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

RESERVED ON : MAY 26, 2016

DECIDED ON : JULY 28, 2016

+ **Crl.A.1059/2015 & Crl.M.B.7901/2015**

SANJAY

.... Appellant

Through : Mr.Rajesh Dua with Mr.Saurabh
Duggal and Mr.Ankit Mathur,
Advocates.

Versus

STATE

..... Respondent

Through : Mr.Tarang Srivastava, APP.
SI Roshan Lal, PS Nangloi.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 09.09.2015 of learned Additional Sessions Judge in Sessions Case No.142/13 arising out of FIR No.538/06 registered at Police Station Nangloi by which the appellant-Sanjay was convicted for committing offence punishable under Section 376/506 IPC. By an order dated 14.09.2015, he was sentenced to undergo Rigorous Imprisonment for ten years with fine ₹20,000/- under Section 376 IPC and Rigorous Imprisonment for three years with fine ₹5,000/- under Section 506 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case, as set up in the charge-sheet was that on 21.11.2005 between 8.00 a.m. to 10.00 a.m. at H.No.3/138A, Veena Enclave, Nangloi within the jurisdiction of Police Station Nangloi, the appellant committed rape upon the prosecutrix 'X'

(assumed name), aged around 16 years and criminally intimidated her. The incident was reported to the police on 1.6.2006. After recording victim's statement (Ex.PW-2/A), the Investigating Officer lodged First Information Report. 'X' was medically examined, she recorded her 164 Cr.P.C. statement. Exhibits collected during investigation were sent to FSL for examination. Statements of witnesses conversant with the facts were recorded. The accused was arrested and medically examined. Upon completion of investigation, a charge-sheet was filed against him in the court. To establish its case, the prosecution examined eleven witnesses. In 313 statement, the appellant denied his complicity in the crime and pleaded false implication. He examined DW-1 (Geeta), DW-2 (Chander Kanta), DW-3 (WSI Savita), DW-4 (Dhanni Devi) and DW-5 (Satish Kumar) 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 minutely. Admitted case is that the victim's father had expired on 28.11.1996. The appellant, her father's friend, used to visit them at the time of his treatment before death. It is also admitted that after the death of her father, PW-5 (Durga Devi), her mother and the appellant started living together as 'husband' and 'wife' at Nangloi. The appellant was also a married person having four children. Initially, relationship between PW-5 (Durga Devi) and the appellant was cordial. However, after relations became strained subsequently, Durga Devi (PW-5) returned to her residence at Trilok Puri.

4. Appellant's conviction is primarily based upon the sole testimony 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.

The incident whereby the prosecutrix 'X' was ravished by the appellant allegedly took place on 21.11.2005. The occurrence was not reported to the police and no FIR was lodged on that day or soon thereafter. It has come on record that the prosecutrix had narrated her ordeal to her mother on the same day after she returned from her office at about 2.30 or 3.00 p.m. The victim and her mother deposed that they had approached the police at Police Station Nangloi to lodge the complaint and had met one Police Officer Savita who had advised them not to initiate any action for the sake of welfare of her daughter. She thought it better to maintain silence and did not lodge the report. The explanation offered by the victim and her mother for inordinate delay in lodging the FIR inspires no confidence. PW-11 (SI Urmil Sharma), the Investigating Officer in the cross-examination disclosed that she had enquired from Sub-Inspector Savita about the victim's visit to the Police Station to lodge FIR. However, she denied if anything of that sort had happened. The appellant examined WSI Savita as DW-3. She categorically claimed that on 21.11.2005, the prosecutrix and her mother had not visited her and she had not persuaded them not to lodge the complaint against the accused. No complaint, whatever, was lodged any time against SI Savita for abdicating her responsibility. The matter was not brought to the notice of the concerned SHO or higher officers. So much so, the complainant or her mother did not apprise their close relatives about any such incident. It has further come on record that the prosecutrix was being

teased for the last about six or seven months before the said incident. PW-2 (X) and PW-5 (Durga Devi), 'X's mother, deposed that the accused used to show blue films to the prosecutrix during that period. No such blue film was recovered during investigation. Again, no plausible explanation has been offered as to why the accused was not confronted for outraging 'X's modesty and why the incident was not conveyed to the police. It is highly unbelievable that after this kind of episode, the complainant (PW-5) would permit her daughter to remain in the appellant's company. PW-6 (Hemant) victim's maternal uncle, did not testify if he was informed about any rape incident on 21.11.2005 or soon thereafter. Only on 29.5.2006 when an FIR was lodged against the accused, PW-5 (Durga Devi) informed him that the accused had committed rape upon her daughter on 21.11.2005. PW-7 (Keval Kishan @ Sonu), victim's brother also was not informed about such incident allegedly occurred on 21.11.2005 and soon thereafter. The prosecutrix was not taken for medical examination on 21.11.2005 to infer if she had sustained any injury on her body including private parts.

5. Relations between the parties were tense and strain. Admittedly, a quarrel had taken place between the accused on one hand and PW-6 ((Hemant), 'X' maternal uncle and PW-7 (Keval Kishan @ Sonu), victim's brother, on the other hand on 28.05.2006. It has further come on record that a 'Kalandra' under Section 107/151 was lodged against the appellant. The police had recorded statements of PW-6 (Hemant) and that of PW-7 (Keval Kishan @ Sonu) in the said 'Kalandra'. The appellant was arrested in the said Kalandra on 29.05.2006 and was released on 30.05.2006. It is relevant to note that in the said Kalandra neither PW-6 nor PW-7 accused the appellant for committing rape upon 'X' on 21.11.2005. PW-5

admitted in the cross-examination that she and her brother did not reveal anything about the rape/blue films in the 'Kalandra' lodged under Section 107/151 Cr.P.C. It has not been explained as to why the incident of rape was omitted to be disclosed to the police that day.

6. Admittedly, complaints (Ex.PW-2/DA) and (Ex.PW-2/DB) dated 7.12.2005 and 23.12.2005 were lodged by PW-5 (Durga Devi) against the accused. In the said complaints also there is no mention if the prosecutrix was sexually assaulted any time. These complaints were quite comprehensive and duly typed. These disclose that on 21.11.2005, PW-5 (Durga Devi) had left the appellant's company along with her children and had gone back to her house at Trilok Puri. It was, however, not disclosed if on 21.11.2005 any such rape occurrence had taken place.

7. On 01.06.2006, admittedly the prosecutrix's mother-complainant Durga Devi took assistance of media people including one Sohail to register case for the incident dated 28.05.2006 when allegedly her son was thrashed by the appellant. She along with media people went to Police Station Nangloi and lodged the FIR. Mr.Sohail or any other person from the media has not been examined. The victim's mother was working in Krishi Bhawan, Ministry of Defence. She was not so novice not to initiate action against the accused for the heinous offence allegedly committed on 21.11.2005. In her court statement, she even implicated the accused for committing rape upon her after her husband's death. She reasoned that she did not raise alarm at that time to protect her honour. Subsequently, on accused's promise to be helpful to her in life, she reconciled and started living as his 'wife'. It has come on record that victim's father and the appellant were friends since childhood and had visiting terms. PW-2, 6 and

7 did not corroborate PW-5's version if the appellant had committed rape upon her (PW-5) before they started having live-in-relation.

8. PW-2 in her Court statement disclosed that on 21.11.2005 in the absence of her mother the accused had given beatings to her and had established physical relations with her forcibly. She, however, did not explain as to why she did not raise any alarm that time or soon thereafter. She did not contact her mother or any other relatives including her brother and maternal-uncle to inform them about the incident. She did not get herself medically examined. Nothing has emerged if she had suffered any injuries, whatsoever, on her body including private parts. Nothing has surfaced if she resisted the sexual assault or had struggle marks on her body. Her torn clothes were not seized. As per FSL report (Ex.PW11/D), no semen could be detected on exhibit '1'(Cotton Wool Swab on a stick described as 'HVS'). FSL report does not connect the accused with the crime. MLC (Ex.PW-10/B) reveals that no external injuries on any body part of the prosecutrix were found at the time of her medical examination. Hymen was found torn; OS admitted one finger. No other incriminating article like bed sheet was seized. No independent witness from the neighbourhood was examined. PWs 2 and 5 have been confronted with their statements recorded during investigation and certain facts stated before the court did not find mention therein. The improvements made by them have not been explained. PW-5 (Durga Devi) went to the extent of deposing that on her return, the victim had apprised that the accused had inserted finger in her private parts and licked/sucked her breast. She even stated that before committing rape, the accused had caused injuries on victim's lips and her shamiz/inner cloths were torn. Her daughter had given beatings to the

accused by legs. These facts do not find mention in 'X's statement. It is highly unbelievable that PW-5 (Durga Devi) would maintain any relation with the accused after this horrible incident. She admitted in the cross-examination that the accused continued to harass her on one or the other pretext by snatching her purse; not allowing her to go to office and by touching her feet etc.

9. It appears that after a quarrel took place on 28.05.2006, the prosecutrix was tutored to lodge the FIR against the appellant for committing rape upon her on 21.11.2005. The prosecution has not produced on record any cogent evidence to establish as to what was the exact age of the prosecutrix on the day of incident. As per Birth Certificate (Ex.P-1) her date of birth was stated to be 31.05.1990. There is some alteration in Ex.P-1 where the name of 'Reena' has been struck off to be substituted with 'X's name. Even if this date of birth is taken as correct, on the date of lodging FIR, the prosecutrix was above 16 years of age. It seems that the date of incident i.e.21.11.2005 was chosen to show that the prosecutrix was below 16 years of age on that day. DW-5 (Satish Kumar) disclosed that name of the child was not mentioned at the time of recording entry in the birth register Ex.DW-5/A. He further deposed that the cuttings on Mark 'X' have not been attested by the concerned Sub-Registrar.

10. Geeta, accused's wife, has come to support him as DW-1. She denied to have any strained relation with the accused. She disclosed that on 28.05.2006 a quarrel had taken place with her husband and he was got arrested under Section 107/151 Cr.P.C. by the victim's mother. Her husband was innocent. She claimed that on 21.11.2005, she was present at her home and her husband had gone on duty as a 'driver'. It was appellant's

case from the very inception that the victim's mother had insisted him to transfer his house in her name and on his refusal, he was falsely implicated in this case. This defence seems plausible as relations between the parties were quite strained. The victim or her mother did not disclose as to why a quarrel had taken place on 28.05.2006 with the accused leading to the lodging of Kalandra under Section 107/151 Cr.P.C.

11. Early reporting of the occurrence by the informant with all its vivid details gives an assurance regarding truth of the version. In the case of *Jail Prakash Singh v.State of Bihar & Anr.* 2012 CRI.L.J.2101 the Supreme Court held:-

“The FIR in criminal case is vital and valuable piece of evidence though may not be substantive piece of evidence. The object of insisting upon prompt lodging of the FIR in respect of the commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of actual culprits and the part played by them as well as the names of eye-witnesses present at the scene of occurrence. If there is a delay in lodging the FIR, it loses the advantage of spontaneity; danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of large number of consultations/deliberations. Undoubtedly, the promptness in lodging the FIR is an assurance regarding truth of the informant's version. A promptly lodged FIR reflects the first hand account of what has actually happened, and who was responsible for the offence in question.”

12. Considering the inordinate delay in lodging the FIR and the strained relations between the accused and victim's mother and other relatives, possibility of the accused to be involved in this case falsely cannot be ruled out. The statement of the prosecutrix in the absence of any other

corroborating material cannot be taken on its face value to base conviction. In *Radhu vs. State of Madhya Pradesh* in CrI.A.No.624/2005 decided on 14.09.2007, Supreme Court observed:

“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.

(emphasis given)

13. In *Atender Yadav vs. State of Govt.of NCT of Delhi* 2013 (4) JCC 2962, this Court observed:

37. The prosecutrix in the present case was of 11 years of age when she was allegedly raped by her father. She was a student of V standard during that period. She was of 13 years of age when her statement in court was recorded and by that time she got upgraded in 6th standard. If we just look at various statements given by the prosecutrix she has been consistent in saying that she was raped by her father during the period November-December 2006. Her statement also gets support from the corroborative deposition of her mother (PW-4) and her brother (PW-5) to a large extent, but if we look at the surrounding circumstances in which this case was registered, one gets suspicious and doubtful over the truthfulness and veracity of various statements made by the prosecutrix i.e. the statement (rukka) before the police on the basis of which the FIR was registered, her statement under Section 164 of Cr.P.C. before the Magistrate and the statement made by her in the court. We cannot shut our eyes from the fact that the prosecutrix is a child and more often the children can be easily swayed away and are prone to tutoring, therefore the statement of the child witness should always be scrutinized with great care and caution, more particularly in a case where there is a serious hostility between the husband and wife and there are fair chances for the child to act at the behest of one such party in his/her pursuit of settling scores against the other party. In such cases, not only the court has to search for reliable corroborative evidence either oral or documentary, as a matter of prudence, but must also feel satisfied that such a child is not playing in the hands and dictation of any family member or other person who may be in a better position to have a command and dominance over the child and who has some sinister agenda of settling scores with the other party named as accused in the commission of any crime. This precaution is necessary because child witness is amenable to tutoring and often lives in the world of make-believe. The cases of false implication in rape cases are not uncommon and in some cases parents do persuade gullible or obedient daughter to make false charge of rape either to take revenge or for wreaking vengeance on the accused. We are not here suggesting that in

every case the testimony of child witness should be looked upon with suspicion, but before the same is believed as a reliable and truthful statement, due care and caution should be taken looking into all the facts and circumstances of the case especially where the accused happens to be a member of the family and there is another member in a commanding and dominating position to influence and tutor the child in getting the case registered against the other for settling his own scores and vendetta.

74.The desire to take revenge is an evolved outgrowth of our human sense of unsatisfied reciprocity. We can trace innumerable instances of revenge in the history and also in our Hindu mythology. The feeling of revenge destroys the rationale and a common sense even in an otherwise wisest person. At times the feeling of revenge is so strong that the avenger himself also fails to realise the impact of his deeds and easily get swayed by his emotions to wreck vengeance. In order to take revenge he does not even mind doing gravest of act. An avenger may use various means to take revenge. One such means can be process of law i.e. by false implication of the aggressor.

75.The present case is based on somewhat similar facts. In this case the mother of the Prosecutrix, driven by the feeling of revenge, has gone to the extent of falsely implicating her husband for the rape of their daughter, being completely ignorant of the shame she has brought to her entire family including herself, her daughter and her husband by her such derogatory, disgraceful, intolerable and unacceptable conduct. At the first blush of this case, it appeared to us that the father has really committed such a heinous offence with his own daughter, however a deep scrutiny of all the evidences taken together gives an altogether different picture. Although such cases of false implication in offences especially like rape are rare but they are not uncommon. In the matter of Radhu vs. State of Madhya Pradesh reported in 2007 CriLJ 4704, the

Hon'ble Apex Court took a view that a false charges of rape are rare and there have been also rare instances where the parents have persuaded a colourable and obedient daughter to make a false charge of rape either to take revenge or extort money or to get rid of financial liability. Relevant paragraph of the judgment is reproduced herein below:-

“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.”

14. In the light of the above discussion, this Court is of the view that the prosecution has failed to establish this case against the accused beyond reasonable doubt and he deserves benefit of doubt. Conviction and sentence recorded by the Trial Court are unsustainable and are set aside.

15. The appeal is allowed. Pending application(s) stand disposed of. Copy of this order be sent to the concerned Jail Superintendent for information and necessary action.

16. Trial court record be sent back along with a copy of this order. The appellant be released forthwith if not required to be detained in any other case.

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

JULY 28, 2016/sa