to the version of PW-11 who had stated that after the arrest of Ravinder other two accused persons were arrested on search and Dhanwant was found in a street at Dhona, a place where they used to consume 'sulfa' and on further search Sandeep @ Sonu was arrested from near the bus terminal.

15. The investigating Officer PW-17 has given a different version. As per her version after DD no.28A was marked to her she reached the police station. This DD was earlier marked to PW-10. PW-3 was present in the police station. She was medically examined. Exhibits collected were seized and sealed by PW-17. Site plan was prepared by her. She arrested the accused vide separate memos on 16.11.2011 at about 9.30 a.m. to 10 a.m. vide memos Ex. PW-3/B, Ex.PW-3/C and Ex.PW-3/D. They were medically examined. In her cross-examination, she denied the suggestion that the accused had been falsely implicated.

16. Another interesting feature is the version of constable Pramod (PW-4). He had also joined the investigation. His version was that the accused Ravinder and Dhanwant were in the custody of the Investigating Officer when they joined investigation. They were not arrested in his presence. He retracted from his version and stated that the accused Ravinder, Dhanwant and Sandeep were arrested in his presence and he had signed their arrest memos.

17. DD no.28A had been recorded by PW-2 H.C.Devender Kumar. This was on the intervening night of 15-16.2.2011. Time in the DD is 2.46 a.m. FIR was registered by H.C. Manohar Lal (PW-1) on the following morning i.e. 16.02.2011 at the local police station at Mehrauli under Section 376(2)(g) of the IPC and the time mentioned in the FIR is 8.15 a.m.

18. The record shows that the accused persons had not been put to a TIP. They were strangers to the victim.

19. The evidence collected by the prosecution shows that after the offence had been committed upon PW-3, she had been abandoned and left by the accused. She walked a couple of metres to the Delhi Jal Board Office. The exact distance is not depicted in the site plan from

where the PCR call was made at 2.46 a.m. in the morning. The PCR van reached the spot. PW-11 who was on duty in the PCR had received this information. He reached the spot where PW-3 had met him. This was at about 2.50 a.m. PW-3 had stated that the accused persons would still be found in the park. As per the version of PW-11, Ravinder was apprehended from the park. The investigation had initially been marked to PW-10 when he reached the spot PW-11 was already present and Ravinder already stood apprehended. The time given by PW-10 is 2.46 a.m.

20. Thus as per the testimony of PW-11 and PW-10 Ravinder already stood apprehended between 2.45 a.m. to 3.00 a.m. in the morning. The incident as per PW-3 had occurred around 1.00 a.m. when she had left her brother's house where she was apprehended by the three persons. Arrest memos of the accused persons Ex.PW-3/B, Ex.PW-3/C and Ex. PW-3/D show that accused Ravinder had been arrested from the DDA park at 10.00 a.m. Ex. PW-3/D is the arrest memo of accused Sandeep which shows his arrest at 9.45 a.m. on 16.02.2011 also from the DDA park. Arrest of Sandeep is prior in time to the arrest of Ravinder which is contrary to the ocular testimony of PW-10 (H.C. Zakir Hussain),
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PW-11 (H.C. Jagdish Prashad) and PW-17 (WSI Pratibha Sharma). As per their versions accused Ravinder had been arrested first. After his arrest accused Sandeep @ Sonu and Dhanwant had been arrested. PW-11 has stated that Sandeep @ sonu was arrested from bus terminal near Dhona. The arrest memo shows his arrest from the DDA park for which there is no explanation.

21. No TIP of the accused had also been conducted. Testimony of PW-3 also shows that after the accused had committed the offence they fled away. The incident had occurred at 1.00 a.m. She had gone to Delhi Jal Board Office to make a PCR call which was at 2.46 a.m. After the PCR van reached the spot as per the prosecution, from the DDA park accused Ravinder was apprehended. It is difficult to believe that the accused Ravinder after committing the offence sat in the park waiting for the police to come and nab him.

22. That apart this Court notes that there are varying versions given by the Investigating Officer and the members of the raiding party qua the arrest; their oral versions are in conflict with the arrest memos qua the place from where the accused were arrested and the time of arrest is not clear.

23. It could well be a case where the Investigating Officer, in her attempt to solve an FIR had implicated the accused persons; a defence raised by them right from the very inception. This Court also notes that the testimony of PW-3 has to be read with a greater circumspection in view of the fact that she was not cross-examined.

24. In Tinku Ram vs. State Criminal Appeal No. 841 of 2011 decided on 14.9.2011, a Bench of this Court in the context of the application of the provisions of Section 33 of the Evidence Act had held as under:

“The question which arises is what then is the correct position regarding the deposition of PW-7. We are conscious that Section 138 of the Evidence Act, 1872 mandates that to constitute evidence, the testimony of each witness has to be subjected to cross examination. The provision seemingly admits of no exception; yet courts have recognized them in exceptional situations. "Sarkar on Evidence" at page 2170, states that:

The evidence of a witness who could not be subjected to cross-examination due to his death before he could be cross-examined, is admissible in evidence, though the evidentiary value will depend upon the facts and circumstances of case. [Food Inspector v. James N.T: 1998 Cri LJ 3494, 3497 (Ker)]. If the examination is substantially

complete and the witness is prevented by death, sickness or other causes (mentioned in s 33) from finishing his testimony, it ought not to be rejected entirely. But if not so far advanced as to be substantially complete, it must be rejected [Diwan v. R, A 1933 L 561].

23. In these circumstances, the statement of the prosecutrix has not been corroborated by any other witness regarding attempt to commit rape. Although there is no rule that corroboration is essential before there can be a conviction solely on the testimony of the prosecutrix. In the instant case, the prosecutrix had died after the examination-in-chief and no cross examination has been conducted In these circumstances, it is not proved that the appellant had attempted to commit rape upon the prosecutrix. Therefore, conviction for the offence punishable under Sections 376/511 I.P.C. cannot be sustained.”

25. The discussion in the context of her version which when coupled with the version of PW-4, PW-10, PW-11, and PW-17, persuaded this Court to hold that the identity of the accused does not find established. As per the arrest memos, the accused were arrested one after the other after the incident from the DDA park (evident from the arrest memos); yet the oral version of the witnesses mentions otherwise. PW-10 had given different places of arrest of the three accused persons. As per the prosecution, accused Ravinder was arrested prior in time to the arrest of

accused Sandeep but the time disclosed in the arrest memo shows that Sandeep was arrested prior to Ravinder.

26. In this background this Court is not inclined to uphold the judgment of the Trial Judge. Dents have been created in the version of the prosecution. The prosecution having failed to prove its case to the hilt, the accused persons are entitled to a benefit of doubt and a consequent acquittal. They are accordingly acquitted. They be released forthwith, if not, required in any other case.

27. Appeals are disposed of.

28. A copy of this order this order be sent to Jail Superintendant for intimation and compliance.

INDERMEET KAUR, J

AUGUST 19, 2015

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