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

DECIDED ON : 25th MAY, 2016

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CRL.A.713/2014

NAND KUMAR

..... Appellant

Through : Ms.Saahila Lamba, Advocate.
versus

THE STATE (GOVT. OF NCT), DELHI

..... Respondent

Through : Mr.Vinod Diwakar, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J. (Oral)

1. Challenge in this appeal is a judgment dated 02.07.2013 of learned Addl. Sessions Judge in Sessions Case No.44/13 arising out of FIR No.27/12 PS Sector 23 Dwarka by which the appellant – Nand Kumar was held guilty for committing offence punishable under Section 376 IPC. By an order dated 06.07.2013, 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 25.02.2012 at about 05.00 p.m. at Jain Farm House, Village Bamnoli, New Delhi, the appellant committed rape upon the prosecutrix 'X' (changed name) aged around 16 years. The incident was reported to the police vide Daily Diary (DD) No.28A recorded at Police Station Sector 23 Dwarka at around 06.15 p.m. The investigation was

assigned to SI Ram Pratap who along with Const.Dushyant went to the spot. After recording victim's statement (Ex.PW-1/A), the Investigating Officer lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. The accused was arrested. Statements of the witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court. To prove its case, the prosecution examined nineteen witnesses. In 313 Cr.P.C. statement, the appellant denied his complicity in the crime and pleaded false implication due to previous quarrel; he did not examine any witness in defence. 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. The occurrence took place on 25.02.2012 at around 05.00 p.m. when victim's parents had gone along with other family members to visit a temple at Gurgaon. The prosecutrix was alone in the house. Admitted position is that the appellant and the prosecutrix were acquainted with each other prior to the incident. The appellant had visiting terms at the victim's house.

4. Appellant's conviction is primarily based upon the solitary statement of the prosecutrix 'X'. Needless to say, conviction can be based upon 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. DD No.28A lodged with the police at 06.15 p.m. was to the effect that in a quarrel with a girl, some cash had been snatched. This intimation was given to the police by PW-3 (Sant Baksh), victim's brother-in-law, who arrived at the spot. In the examination-in-chief, he admitted that he had made a call to the police after getting mobile phone from a passer-by stating that an incident of money snatching had taken place. He did not furnish plausible explanation as to why the Investigating Agency was misled and correct information was not conveyed about the sexual incident to the police. In the cross-examination, he admitted that while calling police at 100, he had informed about snatching of money. He volunteered to add that he had made a call after arrival of victim's parents. Apparently, attempt was made to suppress the actual incident that time.

6. In her complaint (Ex.PW-1/A), the prosecutrix informed that on 25.02.2012 at around 05.00 p.m. when she was present alone inside her house, the accused living in a neighbouring farmhouse came there. When she enquired as to why he had come, without disclosing anything, the accused bolted the door from inside; pushed her on the wooden bed; opened the string of her salwar and committed rape upon her after gagging her mouth despite her raising alarm. After some time, the accused went away. She felt pain and started weeping. During this time, her brother-in-law Sant Baksh came at the house and she narrated the incident to him.

7. In her 164 Cr.P.C. statement (Ex.PW-1/B) recorded on 26.02.2012, she disclosed that on 25.02.2012 at about 05.00 p.m. when she was alone and her family members had gone to visit a temple, the accused 'Vichitra' to whom they used to call 'jija' entered inside the room and bolted it from inside. He committed rape upon her after tearing her clothes and

gagging her mouth with the torn clothes. After the commission of rape, the accused fled the spot and was seen by her brother-in-law while fleeing.

8. In her Court statement, she deposed that on that day at around 05.00 p.m. the accused came to her house; gagged her mouth with cloth; pushed her around the bed; tied her hands and legs and committed rape upon her. After entering the room, the accused had bolted the latch of the door. In the meantime, her brother-in-law Sant Baksh came and he opened the latch of the door by putting his hand between the doors. Thereafter, the accused ran away from the spot. He apprised her brother-in-law about the incident. Her statement (Ex.PW-1/A) was recorded by the police. In the cross-examination, she was unable to disclose her age. She claimed that she was completely illiterate. At time of incident, she was alone in the room. The accused had removed her clothes. She admitted that there was no mark of beating on her body.

9. On scrutinizing the inconsistent versions narrated by the victim at various stages of investigation / trial, it seems that she has not presented true facts. Nothing has come on record to show if the victim had raised any alarm / hue and cry at the time of commission of rape to attract the attention of neighbours. PW-3 (Sant Baksh) who happened to arrive at the spot did not reveal if before entering the room, he had heard victim's cries or alarm. Inconsistent version has come on record as to at what time exactly PW-3 (Sant Baksh) arrived at the spot. In her complaint (Ex.PW-1/A), the victim did not state as to at what time her brother-in-law had arrived at the spot or whether he had seen the appellant inside the room or any attempt was made by him to catch hold of him. In 164 Cr.P.C. statement (Ex.PW-1/B), she merely stated that her brother-in-law had seen the accused fleeing the spot.

In the Court statement, she gave an improved version stating that her brother-in-law had arrived at the spot and had opened the latch of the door by putting his hands between the doors. Thereafter, the accused had run away from the spot. PW-3 (Sant Baksh), in examination-in-chief, deposed that he returned to the house at around 04.30 p.m. and saw that the door of the room was open and a curtain was there. When he approached near the room, he saw the accused coming out of it wearing his pant. He also heard a girl weeping and when he entered the room, her sister-in-law 'X' who was in the process of wearing her clothes told her that the accused had committed rape upon her after closing the door and had run away after hearing a noise from outside. In the cross-examination, he disclosed that after the accused fled the spot, he tried to go inside the room. 'X' asked him to stay for one minute as she was wearing clothes. He admitted that he did not notice any injury mark on X's body. Apparently, both the prosecutrix and PW-3 (Sant Baksh) have given conflicting statements about his arrival time. Nothing have been explained by PW-3 (Sant Baksh) as to what attempt was made by him to apprehend the accused at the spot. As per the prosecutrix, PW-3 (Sant Baksh) had found the accused inside the room and had opened it by putting his hands in between the doors. Contrary to that, PW-3 (Sant Baksh) had stated that the door was open and there was a curtain at the gate. Under these circumstances, it is unbelievable that without bolting the door from inside, the accused would attempt to commit rape upon the prosecutrix. The victim was alone inside the house and all her family members had gone away. It appears that early arrival of victim's brother-in-law exposed her. Since the occurrence was witnessed by the close relative, the victim and her family members had no alternative but to lodge the report. Possibility of the

prosecutrix being a consenting party cannot be ruled out. No piece of cloth of the prosecutrix was seen torn as claimed. No external injuries whatsoever were found on her body including private parts. She was medically examined vide MLC (Ex.PW-15/A) and as per this, she was conscious and oriented. No external injury / bleeding was found at that time. The examining doctor has not been produced for examination. The report, however, is on the record. As per this report, in the alleged history it is stated that it was a case of sexual assault by her cousin sister's husband. It further records that the hymen was torn; vagina easily admitted two fingers. There were no struggle or violence marks on X's body to infer if any resistance was offered by her at the time of commission of crime.

10. Victim's age becomes crucial to infer the appellant's guilt. The prosecutrix claimed that she was aged around 16 years on the day of incident. She, in the cross-examination, was unable to disclose her exact age. The Investigating Agency did not collect any proof regarding the date of birth of the victim. PW-2 (Kanhaiya Lal) and PW-3 (Sant Baksh) did not state as to what was the exact date of birth of the prosecutrix on the day of incident. To ascertain her approximate age, ossification test was conducted and as per ossification test report (Ex.PW-17/A) proved by PW-17 (Dr.Rakesh Kumar) her age was in between 16 to 17 years as on 02.04.2012. If margin of error is given, apparently, the prosecutrix was above 16 years of age on the day of incident and physical relations (if any) with her consent did not attract Section 376 IPC.

11. It is true that in 313 Cr.P.C. statement, the appellant did not take the defence of having physical relations with consent. Throughout, he claimed that he was falsely implicated and no such incident had taken place.

At the same time, the burden to prove its case remains upon the prosecution and it cannot take advantage of the weakness of the case of the accused. The prosecution is to stand on its own legs. Merely because the accused did not take the defence to have physical relations with consent during trial, it does not absolve the prosecution to prove its case beyond reasonable doubt. 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. DNA report (Ex.PX) falsifies the appellant's defence that no such incident of having physical relations with the prosecutrix had taken place.

12. Considering the materials on record, as discussed above, the possibility of physical relations with consent cannot be ruled out. No explicit reliance can be placed on the testimony of the prosecutrix to base conviction.

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. In *Rai Sandeep @ Deepu vs. State of NCT of Delhi*, (2012) 8 SCC 21, the Supreme Court commented about the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused. It held :-

“In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of

the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

16. In *Tameezuddin @ Tammu v. State (NCT of Delhi)*, (2009) 15 SCC 566, the Supreme Court held :-

'It is true that in a case of rape the evidence of the Prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.'

17. In the light of the above discussion, the appeal is allowed and the conviction and sentence recorded by the Trial Court are set aside. The appellant shall be released forthwith if not required to be detained in any other case.

18. Trial Court record be sent back forthwith. A copy of the order be sent to the Superintendent Jail for information / compliance.

(S.P.GARG)
JUDGE

MAY 25, 2016 / tr