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

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Date of Decision : May 16, 2016

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CRL.A. 14/2014

BHOLA RISHI

..... Appellant

Represented by: Mr.Anwesh Madhukar, Advocate

versus

STATE OF NCT OF DELHI

..... Respondent

Represented by: Mr.Varun Goswami, APP
W/SI Suman No.4716D, PS BHD
Nagar

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

PRADEEP NANDRAJOG, J. (Oral)

1. Not to reveal her identity, I shall be referring to the victim as 'Nirbal'. She is of humble origin. Migrating to Delhi, her husband used to ply a cycle rickshaw. Six children were born to the couple. Two were daughters who were married in Delhi. When the family was at Delhi and her husband was earning livelihood by plying a rickshaw the family used to stay in a room taken on rent near a ply board factory in Gopal Nagar, Najafgarh. She shifted to the native village in Bihar when her husband returned, and in the month of December, 2012 she came to Delhi to visit her married daughters. Where else would the poor helpless lady find shelter other than the place where she and her husband had set up a matrimonial home. The place was familiar to her. She chose her temporary abode to be a wooden platform (*chabutara*) outside the tea stall run by Mani Ram PW-2, which was near Hanuman Mandir and the ply wood factory in Gopal Nagar, Najafgarh.

2. On December 19, 2012, Nirbal went to Rao Tula Ram Memorial Hospital at Jaffarpur because she was feeling unwell and told the doctor at the casualty that last night two boys had raped her. The duty constable at the hospital immediately passed on the information over the telephone at P.S.Baba Hari Das Nagar where HC Harvinder PW-4 noted the same in DD No.33A, Ex.PW-4/A and marked a copy thereof to SI Anil PW-14. Accompanied by ASI Savita, SI Anil Kumar reached the hospital and found a lady who had already been examined by the Dr.Anil Yadav and had recorded MLC Ex.PW-9/A. He collected a copy of the MLC and entrusted further investigation to ASI Saroj Bala PW-15 and also handed over custody of Nirbal to her. As deposed to by Dr.Anil Yadav, after he prepared the MLC Ex.PW-9/A he referred Nirbal to a Senior Gynaecologist, who collected swab from the vulva, vagina and pubic hair as also blood sample of Nirbal and so recorded on the MLC Ex.PW-9/A and along with the petticoat which Nirbal was wearing handed over the same, after putting them in a parcel, to ASI Saroj Bala who drew up the seizure memo Ex.PW-15/A and thereafter recorded Nirbal's statement Ex.PW-6/A in which she disclosed facts which I have narrated in paragraph 1 above and additionally that last night two boys took her to a room near a tube well in the area nearby the ply wood factory and raped her. She said that she could recognize the two boys if brought before her.

3. Making an endorsement Ex.PW-15/B ASI Saroj Bala sent Ex.PW-6/A to the police station where FIR Ex.PW-3/A was recorded by HC Sunder Singh for an offence punishable under Section 376 IPC and made an endorsement Ex.PW-3/B on the tehrir Ex.PW-15/B.

4. The exhibits received at the hospital by ASI Saroj Bala were

deposited in the malkhana of the police station, wherefrom they were sent for forensic examination after the two accused were arrested and their blood samples were taken; which facts I would further elaborate as I proceed along with the narratives and the investigation conducted, interlacing the same with the testimony of the witnesses.

5. Appellant Bhola Singh and co-accused Vishwanath Rai were apprehended and since nothing was recovered pursuant to their disclosure statements, which are confessional in nature, I make no reference thereto being inadmissible evidence.

6. Statements of Harish PW-1 and Mani Ram PW-2 were recorded under Section 161 Cr.P.C. Nirbal was taken to Ms.Manu Vedwan, M.M.Dwarka on December 21, 2012 and since Nirbal could only speak in Bhojpuri, help of a social worker : Bibha Kumari, PW-5 was taken because the learned Metropolitan Magistrate did not comprehend the language : Maithlee, which Nirbal spoke. Recording a satisfaction that Nirbal could understand the questions put to her and answer the same and was making a statement voluntarily, Ms.Manu Vedwan recorded Nirbal's statement Ex.PW-6/B and drew up the proceedings Ex.PW-16/A conducted by her on December 21, 2012.

7. The two accused being apprehended on the pointing out by Nirbal to ASI Saroj Bala, they were produced before the doctor at Rao Tula Ram Memorial Hospital on December 22, 2012. As recorded in the MLC Ex.PW-7/A pertaining to Vishwanath Rai, Dr.Satish Chander Yadav PW-7 examined him and referred him to the Senior Resident, Surgery for an opinion regarding his capacity to indulge in sex. He collected Vishwanath Rai's blood sample. Appellant Bhola Rishi was thereafter examined by

Dr.Satish Chander Yadav who recorded his MLC Ex.PW-7/B and referred him to the Senior Resident, Surgery for an opinion regarding his capacity to indulge in sex. Dr.Somesh Goel the Senior Resident, Surgery, thereafter examined the two accused and recorded on the MLC Ex.PW-7/A and Ex.PW-7/B, vide Ex.PW-13/A on the former and Ex.PW-13/B on the latter, that the two accused were examined by him and in his opinion there was nothing to suggest that the two were not capable of indulging in a sexual act. Which opinion was proved at the trial by Dr.Satish Chander Yadav PW-13 because Dr.Somesh Goel was not available. He also collected Bhola Rishi's blood sample. ASI Saroj Bala seized the blood samples of the two accused and recorded the said fact in seizure memos Ex.PW-15/D and Ex.PW-15/E.

8. All the exhibits were sent for DNA analysis and report Ex.P-A was obtained. As per the report, DNA profile from blood sample of Bhola Rishi : Ex.C-1a, matched with the DNA profile generated from Ex.A-1a, 1b, 1c, 1d, 1g,1h and A-2. The report categorically opines that the DNA profile generated from Ex.B-1a (DNA generated from the blood sample of Vishwanath Rai) was not similar to exhibits A-1a, 1b, 1c, 1d, 1g,1h and A-2. Meaning thereby, from the vaginal swab being anterior, posterior, right lateral and left lateral of Nirbal in which as per the report human semen was detected, alleles analysis conclusively linked the same to that of Bhola Rishi and ruled out conclusively the same to be matching the DNA of Vishwanath Rai.

9. The land on which the tube well had been dug and adjacent whereto the room in which Nirbal claimed to have been raped, belonged to Harish PW-1, who resiled from his statement recorded during investigation and said that he knew nothing about the case and denied having employed

Bhola Rishi to work on his lands, but admitted during cross-examination, on being declared hostile, that accused Bhola Rishi had taken the key of the room from his employee Ram Chander. Mani Ram PW-2, who ran a tea stall near Hanuman Mandir and the ply wood factory in Gopal Nagar, Najafgarh, also resiled from his statement recorded by the police during investigation and denied that Nirbal used to sleep on the wooden platform outside his tea stall.

10. Examined as PW-6, Nirbal deposed facts in sync with the narratives recorded by me in para 1 and 2 above, but identified Bhola Rishi as one of the two who had raped her; categorically absolving Vishwanath Rai as the other boy. Subjected to cross-examination by learned counsel for Bhola Rishi, relevant would it be to highlight that a suggestion was given to her that she used to make money by voluntarily having physical relations with persons.

11. Vide impugned judgment dated November 13, 2013, acquitting Bhola Rishi of the charge punishable under Section 377 IPC because neither did Nirbal deposed that either accused had carnal intercourse with her against the order of nature, and there was no evidence even otherwise of said act, the learned Trial Judge has convicted appellant Bhola Rishi for the offence punishable under Section 376 (2)(g) of the India Penal Code, while acquitting Vishawnath Rai of the charges framed against him.

12. Endeavour by State to obtain leave to appeal against acquittal of Vishwanath Rai has failed. CrI.L.P.No.33/2015 State Vs. Vishwanath Rai has been dismissed on August 04, 2015.

13. The appellant has been sentenced to undergo rigorous imprisonment for ten years and pay fine in sum of ₹10,000/-; in default to suffer simple

imprisonment for one more year.

14. I have perused the file of Sessions Case No.122/2013. The testimony of Nirbal, her statement Ex.PW-6/A and her statement Ex.PW-6/B have been kept in mind and learned counsel for Bhola Rishi is unable to point out any material contradiction or improvement to discredit Nirbal's testimony. That she said at the first instance in her statement Ex.PW-6/A to ASI Saroj Bala that she was raped in a room near a tube well within the vicinity of ply wood factory outside whereof was a tea stall and near the tea stall was a wooden platform on which she was sleeping lends assurance to her testimony in Court that the offence took place in the room in the tube well, and it hardly matters whether the owner of the land on which the tube well was dug i.e. Harish, did not support the case of the prosecution that Bhola Rishi was employed by him and he had given the key of the room near the tube well to him, because during cross examination by the learned APP he said that Bhola Rishi had taken the key of the room from his employee Ram Chander. It hardly matters whether Mani Ram PW-2, the owner of the tea stall turned hostile. His turning hostile does not discredit testimony of Nirbal, that in the intervening night of December 18-19 of 2012 she was sleeping on a wooden platform outside the tea stall in question and was taken to a room near a tube well nearby by two boys and she was raped.

15. Nirbal's truthfulness emerges from the fact that when she deposed as PW-6 on May 22, 2013, the FSL report Ex.P-A, which was authored on September 13, 2013, was not even in the judicial record and nobody knew its contents. Nirbal identified Bhola Rishi as one of the two boys who had raped her and DNA extract of the blood sample of Bhola Rishi shows that the DNA extracted from human semen from the vaginal swab of Nirbal

matched his. DNA extract from the blood sample of Vishwanath Rai completely ruled out his involvement. She truthfully said that two boys, one of which definitely was Bhola Rishi and the other definitely not was Vishwanath, had raped her.

16. The argument advanced that Nirbal being proved to be wrong qua co-accused Vishwanath entitled Bhola Rishi to a benefit of doubt, is an arguments which stands on no legs, because as noted above Nirbal consistently maintained that two boys had raped her and much before the DNA analysis surfaced said that one of the two boys definitely was Bhola Rishi and the other definitely was not Vishwanath Rai; rather than discrediting her, wins laurels to her testimony.

17. The date of the offence is December 18, 2012 and thus Section 376 IPC before its amendment by the Criminal Law Amendment Act, 2013 would apply. Since there were two rapists, the learned Trial Judge has treated it be to a case of gang rape as conceived of by Section 376(2)(g) as it stood in the statute book on the date of the offence.

18. Learned counsel for Bhola Rishi argues that if this Court believes the testimony of Nirbal coupled with the forensic report is believed by this Court, it would be a case where Bhola Rishi along with one unidentified co-accused would have raped Nirbal and there being only two participants in the crime, it would not be a case of gang rape because two persons would at best be a pair and to be a gang there have to be three or more because a gang would be a group of persons moving about in unison sharing same thoughts, ideas and object. The argument is nothing but quibbling with words. The decision of the Division Bench of the Bombay High Court reported as 1991 CrL.J. 1644 Utam @ Bhadrya & Anr. Vs. The State of Maharashtra has

held that in a case of rape if there is involvement of two it would be a case of gang rape, a reasoning with which I concur.

19. The appeal is accordingly dismissed because minimum sentence to undergo 10 years rigorous imprisonment has been imposed and I find no mitigating circumstance to reduce the sentence.

20. But that would not be the end of the matter because the victim needs to be compensated. Section 357 of the Criminal Procedure Code, 1973 obliges the Court to compensate the victim. Considering the trauma suffered by Nirbal ends of justice would warrant a compensation of ₹2,00,000/- (Rupees Two Lacs only) to be paid to Nirbal. The Government of NCT of Delhi has on February 02, 2012 notified a Delhi Victims Compensation Scheme in exercise of Section 357A in the Code of Criminal Procedure, 1973 as applicable in Delhi and for a victim of rape envisaged compensation is between ₹2 lacs and ₹3 lacs. The compensation is paid out of a fund and the Nodal Agency is the Delhi Legal Services Authority. I therefore direct the Delhi Legal Services Authority to ensure that Nirbal receives the compensation.

21. TCR be returned.

22. Two copies of this decision be sent to Superintendent, Central Jail Tihar for updation of Jail Record and to be supplied to Bhola Rishi.

(PRADEEP NANDRAJOG)
JUDGE

MAY 16, 2016

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