

\$~R7 & R8

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

Judgment Reserved on: May 18, 2016

% *Judgment Delivered on: May 30, 2016*

+ **CRL.A. NO. 248/2015**

SUNDER Appellant
Through: Mr.Chetan Lokur, Advocate

versus

STATE Respondent
Through: Mr.Amit Ahlawat, APP for the State
with SI Karamvir, PS Narela.

AND

+ **CRL.A. NO. 791/2015**

AJAY @ KALIA Appellant
Through: Mr. Ali Chaudhary, Advocate

versus

STATE Respondent
Through: Mr.Amit Ahlawat, APP for the State
with SI Karamvir, PS Narela.

PRATIBHA RANI, J.

1. By filing these two appeals, the appellants Sunder & Ajay have impugned the judgment dated 20th November, 2014 and order on sentence dated 22nd November, 2014 whereby the appellant Sunder has been convicted for committing the offence punishable under Section 376 IPC and appellant Ajay @ Kalia has been convicted for committing the offence

punishable under Section 376 IPC read with Section 109 IPC and sentenced as under:

Appellant Sunder

U/S 376 IPC : to undergo RI for ten years with fine of ₹20,000/- and in default of payment of fine, to undergo RI for two years.

Appellant Ajay @ Kalia

U/S 376 IPC R/w Section 109 IPC : to undergo RI for ten years with fine of ₹20,000/- and in default of payment of fine, to undergo RI for two years.

2. In brief the prosecution case is that on 21st April, 2011, the complainant Raj Singh came to the police station to lodge missing report about his daughter 'R' (name withheld to conceal the identity), aged about 17 years who had been missing since previous year i.e. October, 2010. He informed the police that he suspected one Mehar Chand, S/o Jug Lal, Mobile No. 08053950262 to be behind missing of her daughter and prayed for legal action against him.

3. During investigation, search for the missing girl was made and she was recovered, along with both the accused persons from Railway Station, Narela, Delhi. While prosecutrix was sent for medical examination, both the appellants were arrested and they were also got medically examined. The prosecutrix was also produced before the learned Magistrate for getting her statement recorded under Section 164 Cr.P.C. After completion of investigation, the appellants were sent to face trial for committing offence punishable under Section 363/365/375/34 IPC.

4. After the case was committed to the Court of Sessions, learned ASJ found a prima facie case for the offence punishable under Sections 363/366/376 IPC is made out against appellant Ajay @ Kalia and under Section 376/34 read with Section 109 IPC is made out against appellants Ajay @ Kalia and Sunder and charged them accordingly.

5. On completion of trial, believing the testimony of the prosecutrix and the medical report, both the appellants were convicted and sentenced in the manner stated above.

6. On behalf of the appellant Mr. Chetan Lokur (for Sunder) and Mr. Ali Chaudhary (for Ajay), Advocates have submitted that in this case there was absolutely no material against the appellants to convict them for the offence punishable under Section 376 IPC or for abetting the commission of rape.

7. It has been further submitted that so far as Ajay is concerned, even in her statement under Section 164 Cr.P.C., the prosecutrix stated to have got married to him. She did not even want to return to her parents and specifically stated that she was treated with cruelty by her father and she wanted to go back to her husband Ajay whom she deeply loved.

8. While pointing out material discrepancies in the testimony of prosecution witnesses on the aspect of recovery of the prosecutrix and apprehension of the appellants, attention of the court has been drawn to the following facts:

(i) The prosecutrix has stated that she made a telephone call to her *Jija* who in turn informed her father. Her father along with the police came to Dadri, Haryana from where she was recovered. This version is contrary to

the contents of recovery memo Ex. PW4/A as per which she was recovered from Narela Railway Station on the pointing out by her father.

(ii) As per PW4, Ct. Gopi Chand, they left for Narela Railway Station on 24th April, 2011 at about 2:00 PM and reached there in about 30-40 mins. From the railway station the appellants and the prosecutrix were recovered. Even PW10 SI Rajbir also deposed about the apprehension of the appellants and recovery of the prosecutrix from railway station Narela at about 2:30 or 3:00 PM.

(iii) The MLC of the prosecutrix shows that she was examined on 24th April, 2011 at 1:30 PM and the MLC of the accused Sunder shows the time as 1:00 PM, which again falsifies the version of Ct.Gopi Chand and IO about the time and place of apprehension.

(iv) There is inordinate delay of seven months in lodging the FIR which has remained un-explained.

(v) In the FIR the person named to be behind the missing of the daughter of the complainant is mentioned as Mehar Chand with his mobile number, but there is no investigation on the link of Mehar Chand with this case.

9. On behalf of the State, learned APP submitted that the prosecutrix in this case was minor she had stated about the commission of rape by both the appellants. The medical examination of the prosecutrix also discloses that hymen was found ruptured. The prosecutrix has been recovered when she was with the appellants and all of them have been apprehended together. Thus minor discrepancies on the issue of timing of their apprehension or timing recorded on MLC need to be ignored and the appeal may be dismissed.

10. I have considered the rival contentions and carefully perused the TCR.

11. In the judgment reported as ***Rajoo & Ors. Vs. State of M.P. 2009 (1) LRC 419 (SC)***, after referring to the observations in ***Gurmit Singh's*** case (Supra) which was reiterated in ***Ranjit Hazarika Vs. State of Assam (1998) 8 SCC 635***, in para 9 of the judgment, the Apex Court has held as under :-

“9. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the Indian Penal Code making the penal provisions relating to rape more stringent, and also to Section 114 A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is, however, significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the

prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114 A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

12. Further, in the judgment reported as **Abbas Ahmad Choudhary Vs. State of Assam I (2010) CCR 402 (SC)** the Apex Court has cautioned that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and statement of prosecutrix cannot be treated as gospel truth. The Apex Court has held as under:-

“We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully.”

13. First Information Report in a criminal case is an extremely vital and valuable piece of evidence. In this case FIR has been recorded after period of about seven months, wherein a person namely Mehar Chand with his mobile number was specifically mentioned. I have carefully gone through the charge-sheet, but it is silent on the issue of investigation about the person

named in FIR. The second aspect is recovery of the prosecutrix and apprehension of the appellants. The version of the complainant Raj Singh, father of the prosecutrix and that of the prosecutrix is contrary to the version given by the police officials who are witness to the recovery memo and the arrest memo.

14. PW6, Raj Singh has stated that he received a telephone call from 'R' and he reported the matter to the police. His daughter was found with two persons but he did not remember the place where they were found. He has also stated the two accused persons present in the Court are not the same boys who are apprehended along with his daughter. No doubt in rape case it is the statement of the prosecutrix that has to be considered by the Court to ascertain not only about the identity but also about the nature of the offence committed. PW7, Prosecutrix when examined before the learned Magistrate under Section 164 Cr.P.C had stated the following facts:

- (i) She wanted to live with her husband, Ajay at his house and wanted to go with him.
- (ii) She was taken by one person Sunder who did *galat kaam* with her and gave beating and tried to sell her for ₹5000/- and also tried to hang her.
- (iii) She did not want to live with her papa but can visit him to meet him.
- (iv) She and her husband Ajay love each other too much.
- (v) Before meeting Ajay she had gone to the house of her maternal uncle in Delhi. On that day it was late due to night and one lady took her to Panipat and got her married to Ajay in Mandir in the presence of all, including parents of Ajay and photographs were also taken of the marriage ceremony.

(vi) She also stated that “*Mere pitaji mujhe baail se bandh kar rakhte the, meri shaadi se pehle*”

15. Copies of the marriage ceremony of the prosecutrix with Ajay wherein she is visible with Chura in both hands and in happy mood, giving different poses for photo session, are also placed on record.

16. When the prosecutrix was examined before the Trial Court, she had totally changed her version in her examination-in-chief by stating that she was 18 years of age when she voluntarily married Ajay. Thereafter, Ajay handed over her to Sunder and thus cheated her. She did not want to see the face of Sunder.

17. Regarding Ajay, she has stated that Ajay is resident of village Dhoka, but she did not know the name of village of Sunder. She has stated that she got a telephone call made to her *Jija* from the neighbour-hood of Sunder. Her *Jija* telephoned her father and then police with her father came there and she was brought to Delhi. Firstly Ajay was apprehended by the police and thereafter, Ajay took the police to the house of Sunder and then he was apprehended. She has stated that she was taken to Ajay by a lady who treated her as her *Beti* and got her married to Ajay with whom she stayed for about 5-6 months. Ajay had also established physical relations with her. She has identified both the accused persons correctly.

18. During her cross-examination, she has completely changed her version stating that the statement made by her earlier before the Court was under police pressure and that she had never been to the house of Sunder. In her cross-examination, she had completely exonerated Sunder to be a person who committed *ganda kaam* with her or did any *jabardasti* with her.

19. The age of the prosecutrix at the time she got missing was around 17 years, as stated in the FIR. Thus, she was above 16 years of age at the time of marriage with Ajay with whom she has lived as his wife. Thus, so far as Ajay is concerned, not only from the photographs placed on record about the marriage ceremony, but also from the prosecutrix's own version, she was in love with Ajay, got married to him and wanted to live with him as his wife at his house. Thus, no case under Section 376 IPC, read with Section 109 IPC can be said to be proved against Ajay or Sunder when she has specifically stated that during her cross-examination that Sunder had not committed any wrong act or *jabardasti* (rape) with her. It appears to be a case where the prosecutrix not being able to bear the cruel treatment meted out to her by her father by tying her with *baail* (Ox) was not bearable to her and she being a grown-up girl, aged about 17 years, preferred to leave the home on her own. The parents of the prosecutrix also preferred not to even report the matter to police for seven months till a telephone call was made by her informing the whereabouts. It may also be noted that the prosecutrix has been shown to have been recovered from Narela Railway Station on the pointing out of her father, which is contrary to the version given by the prosecutrix and her father. The recovery memo PW4/A records that during search of the prosecutrix who was missing for about 6-7 months on 24th April, 2011 at Narela Railway Station, Delhi at the pointing of the complainant Raj Singh, his daughter 'R' along with two boys Suresh and Ajay have been recovered. The recovery memo also bears the signature of the complainant Raj Singh as well of both the appellants/accused persons.

20. In view of the testimony of the prosecutrix and her father, which has been discussed above, the factum of recovery of the prosecutrix from Narela

Railway Station, while she was in company of both the persons, is highly doubtful.

21. In view of the testimony of the prosecutrix of having physical relation with Ajay as his wife and also exonerated Sunder of committing any offence on her body, I am of the considered opinion that the impugned order dated 20th November, 2014 and order on sentence 22nd November, 2014 is liable to be set aside for the reasons that the learned Trial Court failed to appreciate that the prosecution case has many loose ends, improvements and embellishments and the prosecutrix had changed her version at every stage, thereby making her statement to be not reliable, so as to base the conviction of both the appellants for the offences complained of.

22. Accordingly, both the appeals are allowed. Both the appellants are acquitted of the charges framed. They be released forthwith, if not required in another case.

23. TCR be sent back alongwith copy of this order.

24. A copy of this order be sent to the concerned Jail Superintendent for information and necessary compliance.

PRATIBHA RANI, J.

MAY 30, 2016

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