

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

**RESERVED ON : 3<sup>rd</sup> FEBRUARY, 2016**

**DECIDED ON : 24<sup>th</sup> FEBRUARY, 2016**

**+ CRL.A. 1393/2013**

MANOJ KUMAR ..... Appellant

Through : Mr.Chetan Lokur, Advocate with  
Mr.Nitish Chaudhary, Advocate.

versus

STATE (GNCT OF DELHI) ..... Respondent

Through : Mr.Vinod Diwakar, APP.

**AND**

**+ CRL.A. 1348/2013**

KAJAL ..... Appellant

Through : Mr.Sameer Kumar, Advocate with  
Mr.Jatin Rajput, Advocate.

versus

THE STATE (NCT OF DELHI) ..... Respondent

Through : Mr.Vinod Diwakar, APP.

**CORAM:  
HON'BLE MR. JUSTICE S.P.GARG**

**S.P.GARG, J.**

1. The appellants – Manoj Kumar (A-1) and Kajal (A-2) have  
filed the appeals to challenge the legality and correctness of a judgment

dated 24.05.2013 of learned Addl. Sessions Judge in Sessions Case No.128/2013 arising out of FIR No.109/2009 PS Swaroop Nagar by which A-1 was held guilty for committing offences punishable under Sections 366/376/506 IPC whereas A-2 was held guilty for committing offences punishable under Sections 366A/114 IPC read with Section 376 IPC. By an order dated 31.05.2013, they were awarded various prison terms with fine. The sentences were to operate concurrently.

2. Briefly stated, the prosecution case as stated in the charge-sheet was that on 05.03.2009 at around 02.30 p.m. A-2 induced the prosecutrix 'X' (changed name) aged around 13 years who lived in her neighbourhood to go to a room located at the upper floor of her House No.B-4, JJ Colony, Bhalaswa, on the pretext to call her daughter Neetu with an intent that she would be forced to have illicit intercourse there with A-1. When A-2 went to the room, A-1 followed her as planned and committed rape upon 'X' after criminally intimidating her. The incident was reported to the police on 30.04.2009 and the Investigating Officer after recording victim's statement (Ex.PW-1/A) lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. Statements of the witnesses conversant with the facts were recorded. The appellants were arrested and medically examined. Exhibits

collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against both the appellants before the Trial Court. To establish its case, the prosecution examined 22 witnesses. In 313 Cr.P.C. statements the appellants denied their involvement in the crime and pleaded false implication. The trial resulted in their conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeals have been filed.

3. I have heard the learned counsel for the parties and have examined the file minutely. Admittedly, the prosecutrix who lived in A-2's neighbourhood had regular visiting terms at her house; they were having cordial relations for the last 20 years. The appellants are related to each other.

4. Appellants' conviction is primarily based upon the solitary statement of the prosecutrix 'X' which has not been corroborated by any other independent source. 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 her complaint (Ex.PW-1/A) lodged after a considerable unexplained delay of more than one month, the victim implicated the

appellants whereby A-2 abetted the commission of rape and A-1 was successful to ravish her on 05.03.2009. She disclosed that on 05.03.2009 at around 02.30 p.m. when she was washing clothes outside her house in the street, A-1 told her that her maternal aunt (Mami) (A-2) had called her in the house. When she went there, A-2 asked her to call her daughter Neetu from the upper room. When she went there, she did not find her. A-1 came behind her and forcibly committed rape upon her in the said room. After the rape incident, she was threatened of dire consequences by A-1 if the incident was reported to anyone. A-1, thereafter went outside. A-2 after coming to the room consoled and advised her to forget the incident and not to disclose it to anyone. In her 164 Cr.P.C. statement (Ex.PW-14/B), 'X' reiterated her version and implicated the appellants for the crime. In her Court statement, 'X' proved the version given to the police and before the learned Metropolitan Magistrate without major variations. She deposed that when she went to A-2's house and enquired, 'Bhabhi kya kaam hai', A-2 asked her to remove green grams from the gram plants. She helped her in that task and when sought permission to go, A-2 asked her to see her newly constructed room on the 1<sup>st</sup> floor. When she expressed inability to do so due to shortage of time, A-2 asked her to call Neetu from the room situated on the 1<sup>st</sup> floor where she was subsequently

raped by A-1. Certain facts deposed by the prosecutrix in her examination-in-chief, however, did not find mention in her initial complaint (Ex.PW-1/A) and the statement under Section 164 Cr.P.C. (Ex.PW-14/B). 'X' has not offered any explanation for making improvements in the Court. The prosecutrix emphatically asserted that she became pregnant due to the rape committed upon her by A-1 and her pregnancy was aborted in its fifth month. In the cross-examination, she admitted that at the time of her Court examination on 25.01.2011, she was already married for the last about five months and her husband's name was Milan. She further admitted that her marriage with Milan was a love marriage against the wishes of her parents. She denied the suggestion that she was having an affair with Milan to whom she wanted to marry and maintained sexual relationship with him or that on becoming pregnant, in order to save Milan, she falsely named the appellants to be the perpetrators of the crime. She claimed that Milan came into contact with her after the said incident and was not known to her at that time. It is apt to note X's parents had not participated in the marriage.

6. X's statement has not been corroborated by any independent evidence. Her conduct is unnatural and unreasonable. She has not explained as to why she did not return immediately from the upper room

after finding that Neetu was not there. She remained in A-1's company in the said room for about 15 / 20 minutes and at no stage, she raised alarm. She did not suffer any injuries on her body to infer forcible rape against her wishes. Even after the rape incident, she did not raise hue and cry and returned to her home silently after wearing clothes. She even did not narrate the incident to her parents and family members and maintained silence for long. One day when her physical condition deteriorated and she became unconscious, on medical examination, her pregnancy was confirmed. It led the prosecutrix and her family members to lodge First Information Report on 30.04.2009. PW-4 (Chanderkala) – victim's mother admitted in the cross-examination that had the pregnancy been not surfaced, they would not have initiated any action for the occurrence. The prosecutrix did not exhibit any abnormal behavior during this period and continued to attend her school regularly. When she was medically examined on 30.04.2009 vide MLC (Ex.PW-1/B), no fresh external injuries were found on her body including private parts. Under these circumstances, the possibility of the prosecutrix to be a consenting party to have physical relations (if any) can't be ruled out.

7. X's emphatic version that she was made pregnant by A-1 because of commission of rape upon her on 05.03.2009 stood belied by

DNA report (Ex.PW-21/A). As per DNA report (Ex.PW-21/A), the source of Ex.2 (A-1's blood sample) could be excluded for being responsible as biological father of source of Ex.1 (X's fetus). It further concluded that the source of Ex.3 (X's blood sample) could not be excluded for being responsible as biological mother of source of Ex.1 (X's fetus). Apparently, A-1 was not the source of pregnancy. During investigation or trial, the prosecutrix did not reveal if at the relevant time, she was having any physical relations with someone else also. As per statement of PW-19 (Dr.Rashmi Khatri), 'X' delivered a female fetus on 10.07.2009 at 08.16 a.m. in the hospital where she was admitted with the history of five months amenorrhoea consequent to rape. Since A-1 was not the author of the crime resulting in pregnancy, it cannot be said that the emergence of fetus was due to the alleged rape committed by A-1.

8. Contradictory and inconsistent versions have been given by the victim and her parents as to when exactly they came to know about the physical relations between the prosecutrix and A-1. As per the testimony of 'X' as PW-1, she informed her parents about the rape incident on the next day itself. PW-4 (Chanderkala) – victim's mother in the cross-examination disclosed that her daughter informed them about the incident

of rape after one and a half month. Despite coming to know of the incident soon after its occurrence, no FIR was lodged promptly.

9. Victim's age becomes crucial to ascertain A-1's guilt (if any). The prosecution, however, did not produce any cogent and worthwhile document on record to ascertain X's exact date of birth. It is emphasized that the prosecutrix's date of birth as recorded in the school record was 10.08.1997. PW-3 (Man Mohan), TGT Maths Teacher, Govt. Girls Sr. Secondary School, proved the documents (Ex.PW-3/A to Ex.PW-3/C). Admittedly, the prosecutrix had taken admission in the said school on 09.04.2008 in 6<sup>th</sup> standard; it was not her first attended school. The date of birth i.e. 10.08.1997 was recorded in PW-3's school record on the basis of school leaving certificate issued by the previous school where the prosecutrix had studied till 5<sup>th</sup> standard. The Investigating Agency did not collect any school record from M.C.Primary Co-Ed School, Bhalaswa, JJ No.1, Delhi, where 'X' had studied from 1<sup>st</sup> standard to 5<sup>th</sup> standard. It was also not verified as to on the basis of what document this date of birth was recorded therein. PW-1 'X' in her cross-examination categorically admitted that she was born at Samastipur in Bihar and did not have any birth certificate to prove her exact date of birth. She expressed ignorance about her date of birth; she was not able to remember even the month or

year of her birth. She disclosed that her twin-sister was aged around 15 years and she was already married. PW-4 (Chanderkala) – victim's mother did not disclose X's date of birth in her examination-in-chief. In the cross-examination, she gave a contradictory and inconsistent version that 'X' was born in Delhi in a house at Rohini. She was not able to remember the month or year of her birth. She did not claim if her date of birth 10.08.1997 was recorded in her school record. PW-5 (Vishwanath) merely disclosed the age of her daughter as 13 years. In the cross-examination, he admitted that no birth certificate was procured from MCD office. 'X' was admitted in the MCD School on the basis of her date of birth recorded in the ration card. Copy of no such ration card has been placed on record. It is unclear as to what date of birth was recorded in the ration card, and if so, on what basis. The Investigation Officer did not conduct ossification test to ascertain her possible age. Since no exact date of birth of the prosecutrix has surfaced on record, it can't be concluded with certitude that 'X' was below 16 years of age and her consent for physical relations (if any) with A-1 was of no relevance. It is well settled law that if two views are possible, one favourable to the accused has to be adopted.

10. On consideration of the totality of the facts and circumstances, it will be unsafe to convict the appellants as there are so many infirmities, holes and lacunas in the prosecution version. No implicit reliance can be placed on the testimony of the prosecutrix as well.

11. 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.”*

12. In view of the foregoing, the appellants deserve benefit of doubt. The appeals filed by them are allowed. Conviction and sentence are set aside. A-2 shall be released forthwith if not required to be detained in any other case. Bail bond and surety bond of A-1 stand discharged.

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

**(S.P.GARG)**  
**JUDGE**

**FEBRUARY 24, 2016 / tr**