

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

RESERVED ON : 01st MAY, 2017

DECIDED ON : 15th MAY, 2017

+ CRL.A. 1223/2013

BIJENDER

..... Appellant

Through : Mr.Udai Raj Singh, Advocate.

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through : Mr.Amit Gupta, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Challenge in this appeal is a judgment dated 01.08.2013 of learned Addl. Sessions Judge in Sessions Case No. 107/11 arising out of FIR No. 145/2011 registered at Police Station Badarpur by which the appellant – Bijender was held guilty for committing offences under Section 363/376 IPC. By an order dated 27.08.2013, he was sentenced to undergo RI for seven years with fine ₹5,000/- under Section 376 IPC and RI for four years with fine ₹1,000/- under Section 363 IPC. Both the sentences were to operate concurrently.

2. In nutshell, the prosecution case as set up in the charge- sheet was that on the night intervening 27/28.05.2011 at about 01.00 / 01:30 A.M., the appellant after kidnapping the prosecutrix 'X' (assumed name) from the lawful guardianship of her parents took her to his house after administering stupefying substance and committed rape upon her. Investigating Officer

after recording victim's complaint (Ex.PW-3/B) lodged First Information Report. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. The appellant was arrested and medically examined. Statements of witnesses conversant with the facts were recorded. Exhibits collected during investigation were sent to Forensic Science Laboratory for examination. Upon completion of investigation, a charge-sheet was filed against the appellant for commission of offence under Sections 363/376 IPC. In order to establish its case, the prosecution examined twelve witnesses in all. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime and pleaded false implication without examining any witness 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. At the outset, it may be mentioned that the appellant's conviction is primarily based upon the sole testimony of the prosecutrix 'X'. It is settled position that the testimony of prosecutrix is sufficient to base conviction and it needs no corroboration provided it is found credible and inspires confidence. The Court may, however, if it is hesitant to place implicit reliance on it, look into other evidence.

4. In the instant case, vital discrepancies and infirmities have emerged in the statements of the prosecution witnesses making it unsafe to base conviction on the solitary testimony of the prosecutrix without independent corroboration. The burden to prove its case beyond reasonable doubt remains upon the prosecution and it cannot take the benefit of the weakness of the defence of the accused.

5. Admitted position is that the prosecutrix and the appellant were acquainted with each other before the incident. The appellant used to live in her neighbourhood. The Trial Court was of the view that X's age was more than 16 years on the day of occurrence; her date of birth being 07.05.1995 as recorded in her birth certificate (Ex.PW-10/G). This date of birth has remained unchallenged during trial.

6. In her complaint (Ex.PW-3/B), the complainant disclosed that on the night intervening 27/28.05.2011 she was sleeping in her house. At around 01.00 – 01.30 night, the appellant came inside her house; forced her to inhale some stupefying substance and took her in his lap to his house; the appellant committed rape upon her. She was kept under quilt to hide; as a result of which, she became unconscious. On regaining senses, she found herself present inside her house. She was taken for medical examination.

7. In her 164 Cr.P.C. statement (Ex.PW-1/B) recorded on 10.06.2011, 'X' gave an entirely different and conflicting version before the learned Metropolitan Magistrate. She informed that when she was sleeping at night time in her house, the appellant sprinkled something on her face; as a result of which, she became unconscious. When she came to senses, she saw that her brother had taken her back to her house. She regained senses after 3 or 4 days. She did not know as to what had happened with her.

8. In her Court statement as PW-3, 'X' deposed that on the night intervening 27/28.05.2011 at around 02.00 a.m. when she was sleeping in her house, the appellant came; pressed her mouth and made her to inhale some intoxicant; due to which, she became little unconscious. The appellant took her to his room by lifting her and committed rape upon her. Thereafter, he put her under the heap of clothes / quilt. After some time, when she

regained consciousness, her family members brought her home. The police was informed and her statement (Ex.PW-3/B) came to be recorded. In the cross-examination, she disclosed that at the time of occurrence her mother, elder brother and younger sister were sleeping along with her in the said room on the ground. She did not know as to what was poured by the appellant on her face. She further disclosed that her brother Dharmender had returned from his job at around 12.00 midnight and her mother had served food to him. Her father was sleeping on the road outside the room. After inhaling intoxicant substance, she became totally unconscious and regained it after about 3 – 4 days. She did not know what had happened with her during these 3 – 4 days. She further admitted that at the appellant's house, his mother and brother used to live. She did not try to raise noise at the time of commission of rape. She denied the suggestion that she wanted to marry the appellant with whom she had love affairs.

9. On scrutinizing the statements of the prosecutrix recorded at various stages of investigation / trial, it appears that she is not consistent throughout. She has changed her version at different stages. She was found present inside the appellant's house at the time of occurrence. It is highly unbelievable that in the presence of her so many family members in the house, the appellant would make her to inhale some stupefying substance and take her in his lap without any reaction whatsoever from her side. The prosecutrix who was purportedly semi-conscious did not raise any alarm / hue and cry to attract the attention of other family members sleeping nearby. Even after reaching the appellant's residence, she had no abnormal behavior and did not raise any alarm. She did not complain to appellant's family members about her forcible abduction. In the morning when her family

members came to know about her presence inside the appellant's house, she was brought back from there. The investigating agency did not associate appellant's family members during investigation. It is unclear if appellant's mother or brother were present inside the house at the time of occurrence. Seemingly, it is a case of elopement with consent. The prosecutrix had gone to the appellant's house and was found present there. She maintained complete silence during the entire episode. Her conduct is highly unreasonable and unnatural. Nothing has come on record to show if at the time of commission of rape, any resistance was offered by her. She was medically examined promptly vide MLC (Ex.PW-3/A). No external injuries whatsoever were found on her body to infer forcible rape. She was found conscious and oriented. It belies her statement that she regained consciousness after 3 – 4 days of the incident. There was no mark of violence on her body including private parts.

10. Possibility of the prosecutrix to be a consenting party cannot be ruled out. Since 'X' was above 16 years of age on the day of occurrence, physical relationship (if any) with the appellant with consent did not constitute offence under Section 376 IPC. Nothing has come on record to show if any overt act was played by the appellant to 'take' or 'entice' her to his house. Appellant's defence under Section 313 Cr.P.C. is quite reasonable and plausible. Since both the prosecutrix and the appellant belonged to two different castes, there was resentment by X's family members to the marriage between them.

11. This Court is conscious that the statement of the 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, the testimony of the prosecutrix is highly unreliable / wavering.

12. In 'Rai Sandeep @ Deepu v. State of NCT of Delhi', (2012) 8 SCC 21, the Supreme Court commented about the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused. It held :

"In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should

have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

13. In 'Tameezuddin @ Tammu v. State (NCT of Delhi)', (2009) 15 SCC 566, the Supreme Court held :

"It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that

this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

14. In the present case, the testimony of the prosecutrix, the associated circumstances and the medical evidence leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. It shows several lacunae. There are various serious contradictions in her statement and actions, from which it can safely be concluded that she has not presented the true facts.

15. In the light of above discussion, I am of the considered view that the prosecution has failed to establish its case against the appellant beyond reasonable doubt. The appellant deserves benefit of doubt. The appeal is allowed; conviction and sentence awarded by the Trial Court are set aside. The appellant shall be released forthwith if not required to be detained in any other case.

16. 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

MAY 15, 2017 / tr