

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

RESERVED ON : 2nd NOVEMBER, 2016
DECIDED ON : 10th NOVEMBER, 2016

+ **CRL.A.860/2013 & CRL.M.B. 7634/2015**

HARI CHAND

..... Appellant

Through : Mr.Vivek Sood, Sr.Advocate with
Mr.M.L.Yadav & Mr.Siddharth
Gupta, Advocates.

VERSUS

STATE

..... Respondent

Through : Mr.Amit Gupta, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 30.03.2013 of learned Addl. Sessions Judge in Sessions Case No.51/2013 arising out of FIR No. 34/09 PS Begumpur by which the appellant – Hari Chand was convicted for committing offence punishable under Section 376 IPC. By an order dated 02.04.2013, he was sentenced to undergo RI for ten years with fine ₹10,000/-.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that on 13.11.2009 at about 01.30 p.m. at House No.204, First Floor, Pocket-18, Sector-24 Rohini, the appellant committed rape upon the

prosecutrix 'X' (Changed name). On 13.11.2009 at around 15.19.37 a PCR call was made about the commission of crime. DD No.18A (Ex.PW-14/A) came to be recorded at PS Begumpur at 03.25 p.m. The investigation was assigned to ASI Ved Prakash who along with Const.Babu Lal went to the spot. After recording victim's statement (Ex.PW-1/A), the Investigating Officer lodged First Information Report. The victim was medically examined. Statements of the witnesses conversant with the facts were recorded. The appellant was arrested. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. In order to establish its case, the prosecution examined seventeen witnesses. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication. The Trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file. Admitted position is that the prosecutrix along with her family members lived in the rented accommodation owned by the appellant for the last about 7 / 8 months. On the day of incident, the appellant had allegedly gone to collect rent and taking advantage of the X's loneliness, he committed rape upon her.

4. Appellant's conviction is primarily based upon the sole testimony of the prosecutrix 'X'. Needless to say, conviction can be based on the sole testimony of the prosecutrix provided it lends assurance of her testimony. In case the court has reasons not to accept the version of the prosecutrix on its face value, it may look for corroboration.

5. In the instant case, material infirmities or inconsistencies have emerged in the statements of the prosecution witnesses making it unsafe to

base conviction on the solitary testimony of the prosecutrix. The prosecutrix was aged around 30 years and was mother of two grown-up children aged around 16 and 14 years. In her complaint (Ex.PW-1/A) given to the police at the first instance, she disclosed that her landlord used to visit them often to demand rent. About a week before the incident in question, he had come to collect rent. When she was alone that time, the appellant had committed rape upon her. She further disclosed that the incident of rape at the time was not disclosed due to fear of shame. Again on 13.11.2009, the appellant came to demand rent at around 01.30 p.m. Being not feeling well, she was lying in the room. The accused committed rape upon her against her wishes and threatened her not to disclose the incident. He left after the crime. When she became normal, a call at 100 was made.

6. In her Court statement as PW-1, the prosecutrix did not whisper a word about the commission of rape upon her by the accused a week before the incident in question. It is highly unbelievable and unacceptable that the prosecutrix would maintain complete silence and shall not report the incident of rape allegedly taken place about a week before the incident. She did not divulge the specific date and time when the said sexual assault had taken place. 'X' did not furnish any plausible explanation for not initiating any proceedings whatsoever against the appellant. Had such an incident been happened a week before against the wishes of the prosecutrix, there was no occasion for her to allow the appellant to enter the house in the absence of her husband and children on the day of occurrence to collect rent. She did not take any precautionary measures to prevent any such incident to happen again. It has come in X's testimony that prior to the arrival of the appellant, he had remained in touch with her and her husband on phone.

The prosecutrix and her husband were well aware about the arrival of the appellant in the house to collect rent. Neither the prosecutrix nor her husband had any objection to his arrival in the absence of the victim's husband. It has further come on record that the appellant remained at the spot for sufficient duration. He was well treated by the prosecutrix; she even prepared tea for him in the house. The prosecutrix who was allegedly the victim of sexual assault a week before is not expected to welcome the rapist and to serve tea. Victim's conduct appears unnatural and unreasonable. Possibility of the victim to be a consenting party in the episode cannot be ruled out.

7. Conflicting versions have been given by the prosecution witnesses as to when the appellant arrived at the spot; till which time he remained present there; when he was arrested; and when the prosecutrix was medically examined. There is inconsistent version if the husband and the children of the prosecutrix were present in the house soon after the incident. It is pertinent to note that during trial neither the victim's husband nor her children were examined. The prosecutrix disclosed that she had informed her husband about the rape incident soon after its occurrence; however, he did not rush to the spot and asked her to inform the police authorities on her own. Victim's husband arrived at the spot at around 11.00 p.m. Again this conduct of the prosecutrix and her husband is highly unbelievable. Victim's husband after coming to know of the incident is not expected to remain aloof of the occurrence and not to move the authorities concerned to apprehend the culprit.

8. The prosecutrix was medically examined vide MLC (Ex.PW-2/A). She did not suffer any visible injuries on her vital body parts

including private ones. PW-5 (Dr.Megha Purohit), examining doctor, disclosed that she did not find clothes of the victim torn and she was not suffering from any injuries. She, in the cross-examination, disclosed that erythematous marks on X's body could be self-inflicted also. PW-6 (Santosh Gupta) from NGO was called at the spot. In her cross-examination, she also disclosed that when she reached the victim's house in the afternoon, her husband and children were present. She remained there for about half an hour. The Investigating Officer had recorded statements of victim's husband and children. She further disclosed that when she saw the prosecutrix for the first time, her clothes were not torn and she could not notice any visible injuries on her body. This version given by the independent witness is inconsistent with the victim's statement when she claimed that at the time of commission of rape, the accused had torn her clothes and she had sustained injuries. It contradicts her version that her husband and children were not present at the spot that time.

9. Entirely conflicting versions have come on record as to when the accused had arrived at the spot and if he was arrested from the spot. The complainant PW-1 disclosed that the appellant came to the house at around 01.30 p.m. in the afternoon. After the crime, he had gone out of the house and she informed the police. She was not categorical to claim that the appellant was arrested at the spot. It was also not disclosed as to at what exact time the appellant was arrested. In the cross-examination, the victim admitted that on the day of occurrence, her husband had made a telephone call to the accused and had called him at 10.47 a.m. She further admitted that the accused had called her on her phone at 12.30 p.m. indicating his intention to come to collect rent. She further admitted that the accused again

made a telephone call at 12.58 p.m. She further admitted that after that the accused came at around 01.00 p.m. He even made a telephone call to her husband on mobile after arriving in the house. Apparently, the appellant was in touch with the victim and her husband. The victim did not suspect any foul play. The victim further admitted that during the presence of the accused, she had got a telephone call from her sister from Haridwar and had conversation with her; the accused was taking tea that time. The victim further admitted that the door was open and not bolted from inside. Though she admitted about the presence of one Jaya in the tenanted room on the ground floor, she did not raise any alarm to attract her attention at the time of crime. She did not disclose if any resistance was offered by her to avoid the assault or she had raised any hue and cry.

10. PW-12 (ASI Sukhdev) PCR official who rushed to the spot on getting wireless message at 01.30 p.m. disclosed that the prosecutrix was present along with her two children at Flat No.204. In the cross-examination, he disclosed that the accused was not present at that time and the police had not apprehended him in his presence. PW-14 (ASI Ved Prakash) contradicting him stated in the cross-examination that when he reached the spot at around 03.45 p.m., PCR officials were present and he left the spot at around 06.30 p.m. PW-15 (Const.Pawan Kumar) gave another version and stated that accused was present at the spot. In the cross-examination, he disclosed that the accused had already been apprehended at the spot. PW-17 (SI Ravinder Kumar), the Investigating Officer disclosed that when he reached at 06.15 p.m., the accused Hari Chand was present there. It is unclear as to when the accused was exactly arrested, and if so, at what place.

11. Taking into consideration the inherent defects in the prosecution case, the vital infirmities and discrepancies in the statements of the prosecution witnesses, the version given by the prosecutrix cannot be considered cogent and convincing to base conviction in the absence of any independent corroboration.

12. Settled legal position is that conviction can be based upon the sole testimony of the prosecutrix provided it is reliable and is of sterling quality. A Court can return a finding of guilt for offence punishable under Section 376 IPC only if the prosecution is able to first prove beyond reasonable doubt that the accused committed the offence where after the next step is of ascertaining the consent in case the prosecutrix is major.

13. In '*Sadashiv Ramrao Hadbe vs. State of Maharashtra & Anr.*' 2006 (10) SCC 92, the Apex Court while reiterating that in a rape case, the accused could be convicted on the sole testimony of the prosecutrix if it is capable of inspiring the confidence in the mind of the Court, put a word of caution that the Court should be extremely careful while accepting the testimony when the entire case is improbable and unlikely to have happened. This is what has been stated:

"It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the 'whole surrounding circumstances are highly improbable and belie the case set; up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The

courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

14. In 'Abbas Ahmed Choudhury v. State of Assam', (2010) 12 SCC 115, observing that a case of sexual assault has to be proved beyond reasonable doubt as any other case and that there is no presumption that a prosecutrix would always tell the entire story truthfully, the Hon'ble Supreme Court held :

"Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1."

15. Hon'ble Supreme Court in the decision reported as (2012) 7 SCC 171 'Narender Kumar Vs. State (NGT of Delhi)' held :

"23. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character."

However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide Tukaram Vs. State of Maharashtra (1979) 2 SCC 143 and Uday Vs.. State of Karnataka 2003 II AD (S.C.) 358)

24. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. The conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of the prosecutrix on its face value, it may look for corroboration. In case the evidence is read

in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected."

16. In the light of above discussion, conviction and sentence recorded by the Trial Court cannot be sustained. The appellant deserves benefit of doubt.

17. Resultantly, the appeal filed by the appellant is accepted. The conviction and sentence are set aside. The appellant shall be released forthwith if not required to be detained in any other case. Pending application also stands disposed of.

18. Trial Court record be sent back immediately with the copy of the order. A copy of the order be sent to the Superintendent jail for information / compliance.

(S.P.GARG)
JUDGE

NOVEMBER 10, 2016 / tr