

\$

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON : JANUARY 12, 2015

DECIDED ON : FEBRUARY 09, 2016

+

CRL.A. 1762/2014, CRL.M.B.Nos.11280/14 & 11281/14

UPENDER BAHADUR @ KANCHHA & ANR..... Appellants

Through : Mr.Aditya Vikram, Advocate with
Ms.Garima Yadav & Mr.Harsh
Prabhakar, Advocates.

versus

STATE

..... Respondent

Through : Mr.Raghuvinder Varma, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is to a judgment dated 05.09.2014 of learned Additional Sessions Judge in Sessions Case No.43/13 arising out of FIR No.150/2011 registered at Police Station Sarita Vihar, New Delhi by which the appellants Upender Bahadur @ Kanchha (A-1) and Rajeev Yadav (A-2) were held guilty for committing offence under Section 376 IPC. By an order dated 23.09.2014, they were sentenced to undergo Rigorous Imprisonment for seven years with fine ₹10,000/- each.

2. Briefly stated, the prosecution case unfolded in the charge-sheet was that on the night intervening 16/17.07.2011 at about 1.00 am in a room at 2nd Floor, near house No.46, Nizamuddin Railway Station, Sarai Kale Khan, New Delhi, A-2 committed rape upon the prosecutrix 'A'(changed name) whereas A-1 committed rape upon another prosecutrix 'G'(changed name) in a room at Madanpur. The incident was reported to the police on 17.07.2011 and the Investigating Officer after recording victim 'A's statement (Ex.PW-3/A) lodged First Information Report. During investigation, both 'A' and 'G' were medically examined; they recorded their 164 Cr.P.C. statements. The appellants along with one Bhootla were arrested and medically examined. Exhibits collected during investigation were sent for examination to Forensic Science Laboratory. Statements of witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against the appellants and Bhotla. To establish its case the prosecution examined 22 witnesses. In 313 statements, the appellants denied their complicity in the crime and pleaded false implication. The trial resulted in their conviction as mentioned previously. It is relevant to note that Bhootla was discharged vide order dated 16.01.2012 and the State did not challenge the

said order. Being aggrieved and dissatisfied, the appellants have preferred the instant appeal.

3. I have heard the learned counsel for the parties and have examined the file. The incident occurred on the night intervening 16/17.07.2011 was promptly reported to the police on 17.07.2011 without any delay. In the complaint (Ex.PW3/A) 'A' gave vivid description of the incident and implicated the appellants for committing sexual assault upon her and her cousin 'G'. In their 164 Cr.P.C. statements (Ex.PW3/E and Ex.PW-4/A respectively), 'A' and 'G' both reiterated the version given to the police and specifically named the appellants for committing rape upon them forcibly at two different places. In her Court statement, the victim 'A' (PW-3) proved the version given to the police without any variation. Giving detailed account of the incident, she deposed that she along with her brother Kanchan and cousin (G) had arrived at Nizamuddin Railway Station to board a train to their village in Orissa. They could not go that day being unable to get train tickets and stayed overnight on the platform. On the next day, at about 8.00 am when they were waiting for the train, A-2 came there and informed them that he was also going to Orissa. After some time, Bhootal and A-1 also arrived there and disclosed themselves to be natives of Orissa going there by train. At around 12.20 pm when the

train arrived at the platform, they could not board it due to heavy rush. The appellants and Bhootal asked them to accompany them to Madan Pur Khadar where their sister lived. Thereafter, they were taken to Madan Pur Khadar. After some time, the accused asked them to purchase a new slippers for her cousin Kanchan as he was wearing ladies chappal. At about 5.00 p.m. the appellants and Bhootal took her and her cousin brother to Railway Station, Nizamuddin. Kanchan lost in the crowd and could not be found despite search. Thereafter, A-2 took her to the Bhootal's room situated near the Railway Station. During night, he committed rape twice upon her forcibly. In the morning A-2 brought her to Madan Pur where her sister 'G' apprised her about the rape committed by A-1 upon her during that night thrice against her wishes. Finding an opportunity, she slipped away from there and disclosed the incident to the landlord who took her and 'G' to the Police Station where her statement was recorded. Similar is the testimony of PW-4 (G), another victim. Both were cross-examined at length. However, no material infirmity could be extracted to discard their versions. Suggestion was put in the cross-examination to PW-3 that she had remained in the appellant's company from 15th to 17th of the said month with her sweet will. Another suggestion was put in the cross-examination of PW-4 ('G') that physical

relations with her were consensual. These suggestions were vehemently denied by the victims. It was heavily upon the appellants to prove that the victims had accompanied them on their own without any allurement or that physical relations were with their free consent. Nothing has emerged on record to infer if victims were acquainted with the appellants before the incident and had voluntarily agreed to accompany them or to have physical relations with consent. Material facts deposed and proved by the victims have remained unchallenged in the cross-examination. The victims had accompanied the appellants to their so-called sister's residence believing that they were also from their village, as represented by them to take shelter there so that they could catch the train to their village next day. However, during night both of them were ravished at different places. Both the victims were under fear as whereabouts of their cousin Kanchan were not known and they were dependent upon the appellants to find him out. The appellants took advantage of the situation and established physical relations by putting them in fear. In the absence of prior acquaintance or familiarity, both the victims who had already worked in Delhi for certain duration, were not expected to suddenly accompany the appellants at an unknown place from the Railway Station from where they had intended to go to their native place and also to have

physical relations with them at two different places unaware about the whereabouts of their cousin Kanchan. Had the victims been consenting parties, there was no occasion for them to lodge the report with the police promptly on the very next day.

4. Victim's ocular versions have been corroborated by medical evidence. In the MLC (Ex.PW13/A), pertaining to 'A' fresh cut marks were noticed on lower aspect of post vagina; hymen was found torn. In G's MLC (Ex.PW.13/B), fresh cut was seen on lower aspect of post-vagina; hymen was torn; tenderness around introitus.

5. PW-7 (Vinita), appellants' so called sister, has corroborated the version given by the victims. She confirmed victim's arrival along with the appellants at their house. She also deposed about the recovery of blanket on which A-1 had slept during night from the room. PW-21 (Kaleshwar Nayak), PW-7's husband, also disclosed that on 17.07.2011 the appellants and Bhootla had brought two girls who were from village adjoining to their native village along with their brother at around 3.00 p.m. The accused persons had told him that the said girls had missed their train while going to their native place and had asked him to permit them to stay there for a night. He had verified and confirmed these facts from the said girls. He further stated that in the evening they had gone for

shopping to buy chappal for victims' brother. A-1 along with a girl stayed at his house while another went to the market and did not come back. PW-5 (Dharmender Bidhuri) is the landlord, who had let out a room to PW-21 (Kaleshwar Nayak). He also supported the prosecution and deposed that on 15.07.2011, a girl had informed him that A-1 had committed rape upon her. He took A-1 to the Police Station. This independent witness had no ulterior motive to make a false statement.

6. PW-20 is Davender Singh at whose residence 'A' worked as maid for about three years since 2008. He disclosed that when 'A' left the job, she deputed her cousin 'G' at her place who had also worked at his house as domestic servant for less than a year. In the evening of 14.07.2011, 'A's cousin Kanchan and she had come to his house to take 'G' back to her native place as her brother was ill. He had allowed her to leave the house paying ₹15,000/- as her balance dues. They wanted to catch train on the next morning for their native place. In the morning of 20.07.2011, he received a call from 'A' informing commission of rape upon her and 'G'. He along with his wife and mother-in-law of his daughter went to meet them and came to know that they had already lodged the complaint. Testimony of this uninterested witness lends credence to the version given by the victims.

7. No sound reasons prevail to disbelieve the victims merely because they did not raise alarm at the time of commission of rape. It did not make their testimonies unreliable or unbelievable. The appellants took advantage of their situation; both the victims were separated at different locations and whereabouts of their brother Kanchan were not known. They were stranger to the location and were in fear. When both 'A' and 'G' met in the morning and came to know about the plight of each other, they gathered courage and finding an opportunity 'A' immediately rushed to the landlord who lived in the neighbourhood and apprised him about the incident. The appellants had misrepresented themselves to be the residents of Orissa. Record reveals that A-1 is a resident of District Sahebganj, Jharkhand and A-2 is from District Muradabad, U.P. PW-7 (Vinita) was not their real sister as claimed by them. Victims' statements have been corroborated by medical evidence as well as FSL report (Ex.PW22/J) which showed semen in the microslides of one of the prosecutrix. The appellants failed to establish that the victims were consenting parties. In 313 statements, they did not even claim that physical relations with the prosecutrix were with their free consent.

8. The Trial Court has dealt with all the relevant contentions. The judgment based upon fair appreciation of evidence warrants no intervention.

9. The appeal lacks merits and is dismissed. Trial Court record be sent back forthwith along with the copy of the order. Intimation be also sent to Superintendent Jail.

(S.P.GARG)
JUDGE

FEBRUARY 09, 2016/sa