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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A. 1057/2013**

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Date of Judgment: 29th February, 2016

AARTI SHARMA

..... Appellant

Through : Ms. Ruchi Munjal, Advocate

Versus

STATE OF DELHI & ORS.

..... Respondents

Through: Ms. Anita Abraham, APP for the State
with SI Madan Meena, P.S. Kapashera.
Mr. Vinay Kumar Sharma with Mr. Udham
Singh, Advocates for respondent no. 2.
Mr. Vikas Padora, Advocate for respondent
No. 3.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. Present appeal has been filed by the appellant under Section 372 of the Code of Criminal Procedure against the judgment dated 22.05.2013 passed by Sh. Virender Bhat, Additional Sessions Judge, (Special Fast Track Court) Dwarka Courts, New Delhi in SC No. 09/13 by which the respondents have been acquitted of all the charges against them.
2. The brief facts of the case, as noticed by the Trial Court are as under:

“The prosecutrix namely 'A' (real name withheld in order to protect her identity) had gone to the shop of accused Preetam Yadav and got her mobile phone recharged. She enquired from the accused if he was aware about any room available for rent. The accused told her that he resides in village Kapashera and would get her a room

on rent. He gave his mobile phone no.9716488303 to the prosecutrix. Thereafter they had been talking to each other and the accused had taken her to show her some rooms which were available for rent. On 03.11.2011 prosecutrix received a telephonic call from accused Preetam Yadav at 7 p.m. saying that he would show her a flat. The accused came to the residence of the prosecutrix in his white colour Maruti 800 car bearing registration no. DL 9CE 9415 and made the prosecutrix sit in the car. He took the car upto a Dhaba near Kapashera Chowk on Bijwasan Road and got some food packed from the Dhaba. Thereafter he took the prosecutrix to a flat on the first floor near Blue Dart Company and closed the door. Thereafter the accused started teasing the prosecutrix, who resisted his acts. Accused Preetam slapped her and threatened her that she would be killed in case she would not remain quiet. Thereafter he raped her. Then the accused Preetam Yadav took her near Fun & Food Village in his car where accused Manoj was waiting in his Hyundai Verna car of white colour and having registration no.-----2112 on its rear number plate. The prosecutrix had seen and met accused Manoj at the shop of accused Preetam. Accused Preetam asked the prosecutrix to sit quietly in the car of accused Manoj. As she had become terrorised, she obeyed accused Preetam. Thereafter accused Preetam took the car upto a secluded place where he got down from the car and accused Manoj raped the prosecutrix inside the car. Thereafter both the accused brought the prosecutrix to Mahipalpur in the car of Manoj and dropped her there. They threatened her that they would kill her if she disclosed the incident to anybody. It is further the case of the prosecutrix that she had herself reached the police station on 04.11.2011 where her statement was recorded by SI Kamal Singh. On the basis of her statement, FIR was got registered. Prosecutrix was got medically examined in Safdarjung Hospital vide MLC No.32186/11.”

3. Upon Committal of the case to the court of Sessions, both the accused were charged with having committed the offences under Section 342/34 of Indian Penal Code, under Section 376 (2) (g) Indian Penal Code, under Section 323/34 Indian Penal Code, under Section 506/34 Indian Penal Code and under Section 201/34 of the Indian Penal Code. The accused pleaded not guilty to the aforesaid charges and accordingly prosecution was called upon to lead evidence.
4. The prosecution has examined 24 witnesses in all. The statement of the respondents were recorded under Section 313 of the Code of Criminal Procedure wherein they denied all the incriminating facts and circumstances of the case put to them and claimed to be tried.
5. Ms. Ruchi Munjal, Counsel for the appellant submitted that the impugned judgment is contrary to the settled position of law and thus not sustainable. The Trial Court disregarded and failed to take into account the relevant material on record and has based its findings on mere conjectures and surmises.
6. Counsel for the appellant further submitted that the Trial Court has committed serious error in acquitting the respondents No.2 and 3 by misconstruing the statement of the prosecutrix under section 164 of Code of Criminal procedure as also her testimony before Court.
7. Counsel for the appellant vehemently argued that the testimony of the prosecutrix alone is sufficient to convict the respondents No.2 and 3 for charges of rape and the same does not require any corroboration.
8. Per Contra, Defence Counsel submitted that the testimony of the prosecutrix cannot be relied upon as it suffers from material contradictions and thus the story put forward by the prosecution is

false and not trustworthy. It is argued that the conduct of the prosecutrix is highly suspicious and must be scrutinized with utmost care and caution.

9. Mr. Vikas Padora, Counsel for the respondent No.3 Manoj Yadav submitted that on the date of alleged offence respondent No.3 was present at M/s Om Sweets along with his wife, sister and children. It is further submitted that the respondent Manoj Yadav was falsely implicated by the prosecutrix, in connivance with Surender Yadav (a friend of the prosecutrix) and one other person Ashwini.
10. Counsel for the respondent No.3 further submitted that after the alleged incident of rape the prosecutrix claims that she was dropped near her house at about 9:30 pm and instead of informing the police she made calls to one mobile phone no. 9811151433 which belonged to Ashwini and it was only after speaking on the aforesaid number she made a call to PCR at 10:44 pm which shows that respondent No.2 and 3 were falsely implicated at the behest of receiver of phone no 9811151433.
11. We heard the learned counsel for the parties and perused the record and also examined the judgment rendered by the trial court in detail.
12. Before we deal with the rival submissions of the parties, we deem it appropriate to rummage through the testimonies of the prosecutrix PW1, DW1, DW2, DW3, PW7 and PW24.
13. PW1 prosecutrix in her examination in chief deposed as under:

On 03.11.2011, I received a call from accused Preetam and he told me that he would be coming to pick me up and he would show two three rooms to me. Vol, we had a plan of meeting since last 2-3 days. Thereafter, accused

Preetam came at Bagga Link Show room in his Maruti 800 car of white colour having number....94... Thereafter, I boarded in the car of the accused then accused got packed meal from a shop near Kapashera chowk. Thereafter, accused took me in a flat at first floor in Chaitanya Apartment. Thereafter, we had meal. Before going there, accused had shown a room which was well furnished. Thereafter, accused removed his shirt saying that he wanted to take rest. Thereafter, accused touched me on my neck. Thereafter, accused told me that he liked me. I objected the act of accused Preetam. Thereafter, I stood and accused pulled my shirt from behind due to which my shirt got torn. Thereafter, accused Preetam slapped me and pushed me on the bed. Thereafter, accused Preetam kissed me and he removed my clothes and after taking out condom beneath the mattress, he committed rape twice with me. Thereafter, I alongwith the accused went to near Fun & Food Village, Kapashera where accused Manoj present in the court (correctly identified) was present in a Verna car. Thereafter, I was forcibly shifted in the said Verna car. Thereafter, accused Manoj took the car at some isolated place.

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At about 8:00 am, accused Preetam was apprehended from his house and at about 9:00 am, accused Manoj was apprehended by police and they were brought to police station....”

Prosecutrix PW1 in her cross examination deposed as under:

After about 1 1/2 year of my staying in Mahipal Pur, I got acquainted with accused Preetam Yadav who was running a mobile shop at Kapashera, near Fun N Food village and a Reebok showroom. I might have visited to accused Preetam Yadav's shop for about 10-12 times Once or twice alongwith my other colleagues.

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I had given the first call to PCR from my mobile after being dropped near Big Apple on 03.11.2011. It is

correct that this call was made at around 10:46 pm and police came and met me.

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I made one telephonic call in between 10:46 pm to 12:44 am to one Shri Sandeep, a friend, residing near Meerut. I do not know any person by the name of Ashwini. Again said: I just made a call to Sandeep whose phone was found to be switched off as a result, I made a call to Ashwini's mobile phone.

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I had physical relations with accused Preetam Yadav

prior to 03.11.2011. *It is correct that I made a telephonic call on 100 number (PCR) disclosing them a fight between me and Preetam Yadav. It is correct that once I visited to the shop of Preetam Yadav namely Naina. It is correct that we used to talk to each other on telephone frequently around 3-4 times in a week. I left my accommodation to accompany Preetam Yadav on 03.11.2011 at about 7:00 pm and I remained with him at Chaitanya Apartment by 9:00-9:30 pm. It is correct that I objected to Preetam Yadav to remain there as I was getting late and on account of that I was annoyed with accused Preetam Yadav as a result, I made a call of Jhagra to PCR police. I do not know any person by the name of Ashwani who is resident of village Kapashera. I know telephone No. 9811151433 upon which I had telephone talk. I cannot tell exactly if I had talked on telephone No. 99114514333.*

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I never happened to know Manoj as named by me in this case. I had seen accused Manoj for the first time in the police station. I came to know the name of accused Manoj from the police.

Court question: Whether accused Manoj Yadav had committed rape with you?

Answer: Yes, Vol accused Manoj Yadav was shown to me in the police station. Further Vol police had told me that this Manoj used to remain with Preetam.

I do not know from where and when accused Manoj was apprehended and brought to the police station. On 04.11.2011 and thereafter I had signed on my statement and few other papers which I cannot describe now. It is correct that I have involved accused Manoj in this case on the asking of the police officials.

My mobile number is 8285210313. I was carrying this mobile phone on 03.11.2011. It is correct that I had made and received four calls lasting to the duration of about five minutes on the said mobile. It is correct that I had talked to person namely Ashwani bearing mobile No. 9811151433 for about 139 seconds. I was outside in the car with accused Preetam at that time. It is correct that thereafter also I talked to ashwani for about 42 seconds from my mobile phone. Vol I had not talked to Ashwani but I had talked to my friend Sandy. It is correct that upto 10:43pm I did not make any call to the police.

14. PW7 Smt Anshu Yadav, W/o respondent No.3 in her court deposition stated that on 03.11.2011, I was driving the said car I alongwith my husband, my sister in law, (jethani) and her children had left house in the said car at 6.30 p.m. for watching a movie. We watched movie "Ravan" in Big Cinemas hall at Ansal Plaza complex, palam vihar, Gurgoan. we left that place at about 9.00 p.m. and reached M/S om

sweet sector-23, Gurgaon. After taking dinner there , we came home and reached there at 10.00 p.m.

15. PW24 SI Saroj Bala in her court deposition stated that I had obtained the CCTV footage of the camera installed on the gate of M/S Om sweets, Gurgaon. The camera was facing towards outside and the footage showed the entry of the accused Manoj, his wife and his bhabhi into the shop after parking the car in front of the the shop. I had obtained the bill from that shop regarding the articles consumed by the accused and his family. The bills are already on record but they do not bear the name of the customer.
16. DW1 Sh. D.K. Singh, employee at M/s Om Sweets Pvt. Ltd, Sector-23 Gurgaon, Haryana deposed that the police officials had then collected the CCTV recordings from IT Department of our restaurant and they showed the CD to me, which depicted the scene of our restaurant and I had also identified accused Manoj present in that CD who has seen standing in queue in front of the counter. He further deposed that in this case, in my opinion ,it would have taken about 15 to 20 minutes for serving the food to the customer after he had made the payment.
17. DW2 Sh. Sandeep Kumar, Cashier at M/s Om Sweets deposed that I have seen the invoices Ex.DW1/A to Ex.DW1/D. These have been issued by me. The police had shown me a CD of CCTV footage of our restaurant, in which I had seen accused Manoj waiting in queue in front of the counter.
18. DW3 Smt. Suman deposed in her examination in chief that I know accused Manoj present in court today. He is my brother in law (Devar). On 03.11.2011 it was the birthday of daughter of Manoj. On

that day I alongwith my children, Manoj, his wife and his daughter left our house at 6:30 p.m in our Hyundai Verna car bearing registration no.-----2112. We straightaway reached Ansal Plaza, Palam Vihar, New Delhi and watched movie 'Ravan' there from 7 p.m to 9 p.m. From there we reached Omax Mall, where we had our dinner in M/s Om Sweets restaurant. From there we returned home and reached there at about 10 p.m.

Material contradictions in the testimonies

19. As per the version of the prosecutrix she left her accommodation to accompany respondent No.2 on 03.11.2011 at about 7:00 pm and remained with him at Chaitanya Apartment till 9:00-9:30 pm where the alleged incident of rape was committed on her by respondent No.2. She further stated that she was forcibly taken by respondent No.2 in his car near Fun & Food Village, Kapashera where she was forcibly shifted in the car of respondent no. 3 and raped by respondent no.3. After being dropped by respondent no. 2, she had first called the PCR from her mobile on 03.11.2011 at around 10:46. It is pertinent to note herein that if the alleged rape was committed on the prosecutrix by respondent No.2 between 7:00 pm and 9:30 pm the normal conduct in this circumstance would have been for the prosecutrix to call up the PCR immediately and inform about the incident of rape and not of the quarrel.
20. The prosecutrix was well aware that she was going to spend considerable time with the respondent No.2 as she accompanied him to get a packed meal and then went to the apartment. Prosecutrix further stated that respondent no. 2 slapped her and pushed her on the

bed and raped her twice. However in the cross examination she admitted that she was having physical relation with the respondent no.2 and it appears from the record that she voluntarily accompanied the respondent no.2 in the apartment and as such there was no occasion for respondent no. 2 to force anything on her.

21. The unnatural conduct of the prosecutrix that after being raped twice by respondent no. 2 she went with him in his car and further shifted in the car of respondent no.3 without making any attempt to shout or raise an alarm is improbable and casts serious doubt in her story.
22. The prosecutrix herself admitted that Manoj was not known to her and she had seen him for the first time in the police station. Moreover, the testimonies of the DW1, DW2, DW3, PW7 and PW24 establish the case of respondent no.3 that he was not present on the alleged date of incident.
23. On perusal of the testimonies of PW19 and PW24 it is clear that there are contradictions in the deposition of the aforementioned officers. The prosecutrix stated that she was not acquainted with respondent No.3 and met him for the first time in the police station. The officers who went together to arrest both the respondents totally contradicted each other in their statements wherein PW19 Constable Josh Kumar stated that the house of the respondent No.2 was identified by the prosecutrix and respondent No.3 was arrested at 9:00 am. Per contra, PW24 Woman SI Saroj Bala stated that she got the address of respondent No.3 by making inquiries and not by identification by the prosecutrix. At the same breath she further deposed that respondent No.3 was arrested at about 8:00am. Further as per record, prosecutrix

was taken to Safdurjung Hospital at 04:30 am for medical examination and she remained there for six to seven hours which falsifies the case of the prosecution that the arrests were made on the identification of the prosecutrix. Keeping in view the above material, the arrest of respondent no. 2 and 3 were not in the manner as mentioned in the charge sheet.

24. Hon'ble Supreme Court in catena of judgments held that the testimony of victim of rape needs no corroboration and conviction can be founded on prosecutrix testimony alone if it is unimpeachable and beyond reproach. In **Krishan Kumar Malik vs State of Haryana** :**(2011) 7 SCC 130** it was held as under:

"31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the Appellant guilty of the said offences. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (Code of Criminal Procedure), FIR and deposition in Court"

25. **In Mohd Ali vs State of U.P : (2015)7SCC272** it was held as under:

"22. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and

reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished number of times. Under these circumstances, the medical evidence gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. True it is, the grammar of law permits the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a Court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unrepachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely do not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the accused-Appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same.”

26. On careful analysis of the testimony of the prosecutrix, we find a large number of contradictions, inconsistencies and exaggerations in her statement noted above, which casts shadow of doubt and lead us to find it difficult to rely on her version.

Medical and scientific evidence

27. Having discussed the testimony of the prosecutrix, it is significant to examine whether the medical evidence adduced finds support from the oral testimony of the prosecutrix. PW5 Dr. Savita Verma, Sr. Resident, Safdarjung hospital, New Delhi examined the prosecutrix on 04.11.2011 opined as under:

“At about 4:30 am, a girl Aarti was brought to the hospital by lady constable Mamta for medical examination. The girl told me that she has been raped by her friend Pritam and his friend Manoj on 3.11.2011 from 8 pm to 10 pm.

I examined the girl and found a scratch mark 1cmx1cm with in inner quadrant on the right breast. On her internal examination, I found her pubic hair normal, labia majora and minora normal. The hymen was torn but no semen was seen. There was no bleeding through vagina.”

Blood and Semen samples were sent for scientific examination. L. Babyto Devi, Senior Scientific Officer (Biology) FSL submitted its report bearing No. FSL 2011/B-7797 dated 12.04.2012 Ex.PY wherein she has declared that no semen was detected from the clothes of prosecutrix and also from the seat cover of the car.

28. From the medical and scientific evidence it has come on record that no internal injuries have been detected on the prosecutrix and no semen was detected on the undergarments or on the seat cover of car. In view

of the above, the reports do not co-relate the version alleged by the prosecutrix and thus the prosecution has failed to discharge its onus to prove the rape on the prosecutrix.

29. In ***Raju v. State of Madhya Pradesh: (2008) 15 SCC 133***, the Hon'ble Supreme Court has held that testimony of the victim of a rape cannot be presumed to be a gospel truth and observed that false allegations of rape can cause equal distress, humiliation and damage to the accused as well, in para 11, the supreme Court echoed the sentiments as under:-

"11. 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."

30. Undoubtedly, there is an increase in the crime relating to rapes, but all the rape cases which are filed have their own factual matrix. While most of the cases may be genuine, many of the cases are being reported by those women who have consensual physical relationship with a man but when the relationship breaks due to some reason, the women use the law as a weapon for vengeance. In the instant case the prosecutrix admitted that she was friendly to respondent No. 2 and had

physical relations with him prior to 03.11.2011 and on the date of alleged incident the prosecutrix got annoyed with the respondent No.2 due to which she called up the PCR. Thus, the physical intimacy shared by both of them was consensual and therefore, there is no question of raping the prosecutrix.

31. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and the prosecution has to prove a charge beyond reasonable doubt. The accused has a right to fair trial and the presumption of innocence is in favour of the accused.
32. In view of the aforesaid facts, we do not find any infirmity in the impugned judgment passed by learned trial court. We also find no reasons to take a different view than the view taken by the learned trial court. Consequently, present appeal stands dismissed.

SANGITA DHINGRA SEHGAL, J

G. S. SISTANI, J

FEBRUARY 29, 2016

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