

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

**RESERVED ON : 2nd MARCH, 2017
DECIDED ON : 3rd MARCH, 2017**

+ CRL.A. 555/2014
CHOTTAN KUMAR Appellant
Through : Ms.Saahila Lamba, Advocate.

versus

THE STATE (NCT OF DELHI) Respondent
Through : Ms.Manjeet Arya, APP.

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

S.P.GARG, J.

1. Present appeal has been preferred by the appellant – Chottan Kumar to challenge the legality and correctness of a judgment dated 11.02.2014 of learned Addl. Sessions Judge in Sessions Case No.61/13 arising out of FIR No.120/12 PS Jaitpur by which he was convicted for committing offence punishable under Section 376 IPC and was sentenced to undergo RI for seven years with fine ₹10,000/-.

2. The prosecution case as set up in the charge-sheet was that on 09.04.2012 at around 12.30 p.m. in a room at first floor, House No.FB/II, J.J.Colony, Madanpur Khadar, New Delhi, the appellant committed rape upon the prosecutrix 'X' (assumed name) aged around 21 years without her consent. The information about the occurrence was conveyed to the police on 14.04.2012. The Investigating Officer after recording victim's statement

(Ex.PW6/A) lodged First Information Report. 'X' was medically examined. Statements of the witnesses conversant with the facts were recorded. The appellant was arrested and taken for medical examination. Upon completion of investigation, a charge-sheet was filed against the appellant in the Court and the prosecution examined nine witnesses to substantiate its case. 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. Appellant's conviction is primarily based upon the sole testimony of the prosecutrix 'X'. Settled legal position is that conviction can be based upon the sole testimony of the prosecutrix provided it is reliable and is of sterling quality.

4. In the present case, number of material inconsistencies and infirmities have emerged in the statements of the prosecution witnesses making it unsafe to base conviction of the appellant on the solitary statement of the prosecutrix without independent corroboration. The occurrence took place on 09.04.2012. However, the incident was reported to the police after a delay of five days. No plausible explanation has been offered by the prosecutrix for not reporting the incident to the police promptly. PW-4 (Rajender Prasad) – victim's husband in the examination-in-chief itself disclosed that he had come to know about the incident of rape on 09.04.2012 in the evening when he found her wife 'X' weeping. He also did not offer any plausible explanation as to why the matter was not reported to the police soon thereafter. It has further come on record that earlier also the appellant had allegedly molested the prosecutrix. However, no complaint whatsoever was lodged against him any time.

5. In her Court statement, PW-6 'X' informed that on 07.04.2012 at around 08.30 a.m. her daughter – Pooja aged around two and a half years had gone to the appellant's rented room. When she went there to bring her back, the appellant was found watching something on his mobile. When the appellant asked her to see the film on mobile, she declined, but on his persistence, she saw the film on the mobile and found it was a dirty film. Even at that time she did not lodge any complaint with her husband about appellant's conduct and behaviour. She had no occasion to see any movie on the appellant's mobile when he was alone in his room.

6. On 09.04.2012 at about 12.30 p.m. when the alleged incident took place, the prosecutrix did not raise any alarm whatsoever. She remained completely mum for number of days and reported the incident to the police only on 14.04.2012. Nothing has come on record if any resistance whatsoever was offered by the prosecutrix to avoid the commission of rape. The appellant was not armed with any weapon to cause real apprehension in her mind not to raise alarm. Even after the commission of crime, after the departure of the appellant, the prosecutrix maintained complete silence and did not bring it to the notice of her family members residing on the ground floor. It has come on record that victim's brother-in-law and her family members lived on the ground floor and were present on the day of occurrence. Soon after the lodging of the FIR, the victim was medically examined vide MLC (Ex.PW-3/A). No external injuries whatsoever were found on her body to ascertain if there were any marks of violence to infer resistance.

7. The victim or her family members never asked the appellant to vacate the tenanted premises though he had allegedly indulged in

molestation prior to the occurrence. Soon after the victim's family members came to know about the physical relationship with the appellant, allegedly the victim's husband went to the appellant's room and asked him to vacate the tenanted room; it were vacated by him next day itself. It appears that the physical relationship (if any) with the prosecutrix was with her free consent. Initially, the victim's family members had no inkling about the physical relationship on 09.04.2012 and when they came to know about it, pressure was seemingly put upon the victim to narrate the entire incident and thereby she in order to save her skin, implicated the appellant for commission of rape.

8. No independent public witness was associated at any stage of investigation. No statement of any neighbour was recorded to find out the appellant's conduct and behaviour. It is on record that the parties had visiting terms. The appellant was residing in the tenanted accommodation for the last about two years and there was no complaint whatsoever.

9. PW-4 (Rajendra Prasad) in the cross-examination disclosed that initially the complainant had disclosed that the appellant had only 'grabbed' her. She had not revealed if rape was committed by him on that day. Number of discrepancies have emerged in the statement of the prosecutrix and possibility of her having physical relationship with consent is not ruled out. Victim's statement cannot be taken on its face value to base conviction without independent corroboration which is lacking in the instant case.

10. 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."

11. In 'Abbas Ahmed Choudhury v. State of Assam', (2010) 12 SCC 115, observing that a case of sexual assault has to be proved beyond reasonable doubt as any other case and that there is no presumption that a prosecutrix would always tell the entire story truthfully, the Hon'ble Supreme Court held :

"Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only

the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1."

12. Hon'ble Supreme Court in the decision reported as (2012) 7 SCC 171 '*Narender Kumar Vs. State (NGT of Delhi)*' held :

"23. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character.

However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring

home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide Tukaram Vs. State of Maharashtra (1979) 2 SCC 143 and Uday Vs.. State of Karnataka 2003 II AD (S.C.) 358)

24. The prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. The conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of the prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected."

13. Resultantly, the appeal is allowed. Conviction and sentence recorded by the Trial Court are set aside. The appellant shall be released forthwith if not required to be detained in any other case.

14. Trial Court record be sent back forthwith with the copy of the order.

15. Intimation be sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

MARCH 03, 2017 / tr