

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

RESERVED ON : FEBRUARY 02, 2015

DECIDED ON : FEBRUARY 06, 2015

+ CRL.A. 1446/2014 & CrI.M.B.10776/2014

HIMANSHU @ CHINU

..... Appellant

Through : Mr.Jivesh Tiwari, Advocate.

versus

STATE

..... Respondent

Through : Ms.Kusum Dhalla, APP.

**SI Joginder Singh, P.S.Shalimar
Bagh.**

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is to a judgment dated 15.12.2012 in Sessions Case No.6/10 arising out of FIR No.303/09 registered at Police Station Shalimar Bagh by which the appellant-Himanshu @ Chinu was held guilty for committing offence under Section 376 IPC. By an order dated 22.12.2012 the appellant was awarded Rigorous Imprisonment for seven years with fine ₹5,000/-.

2. Allegations against the appellant, as projected in the charge-sheet, were that on 12.10.2009 at about 08:00 p.m. after kidnapping the prosecutrix 'X' (assumed name), he took her in a garden/park near Sahipur village, Shalimar Bagh and committed rape on her person. Daily Diary (DD) No.25/A (Ex.PW-10/A) came into existence when information was conveyed at Police Station Shalimar Bagh that 'X' has been raped by one Chinu. The investigation was assigned to ASI Manisha. After recording victim's statement, FIR under Section 363/366/376 IPC was registered. During investigation, 'X' recorded her Section 164 statement. She was medically examined. Statements of witnesses conversant with the facts were recorded. The appellant was arrested. Exhibits were sent to Forensic Science Laboratory for examination. After completion of investigation, a charge-sheet was laid before the court. The prosecution examined 11 witnesses to establish appellant's guilt. In 313 statement, denying his involvement in the crime, he pleaded false implication and examined DW-1 (Ms Neetu) and DW-2(Smt.Neeru) in defence. The trial resulted in his conviction under Section 376 IPC. It is significant to note that the appellant was acquitted of the charges under Section 363/366 IPC and the State did not challenge the said acquittal.

3. Conviction of the appellant is primarily based upon the sole testimony of the prosecutrix 'X'. Her testimony has, however, not been corroborated by any other independent witness. Admitted position is that both the prosecutrix and the appellant were known to each other for about 2-3 years before the incident. They used to have conversation on mobile. The prosecutrix used to meet the appellant in a park near her house. Despite scolding by her father, she did not stop meeting him and to have conversation on phone. After registration of the FIR, admittedly, she remained in touch with the appellant's sister. In her cross-examination, she admitted that after a quarrel with her father, she had left the house to stay at the house of the appellant's sister in village Shalimar Bagh. She stayed there for about 25 days. Victim's father PW-2 (Prem) on 17.03.2010, admitted that his daughter was missing from the house since 3.2.2010. He further admitted that her daughter used to visit the appellant's house even after his arrest to meet his sister and conversed with her for long hours. In the cross-examination, he expressed inability to disclose her whereabouts and to produce her in the court. The prosecutrix admitted that she was having friendship with the accused for the last 2-3 years prior to the incident to the knowledge of her father.

4. The occurrence took place on 12.10.2009. Delay to lodge the FIR on 13.10.2009 remained unexplained. Prosecution witnesses have given inconsistent version as to how and under what circumstances, 'X' had gone to meet the appellant. In her statement to the police at the first instance on 13.10.2009, 'X' informed that the accused had met her on the way when she was going to her aunt's house at about 08:00 p.m. The appellant's friend Roshan was also with him that time and when they both started talking, he (Roshan) went away. Roshan was not cited as a witness in the instant case. She further disclosed that after the rape, she returned to her home and disclosed the incident to her father on 13.10.2009. She did not offer any explanation as to why she did not raise alarm at the time of alleged commission of rape or on her way back to home. She also did not explain as to why the incident was not disclosed to her father on the same evening. In 164 statement, she reported that the incident was reported by her to her papa. She, was, however, conspicuously silent as to when the incident was narrated to him. PW-2 (Prem), victim's father narrated a divergent version and deposed that on the day of occurrence, he was informed by one of his children, at his work place that 'X' had gone to meet Chinu (the appellant). After coming to home, he made inquiries from 'X' and she informed that she had gone to meet the appellant to tell

him not to meet her in future and not to talk to her. Thereafter, she told that the appellant had committed rape on her forcibly. When PW-2 was informed about the incident on 12.10.2009, there was no occasion for him not to lodge the report with the police on that date. In the cross-examination, PW-2 changed his version and stated that when her daughter returned, her clothes were soaked with blood and she did not disclose anything to him. Thereafter, he called his sister next morning and 'X' informed her everything. 'X's 'bua' has not been examined to substantiate his version. PW-7 ('X') disclosed that her 'bua' was present on the day of incident and she informed her and her father about the incident of rape on the said date i.e. 12.10.2009. Admittedly, the version given by the prosecution witnesses in this regard is inconsistent.

5. The prosecutrix who was medically examined on 13.10.2009 vide MLC (Ex.PW-8/A) did not name the accused for sexual assault. There was no visible physical injuries on her private parts. The hymen was found torn and vagina admitted two fingers easily.

6. From the testimony of material witnesses, it can safely be inferred that the physical relations (if any) with the appellant were result of free consent of the prosecutrix. 'X' was a consenting party throughout. Indisputably, she was above sixteen years of age. There is no evidence on

record if she was ravished by the appellant against her wishes. PW-2 introduced entirely contradictory version in the cross-examination and stated that on his return to home on the day of occurrence at about 07:30 p.m. she saw his daughter standing with the accused and three other boys. On seeing him, she as well as the accused and his associates ran towards the park. When she returned on her own after about half an hour, her clothes were soaked with blood and nothing was disclosed by her to him.

7. Considering the vital infirmities in the prosecution case, her conduct to stay with appellant's sister after his arrest and the other surrounding circumstances, conviction based on her sole testimony which is full of discrepancies, cannot be sustained. Conviction can be recorded on sole testimony of the prosecutrix provided it lends assurance of her testimony. Story prepared by her is found to be improbable. The Trial Court even acquitted the appellant of the charges under Section 363/366 IPC.

8. In the light of the above discussion the appeal succeeds. The conviction and sentence under Section 376 IPC are set aside. Copy of this order be sent to the concerned Jail Superintendent for information and necessary action. Trial court record be sent back along with a copy of this

order. The appellant be released forthwith if not required to be detained in any other case. All pending application(s) also stand disposed of.

(S.P.GARG)
JUDGE

FEBRUARY 06, 2015

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