

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

% *Judgment Reserved on: May 19, 2016*
Judgment Delivered on: May 25, 2016

+ **CRL.A. 663/2015**

REKHA Appellant

Represented by: Mr.Anwesh Madhukar,
Advocate. (DHSLC).

versus

STATE Respondent

Represented by: Ms.Rajni Gupta, APP for the
State with SI Surender Singh
PS Bawana, WSI Ritu, CAW
Cell, Outer Distt.

+ **CRL.A. 935/2015**

SANJAY Appellant

Represented by: Mr.Anwesh Madhukar,
Advocate. (DHSLC).

versus

STATE Respondent

Represented by: Ms.Rajni Gupta, APP for the
State with SI Surender Singh
PS Bawana, WSI Ritu, CAW
Cell, Outer Distt.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J.

1. Rekha and Sanjay, both have been convicted for the offences punishable under Section 376 (2) (g) read with Section 114 IPC besides Section 506/34 IPC and directed to undergo Rigorous Imprisonment for a period of ten years vide impugned judgment of conviction dated May 07,

2015 and order on sentence dated May 14, 2015 respectively.

2. Learned Amicus Curiae contends that the prosecution case as set up by the prosecutrix is wholly unreliable. Though immediately after the alleged incident, the prosecutrix called up the police and was medically examined however, the various swabs taken and sent for analysis to the FSL do not support her case that she was raped by two persons, that is, Sanjay and Bittu. The prosecutrix has admitted that on the complaint of Rekha her husband was in custody and earlier a complaint was lodged by Sanjay against the husband of prosecutrix, however even as per the prosecutrix Rekha and the husband of the prosecutrix were earlier doing liquor business and had fallen apart. Thus these were the reason both Rekha and her husband have been falsely implicated. Due to the falsity of the case, the third unknown person has not been arrested till date and not even declared a proclaimed offender. It is highly improbable that the prosecutrix will accompany Rekha on whose complaint her husband is in custody to go to a lawyer to get her husband released. Referring to the decisions of the Supreme Court reported as AIR 2006 SC 2639 Priya Patel vs. State of Madhya Pradesh & Anr. and 2009 (12) SCC 403 State of Rajasthan vs. Hemraj & Anr. it is contended that a woman cannot be said to have an intention to commit rape and thus no charge of gang rape can be foisted on Rekha and Sanjay. *Mense rea* is an important ingredient of an offence and if a woman can have no intention to commit rape then she could not have abetted the same. Reliance is placed on the decision of the Constitution Bench reported as 1994 (3) SCC 569 Kartar Singh vs. State of Punjab. The learned Trial Court failed to consider that Rekha and Sanjay have not only probablised but also proved beyond reasonable doubt that Rekha was

admitted in hospital when the alleged incident took place and Sanjay was going to meet her when he was called by the police. Thus both Rekha and Sanjay are entitled to be acquitted.

3. Learned APP for the State referring to the definition of ‘abetment’ states that even if a woman can have no intention to commit rape she can abet the offence as was held in the decision reported as 194 CrLJ 569 Prabha @ Swayamprabha & Ors. vs. State of Kerala. The MLC of the prosecutrix proves that rape was committed on her. At least one injury on the prosecutrix could not be self inflicted. The defence has taken different pleas in the suggestions to the witness, in statement under Section 313 Cr.P.C. and the defence evidence led. The defence has also not proved that it was appellant Rekha on whose complaint the husband of the prosecutrix was in custody by producing the FIR and the other documents. The plea of alibi of Rekha is not substantiated as no time of admission is noted in the hospital record. Further Rekha was admitted for gastroenteritis problem, but her mother stated that she had suffered a heart attack.

4. Process of law was set into motion by the prosecutrix when she made a PCR call informing that someone had done “jabardasti” with her. The call was recorded vide DD No.64B whereafter ASI Ram Ratan took her to BSA Hospital and got her medically examined and recorded her statement. In her statement, the prosecutrix stated that she was a house wife doing household work and her husband was confined in the jail for last 8-9 months. On June 09, 2012 at about 8.00 PM in the evening she was present at her house. One lady namely Rekha who lives in B-Block, 1143, JJ Colony, Bawana came to her in her I-10 car and told her that she can take her to a lawyer who could get released her husband from jail. Trusting Rekha, the prosecutrix sat in

the car and when they reached near the canal Rekha stopped the car and Sanjay, resident of Shahbad JJ Colony, husband of Rekha and one more person sat inside the car. Sanjay sat besides Rekha on the front seat whereas the other person sat on the rear seat with the prosecutrix. When the prosecutrix asked Rekha about payment to the lawyer Rekha turned the car towards the factory area stating that she had to get the money for the lawyer. The car stopped at some distance at an isolated place whereafter all the three came to the rear seat. Rekha pressed her mouth and caught her hands due to which the prosecutrix could not raise alarm whereafter Sanjay and other person turn by turn committed rape on her. The prosecutrix struggled to save herself due to which she sustained marks on her neck, right cheek and scratches on the upper portion of the breast. The three of them left after committing the offence, making her alight from the car and threatening her not to disclose about the incident. She had her mobile phone from which she called the PCR.

5. Statement of the prosecutrix was recorded under Section 164 Cr.P.C. wherein she reiterated her version made in the Rukka on the basis of which FIR was registered. Medical examination of the prosecutrix was conducted and the MLC noted bruise marks on the right and left side of the neck, abrasion on the left cheek and multiple scratches on the left forearm and right side chest wall and fresh and old abrasion on left forearm.

6. Clothes, debris collection, the body fluid collection, nail scrapping, in between fingers, breast swab, combing of pubic hair, clipping of pubic hair, cervical mucous with slide, vaginal secretion, culture swab , washing from vagina, rectal swab, oral swab, blood and urine of the prosecutrix were collected and sent to the FSL. Pieces of seat cover of the car of Rekha were

also taken. These were also sent to FSL and as per the FSL report Ex.PW-13/A in none of the exhibits semen could be detected. Thus no DNA analysis was required to be conducted.

7. During the course of trial, the prosecution examined Dr.Meet Kumar, PW-20, CMO, BSA Hospital who prepared the MLC. In cross-examination Dr.Meet Kumar admitted that though there were abrasion and bruises but there was no effusion of blood and that the said injuries, that is, bruise and abrasion could be caused accidentally by fall or mechanically or any method of injury. Even for the bruise marks on the cheek which he opined could not be self-inflicted he stated that it could be caused by a blunt force or fall on the surface. The appellants examined three witnesses in defence DW-1 Dr.J. Raj Dhami, DW-2 Smt. Lalita, the mother of Sanjay and DW-3 Bibi Lal Man, mother of Rekha.

8. DW-1 brought the summoned record and deposed that as per the record of admission and discharge No.7346/2012 Rekha was admitted in his hospital, that is, Shakuntala Nursing Home and Hospital on June 09, 2012 at 5.40 PM and was discharged after treatment on June 16, 2012. According to the case history of Rekha which was given by Smt.Saroj she was suffering from gastroenteritis convalation. She was examined in the labs and her CT scan was also done. The copy of the admission and discharge register was exhibited as Ex.DW-1/A and diagnosis reports as Ex.DW-1/B. Ex.DW-1/A was a running register which mentions the number of Rekha, w/o Sanjay at Sr.No.7346/12. Despite extensive cross-examination of DW-1 nothing could be brought out to show that there was manipulation in the register of Shakuntala Nursing Home and Hospital which noted the admission of Rekha in the hospital on June 09, 2012. Further DW-2 Lalita deposed that on June

09, 2012 her son was with her when they were going to the hospital after Rekha got admitted, her son received a phone call from the police station and thus he alighted at Shahabad Diary and went to the Police Station. At about 9.00 PM on June 09, 2012 Lalita received a phone call from the police stating that her son was in the police station and calling her there. When she reached at 10.30 PM she was not permitted to meet her son and she was informed that he was at the police post so at about 1.00 in the night she returned.

9. In the cross-examination learned APP asked Smt.Lalita whether she could produce the call details of her landline phone number which nobody could, being a MTNL landline number, as the same are generated only if the phone is under observation. DW-3 Bibi Lal Man, mother of Rekha also proved that her daughter was admitted in the hospital on June 09, 2012. Though she stated that when she asked the doctor he stated that it was heart attack however, from the record it is evident that Rekha was suffering from gastroenteritis convalation. She also exhibited her complaint Ex.DW-3/X and the postal receipts sent by her to various authorities informing how her daughter and son-in-law had been falsely implicated.

10. Before dealing whether the appellants have been able to probabalised their defence it would be appropriate to deal with the case of the prosecution. Indubitably, conviction for an offence punishable under Section 376 IPC can be based on the sole testimony of the prosecutrix but only if the version of the prosecutrix is reliable. In the present case prosecutrix PW-11 in her examination-in-chief admitted that both Rekha and Sanjay were living as wife and husband. She knew Rekha prior to the incident as Rekha and the husband of the prosecutrix were doing the

business of sale of liquor together and that on that day Rekha told her that a lawyer was present at her house and she could come to her house and seek legal advice for getting her husband released from legal custody. In her cross-examination, she admitted that in the year 2008 her husband Gopal had been arrested in FIR 367/08 PS Bawana under Section 324/34 IPC where the complainant was Sanjay, the appellant herein. She further admitted that her husband was in custody when the incident took place. She admitted the suggestion that her relations with Rekha were not cordial but that was not on account of the case lodged against her husband at the instance of Rekha. Once the relations between Rekha and Sanjay on one hand and the prosecutrix on the other hand were not cordial and Rekha and Sanjay were the complainants in two FIRs against her husband of which in one case he was lodged in Tihar Jail, when the incident took place, it is highly improbable that on the advice of Rekha, the prosecutrix would accompany her to meet a lawyer so that the prosecutrix's husband could be released. The contention of learned APP is that Rekha has not proved by exhibiting the FIR that she was the complainant in the case against the husband of the prosecutrix. The contention is misconceived in view of the admissions by the prosecutrix and the fact that in her statement under Section 313 Cr.P.C. Rekha has mentioned the details of the case.

11. In the rukka and the statement in Court the prosecutrix gave the colour, number DL 4C AQ 1795 of Rekha's car. When she was cross-examined on this aspect she first stated that she had noted the number on a piece of paper and later stated that she remembers the number. It is the case of the prosecutrix that Rekha caught hold of her hands and mouth when two persons Sanjay and the other she did not know, committed rape on her one

by one. Swabs and samples were taken from the body parts of the prosecutrix immediately after the incident and also from the seat covers of Rekha's car which was recovered later however, in none of the exhibits any semen was detected. In her cross-examination she admitted that there were jhuggis constructed near the spot and after the accused left, many people collected who persuaded her to make a call to the PCR. She further admitted that she did not raise any alarm when she was inside the vehicle nor she raised any alarm when she was dropped from the vehicle and the accused ran away. From the above noted version it can be clearly held that the testimony of the prosecutrix per-se does not inspire confidence. Ordinarily in every case where injuries are present on the body of the prosecutrix the same would amount to corroboration however, in the cross-examination in the present case the doctor admitted that the injuries found on the body of the prosecutrix could be self-inflicted or by the blunt object and further corroboration from the FSL report in the present case is totally missing. Rekha has proved her plea of alibi by leading defence evidence and if Rekha was not available the entire version of the prosecutrix that she went along with Rekha in her car and Rekha made Sanjay and one more person sit en-route whereafter Rekha caught hold of her hand and mouth and that two of them committed rape on her one by one cannot be relied upon. Thus the appellants are entitled to benefit of doubt.

12. Supreme Court in the decision reported as (2007) 12 SCC 57 Radhu Vs. State of Madhya Pradesh while dealing with an uncorroborated unreliable testimony of a prosecutrix held:

“6. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the

prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a "rape", if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, wrists, face, breast, thighs and back are indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case.

12. Dr. Vandana (PW 8) stated that on examination of Sumanbai, she found that her menstrual cycle had not started and pubic hair had not developed, and that her hymen was ruptured but the rupture was old. She stated that there were no injuries on her private parts and she could not give any opinion as to whether any rape had been committed. These were also recorded in the examination report (Ext. P-8). She, however, referred to an abrasion on the left elbow and a small abrasion on the arm and a contusion on the right leg of Sumanbai. She further stated that she prepared two vaginal swabs for examination and handed it over along with the petticoat of Sumanbai to the police constable, for being sent for examination. But no evidence is placed about the results of the

examination of the vaginal swabs and petticoat. Thus, the medical evidence does not corroborate the case of sexual intercourse or rape.

13. We are thus left with the sole testimony of the prosecutrix and the medical evidence that Sumanbai had an abrasion on the left elbow, an abrasion on her arm and a contusion on her leg. But these marks of injuries, by themselves, are not sufficient to establish rape, wrongful confinement or hurt, if the evidence of the prosecutrix is found to be not trustworthy and there is no corroboration.

16. The evidence of the prosecutrix when read as a whole, is full of discrepancies and does not inspire confidence. The gaps in the evidence, the several discrepancies in the evidence and other circumstances make it highly improbable that such an incident ever took place. The learned counsel for the respondent submitted that the defence had failed to prove that Mangilal, father of the prosecutrix was indebted to Radhu's father Nathu and consequently, defence of false implication of the accused should be rejected. Attention was invited to the denial by the mother and father of the prosecutrix of the suggestion made on behalf of the defence that Sumanbai's father Mangilal was indebted to Radhu's father Nathu and because Nathu was demanding money they had made the false charge of rape to avoid repayment. The fact that the defence had failed to prove the indebtedness of Mangilal or any motive for false implication does not have much relevance as the prosecution miserably failed to prove the charges. We are satisfied that the evidence does not warrant a finding of guilt at all, and the trial court and the High Court erred in returning a finding of guilt.

13. The appeals are allowed. Impugned judgment of conviction and order on sentence are set aside. The Superintendent, Tihar Jail is directed to release the appellants from jail forthwith, if not required in any other case.

14. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.

15. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 25, 2016
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