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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : FEBRUARY 08, 2016

DECIDED ON : MARCH 08, 2016

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CRL.A. 2/2005

ANAND @ BALLI RAM

..... Appellant

Through : Ms.Shweta Kapoor, Proxy counsel
for Ms.Naomi Chandra, Advocate.

VERSUS

STATE

..... Respondent

Through : Mr.Raghuvinder Varma, APP.
SI Deepak Shiwatch.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The appellant-Anand @ Balli Ram impugns a judgment dated 29.10.2004 of learned Additional Sessions Judge in Sessions Case No.10/2003 arising out of FIR No.402/2001 PS Chanakya Puri by which he was held guilty for committing offence punishable under Section 376 IPC. By an order dated 30.10.2004, he was sentenced to undergo Rigorous Imprisonment for seven years with fine ₹ 4,000/-.

2. Briefly stated the prosecution case as reflected in the charge-sheet was that on 21.11.2001 at about 10.30 p.m. in the jhuggi cluster of

Indira Camp, Babu Dham, Chanakya Puri, the appellant along with his associate Dinesh Kumar @ Tillu (since acquitted) kidnapped/abducted the prosecutrix 'X'(changed name) and committed gang-rape upon her in the house belonging to Usha. The incident was reported to the police promptly. PCR van on receipt of a call through wireless at 11.11 p.m. went to the spot; local police also arrived there. After recording victim's statement (Ex.PW-2/A), the Investigating Officer lodged First Information Report. 'X' was medically examined. The appellant was arrested from Usha's shop soon after the incident whereas accused Dinesh Kumar @ Tillu succeeded to flee the spot. During investigation, statements of witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Despite best efforts, Dinesh Kumar @ Tillu could not be arrested and was declared Proclaimed Offender. A charge-sheet was filed against the appellant for commission of offences under Sections 366/376 IPC. During pendency of trial, Dinesh Kumar @ Tillu was arrested and a supplementary charge-sheet was filed against him. In order to establish its case, the prosecution examined eleven witnesses. In 313 statements, the accused persons denied their involvement in the crime and pleaded false implication. DW-1 (Usha) appeared in defence. The Trial Court after

considering the rival contentions of the parties and on appreciation of the evidence acquitted Dinesh Kumar @ Tillu of the charges. It is apt to note that the State did not challenge the said acquittal. Being aggrieved and dissatisfied, the appellant has preferred the instant appeal.

3. In the written submissions Ld. Counsel for the appellant urged that the Trial Court did not appreciate the evidence in its true and proper perspective. There were material lapses in the investigation by the Investigating agency; the crime spot was not visited and its photographs were not taken. The prosecution did not produce and examine material witness Maya Devi, victim's mother-in-law present along with the prosecutrix at the time of arrival of PCR at the spot. Non-examination of PW Raju, who had allegedly seen the prosecutrix 'unconscious' at the crime spot was not examined. 'X' did not suffer any visible external injuries on her body including private parts. FSL reports (Ex.PW8/F1 and Ex.PW-8/F2) did not connect the appellant with the crime. The prosecutrix has given divergent versions and at one stage filed an 'affidavit' stating that no such incident had taken place. Statement under Section 313 Cr.P.C. came to be recorded mechanically.

4. Admitted position is that the victim is Usha's (DW-1) real sister. Both the appellant and Dinesh Kumar @ Tillu worked with her

(DW-1 Usha). Relations between the victim and Usha, real sisters were strained. After victim married Anil Kumar, Usha's husband, she has instituted divorce proceedings against him. The occurrence took place on the night intervening 21.11.2001 at around 10.30 p.m when 'X' had gone to answer the call of nature. The police machinery was set in motion promptly without any delay. PW-1 (Vasu Dev) along with other officials present in PCR Van, Victor 67, on receipt of a wireless call about a girl lying 'unconscious' behind Maurya Hotel near water tank arrived at the spot at around 11.15 p.m. He met the prosecutrix and her mother-in-law Maya Devi there; 'X' apprised him of the incident. SI Saroj Tiwari recorded her statement (Ex.PW-2/A) in which 'X' gave detailed account as to how and in what manner, she was sexually assaulted by both the appellant and Dinesh Kumar @ Tillu inside the shop. Specific and definite role in the crime was assigned to the appellant. The Investigating Officer was able to apprehend him from Usha's shop soon thereafter. Since the FIR was lodged without any delay, there was least possibility of the prosecutrix to have concocted a false story in such a short period.

The Investigating Officer had moved an application under Section 164 Cr.P.C. to record victim's statement before the learned Metropolitan Magistrate. However, he declined to record her statement.

5. In her Court statement as PW-2, the victim fully proved the version given to the police at first instance without any variation. In her examination-in-chief recorded on 30.04.2002, she implicated the appellant by name and assigned specific and certain role to him in the crime. She deposed that on 21.11.2001, when she had gone to answer the call of nature in the area by the side of road at about 10 or 11 p.m. behind Maurya Hotel, the appellant, who lived in her neighbourhood, caught hold of her by hand and his associate Dinesh Kumar @ Tillu caught hold of her by neck. Dinesh Kumar @ Tillu pushed her as a result of which she started feeling giddi. Thereafter, both of them dragged her to Usha's shop and committed rape upon her turn-by-turn. Thereafter, they brought her to a place where a cobbler used to sit and left her there 'unconscious'. After some time, her mother-in-law arrived there. Her salwar (Ex.P1) was seized by the police. The appellant was arrested from inside Usha's shop on her pointing-out. In the cross-examination, she admitted that Anil Kumar, her husband was earlier married to Usha and she had not taken divorce from her husband Jai Shankar Prasad. She denied to have physical relations at that time with her husband Anil Kumar. She denied if there were several litigations between her family and the accused.

6. In her testimony recorded prior to the apprehension of co-accused Dinesh Kumar @ Tillu, she fully supported the prosecution and proved the version given to the police without any major improvements. Despite lengthy cross-examination, no material infirmities or contradictions could be elicited. The appellant did not assign any oblique motive to the prosecutrix to falsely rope him in the crime. Nothing has emerged on record if prior to the incident there was any history of hostility between the two. 'X' was found at a secluded place at odd hours at about 11.15 p.m. on the night intervening 20/21.11.2001. PCR was alerted soon after the incident. On getting a call through wireless, they immediately rushed to the spot and found the victim and her mother-in-law present there. PW-1's (HC Vasu Dev) testimony lends credence to the victim's version. 'X' had given detailed account of the incident to him on his arrival at the spot. The prosecutrix was taken for medical examination at Lady Hardinge Medical College. There at 1.20 am vide MLC (Ex.PW9/A), she was medically examined. Alleged history recorded therein reveals that she was sexually assaulted by the appellant and his associate Dinesh Kumar @ Tillu, her neighbours on 21.11.2001 in a room near her house. The examining doctor did not rule out the possibility of sexual intercourse. FSL reports (Ex.PW8/F1 and Ex.PW-

8/F2) reveal that human blood of 'AB' group was detected on Ex.3 (salwar) and Ex.6 (blood sample). Human semen stains were detected on Ex.1a and Ex. 1b (vaginal swabs), Ex.2a and 2b (microslides having whitish smear described as 'Vaginal smear'); Ex.3 (salwar) and Ex.5(underwear). 'AB' group was detected on Ex.3 and Ex.5. It shows that human semen of 'AB' group found on the appellant's underwear (Ex.5) was similar to 'AB' group on victim's salwar (Ex.3).

7. PCR form (Ex.PW8/DA) speaks volume of the incident and corroborates the victim's statement. Information was received by PCR at 23:15 hours from one Raju (Mobile No.6880744) on 21.11.2001 informing that a girl was lying unconscious behind Maurya Hotel, near water tank, Bapu Dham. It further records that at 23:39 hours 'X' who had gone to answer the call of nature was ravished by two boys Tillu and Balli Ram inside their shop. It further records that Anand @ Balli Ram and 'X' were present at the spot but Tillu could not be found. This document is in consonance with the victim's narration of sequence of events.

8. After Dinesh Kumar @ Tillu was charge sheeted, 'X' was recalled for recording statement qua him. She identified him to be the individual who had caught hold of her by neck and had pushed her. In the

cross-examination, she admitted that affidavit (Ex.PW2/DA) was signed by her after going through its contents. She, however, denied to have appeared before the Oath Commissioner to put her signatures thereon. She admitted that affidavit (Ex.PW-2/DA) was signed by her on her own without any pressure and the accused persons had not committed any wrong act with her. It was emphasized that 'X's version cannot be believed as she has given two contradictory and inconsistent versions. This plea deserves out-right rejection. Apparently, after Dinesh Kumar @ Tillu's arrest, 'X' was won over by the accused persons. Seeming for that reason, she opted to exonerate the appellant and his associate Dinesh Kumar @ Tillu. In view of the law laid down by Hon'ble the Supreme Court in '*Khujji @ Surendra Tiwari vs. State of Madhya Pradesh*', 1991 Crl.L.J.2653, the statement given in the cross-examination after a gap of about 13 months of recording her previous evidence can correctly be ignored or discarded. 'X' cannot be permitted to sabotage the prosecution case and to play hot and cold merely because she has opted to settle the dispute with the perpetrators of the crime at a subsequent stage. 'X's recall for examination was meant to prove prosecution's case against Dinesh Kumar @ Tillu who was Proclaimed Offender. So far as the

appellant is concerned, her testimony was complete before Dinesh Kumar @ Tillu's arrest.

9. Minor contradictions, inconsistencies and discrepancies highlighted by the appellant's counsel are inconsequential as they do not affect the core of the prosecution case. Appellant's involvement had come to light soon after the incident. The victim was defiled taking advantage of her loneliness at odd hours when she had gone to answer the call of nature. 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 to seek corroboration. Non-examination of her mother-in-law Maya Devi is not fatal. Record reveals that she was cited as a witness and process was issued many times to secure her presence but she could not be traced. Bailable warrants were also issued but these were returned unexecuted with the report that she had left the given address. Needless to say, sincere efforts were made by the prosecution to ensure her appearance before the court but for the reasons beyond their control, she could not be examined. The appellant was also unable to produce and examine her in defence. Again non-examination of informant, PW Raju, is not very relevant as he was not a witness to the incident. His name finds mention in the PCR form (Ex.PW8/DA).

10. The appeal lacks merits and is dismissed. Trial Court record along with the copy of this order be sent back forthwith. Intimation be sent to the Superintendent Jail. The appellant shall surrender before the Trial Court on 18.03.2016 to serve out the remaining period of substantive sentence.

(S.P.GARG)
JUDGE

MARCH 08, 2016
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