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

% *Date of Decision: December 05, 2017*

+ **CRL.A. 1646/2013**

NEERAJ

..... Appellant

Through: Mr.Vikram Singh, Advocate
with appellant produced from
custody.

versus

STATE GOVT. OF NCT OF DELHI

..... Respondent

Through: Ms.Rajni Gupta, AP for the
State.

PRATIBHA RANI, J. (Oral)

1. This appeal has been preferred by the appellant assailing the judgment 18th September, 2013 and order on sentence dated 25th September, 2013 passed in Sessions Case No.150/13 (pertaining to FIR No.114/2009 under Sections 376/452 IPC, PS Bawana) whereby he has been convicted for committing the offence punishable under Section 458/376 IPC and sentenced as under:

- (i) U/s 458 IPC : to undergo RI for seven years
with fine of ₹10,000/- and in
default of payment of fine to
undergo RI for one year.
- (ii) U/s 376 IPC : to undergo RI for ten years and
to pay a fine of ₹15,000/- and in
default of payment of fine to
undergo RI for two years.

2. Process of law was set into motion on recording of DD No.28A dated 22nd May, 2009 at PS Bawana that wireless operator had informed at 11:28 pm about the information received from lady Constable Vimal Kanta, 2629 PCR that '*Pooth Khurd Ram Singh ka makaan Naresh ke ghar Rajender Joon wali gali ek aadmi ne ijjat lut li. Maine use band kar rakha hai Ph.No.9999615960.*'

3. The above DD was assigned to SI Mahender Pratap Singh (PW-14) who along with Ct.Rahul Bedi (PW-11) left for the spot. Case FIR No.114 dated 23rd May, 2009 was recorded on the basis of the statement made by the prosecutrix 'R' (name withheld to conceal identity) wherein she alleged that on 22nd May, 2009 the appellant/convict herein entered her house and committed rape on her. After investigation, the charge-sheet was filed and case was committed to the Court of Session.

4. The appellant was charged for the offence punishable under Section 458/376 IPC to which he pleaded not guilty. Prosecution examined 18 witnesses to substantiate its case. The appellant was also examined under Section 313 Cr.P.C. to explain the incriminating evidence appearing against him. He has produced three witnesses in his defence.

5. After discussing the evidence adduced, the learned trial Court found the statement of the prosecutrix to be inspiring confidence and held the appellant guilty and sentenced him in the manner as stated earlier.

6. Mr.Vikram Singh, learned counsel for the appellant has filed detailed written submissions highlighting improbabilities and

infirmities in the version of PW-1 'R' – the prosecutrix, PW-11 Ct.Rahul Bedi, who accompanied the first Investigating Officer to the spot and PW-14 SI Mahender Pratap – the first Investigating Officer. It has been contended that PW-11 Ct.Rahul Bedi was not even present at the police station as is proved from his CDRs and the MLC of the convict Ex.PW7/B wherein the name of the constable in the Column 'Brought By' is mentioned as Ct.Mukesh No.1228/OD. It has also been contended that the explanation given by PW-11 Ct.Rahul Bedi that he forgot his mobile at his residence on that date is also not acceptable for the reason that mobile was constantly changing location as is proved from his CDRs.

7. Learned counsel for the appellant has drawn the attention of this Court to the fact that entire version of the prosecutrix is unbelievable for the reason that as per her, she stepped out of the room at 11.15 pm to check the water motor and she has called PCR at 11.27 pm. Within a period of 12 minutes, as per the prosecutrix, she has checked the motor, she was caught by the appellant, gagged and dragged inside the room and after tearing her clothes, she was raped. Thereafter she had the necessary time to lift her clothes as well lock and key and also pushed the convict and bolted the door from outside as well locked it and this 12 minutes also includes the time that after wearing her clothes, she had gone to the terrace and taken the mobile phone of Sonia – wife of the tenant and at 11.27 pm even call was made to the police station which in itself appears to be highly improbable. Not only that, as per PW-14 SI Mahender Pratap, the crime team consisting of SI Joginder Singh had reached the spot. However, from

the official record of SI Joginder from crime team it is proved that he had already made departure entry vide DD No.13A dated 22nd May, 2009 at Special Staff, Outer District at 5.00 pm before proceeding on leave w.e.f. 23rd May, 2009 to 14th June, 2009 i.e. much before the occurrence, hence he had no reason to be present at the spot or to make a statement Ex.PW14/DA on 23rd May, 2009 before SI Mahender Pratap.

8. Learned counsel for the appellant has submitted that the appellant and the prosecutrix have been taken to Maharishi Balmiki Hospital soon after the alleged incident. Both of them were medically examined immediately after the occurrence and samples were taken by the Doctors who had examined them. Semen stains found on the underwear of the prosecutrix and the DNA generated from the blood sample of the appellant have been subjected to DNA examination. **The DNA report proved that the human semen found on the undergarments of prosecutrix does not match that of the appellant/convict.**

9. Learned counsel for the appellant/convict has contended that despite there being scientific evidence to prove that the appellant was not the person who committed the rape, the appellant has been convicted on the basis of the statement of the prosecutrix which is wholly untrustworthy and was not sufficient to convict him.

10. Learned APP for the State while supporting the judgment of the learned trial Court has submitted that learned trial Court has scrutinized the evidence both orally and documentary before arriving at the conclusion that the prosecutrix was raped by the convict in her

room. Learned APP for the State while relying upon the judgments *Karnel Singh Vs. State of M.P.*, (1995) 5 SCC 518; *State of U.P. Vs. Nahar Singh (Dead) and Others*, (1998) 3 SCC 561 and *Vikram Kumar Vs. State (NCT of Delhi)*, 2013 SCC OnLine Del 1807 has submitted that any flaw in the investigation cannot be a ground to extend the benefit of doubt to the convict.

11. In respect of the CDRs, learned APP has submitted that there is no evidence to prove that the two numbers alleged to be belonging to the convict and the prosecutrix were in use by them. Learned APP has submitted that in view of the statement of the prosecutrix that she was raped by the convict in her room and she was not a consenting party to any such incident, there was no reason to discard her testimony as conviction can be based on the solitary statement of the prosecutrix. Thus, the learned trial Court was justified convicting the appellant by relying upon the testimony of prosecutrix.

12. To appreciate the rival contention raised at the bar, I have carefully perused the judgment and scrutinized the evidence in detail. The learned trial Court based its finding on the consideration of the evidence of the prosecutrix. It is not in dispute that the prosecutrix was a lady aged about 30 years and mother of two grown up children aged about 13 and 11 years. She was from a rural background being resident of village Pooth Khurd and thus capable of offering strong resistance. The convict aged about 25 years was well known to her being resident of the same village.

13. In order to test the veracity of the deposition of PW-1 'R' – the prosecutrix, it may be relevant to make reference to her statement

Ex.PW-1/A, which formed basis of registration of FIR 114/2009 at PS Bawana.

14. PW-1 'R' - the prosecutrix in her statement Ex.PW-1/A has stated that she was a house wife and her husband Naresh had expired about three years ago. Her elder son, aged about 13 years stayed in hostel in Sonapat and her daughter aged about 11 years had gone to her maternal uncle's house during vacations. The prosecutrix 'R' was living alone in the said house. On the date of occurrence i.e. 22nd May, 2009 at about 11:15 pm she came out of her room to check the water motor. Her tenant's wife namely Sonia was sleeping on the terrace of the house. When the prosecutrix came out to check the motor, the appellant/convict Neeraj who is also resident of the same village, entered her house and after gagging her mouth, dragged her inside the room and bolted the door from inside. She raised alarm but as it was night time, nobody could come. The convict Neeraj gagged her mouth with a cloth and committed rape on her. Thereafter she pushed him with her leg and came out of the room and locked the room from outside. She ran towards the terrace of the house and informed PCR from the mobile of her tenant. The police reached the spot and in the meanwhile the convict Neeraj removed the window Air Conditioner and came out of the room through the opening of Air Conditioner but in the process fell on the staircase. He was overpowered by the police officials. The convict received injuries due to fall on the staircase. She prayed for legal action against the convict for committing rape on her.

15. During her examination before the Court she improved her

version as under:-

- (i) On the date of occurrence at about 11.15 pm, when she came out to check the water motor, accused Neeraj came all of a sudden, caught her from behind, put one hand on her mouth and dragged her inside her house.
- (ii) Her clothes were torn and removed by him and thereafter he committed forcible sexual intercourse with her.
- (iii) She thereafter pushed him and came out of the room and bolted the door from outside.
- (iv) Thereafter she wore her clothes and informed the PCR.
- (v) She made three calls and on the third call, PCR arrived.
- (vi) She did not allow the PCR officials to open the door and insisted for the presence of SHO before unlocking the room.
- (vii) SHO, PS Bawana reached the spot. But, by the time SHO opened the door, accused Neeraj had managed to remove the window Air Conditioner of her room and had placed it on the bed and through the opening for the Air Conditioner, he jumped over the staircase and was apprehended by the police.
- (viii) Thereafter her statement Ex.PW1/A was recorded.
- (ix) She was taken to Maharishi Balmiki Hospital where she was medically examined.

During cross examination, her version is as under:

- (i) There were three tenants at her house, one on the ground floor and two on the first floor.

- (ii) Two ladies (wives of the two tenants) alongwith their kids were available in the house at the time of incident and were sleeping on the terrace with her children.
- (iii) Rooms of the tenants was at a distance of 5 mtrs. from her house.
- (iv) Police calls were made from the phones of those ladies by her.
- (v) Male members of the family had gone for night duty.
- (vi) Mobile phone of the tenant was inside the room which was put on charging and she made a call to the police from that mobile phone.
- (vii) She woke up the ladies present upstairs and informed them about the incident.
- (viii) Police did not make any inquiries from those ladies or from the neighbours including her tenants.
- (ix) One lady constable accompanied her to the hospital for medical examination.
- (x) She did not receive any injury in this occurrence.

16. PW-4 Ct.Manita received the information about the requisition of a lady constable from PS Bawana. PW-4 Ct.Manita has stated that she took the victim to Maharishi Balmiki Hospital for medical examination. Although the number and time of DD entry vide which the lady constable was requisitioned, was not mentioned, in the report under Section 173 CrPC, the endorsement on the rukka shows that PW-4 Ct.Manita met only in Maharishi Balmiki Hospital.

17. PW-6 ASI Ram Dutt was on PCR duty on the night intervening 22/23-05-2009 when he received a call at 11.27 pm which was recorded in the Register Ex.PW6/A. PW-6 ASI Ram Dutt is the first

person who reached the spot. He stated that the complainant/prosecutrix was standing at the gate of her house which was bolted from outside. She refused to open the door in his presence and insisted that she would open the door only in presence of SHO, PS Bawana. Therefore, the SHO was called. SHO reached the spot and then lock was opened. When he opened the door, the accused was found present in the room trying to escape from the room through the opening where the Air Conditioner was fitted and the Air Conditioner was found lying on the bed. He did not state about any other call received by PCR except at 11.27 pm.

18. During cross examination, PW-6 ASI Ram Dutt has stated that in the presence of SHO, two tenants residing in the building also came there. SHO requested the tenants to send a lady with the prosecutrix but the male member refused for the same and one out of those two tenants sat with the prosecutrix when she was taken for medical examination.

19. PW-10 HC Vijay Kumar – the Duty Officer has stated that on 22nd May, 2009 on the basis of information received from PCR, DD No.28 Ex.PW10/A in respect of the incident was recorded at 11.28 pm. He also stated that on 23rd May, 2009 at 4.05 am on receipt of rukka sent by SI Mahender Pratap, he recorded FIR Ex.PW10/B.

20. As per the chargesheet, PW-11 Ct.Rahul Bedi had accompanied SI Mahender Pratap to the spot. His statement is to the effect that on receipt of DD No.28A when they reached the spot, they met prosecutrix 'R' who informed that the convict was locked inside the room. There was opening for the Air Conditioner in the staircase and

they noticed the accused coming out from the room through the said opening but he fell down in that process and sustained injuries. The accused was apprehended by them and thereafter the convict as well as the prosecutrix were taken to Maharishi Balmiki Hospital. There in the hospital, SI Mahender Pratap recorded the statement of prosecutrix and sent the rukka through him for registration of FIR. After registration of the FIR, he again returned to Maharishi Balmiki Hospital and handed over the documents to the IO where the prosecutrix, the accused and lady Ct. Manita was also present and from there, they all left for the spot. Crime team had already reached there by that time.\

21. In cross examination, PW-11 Ct.Rahul Bedi has admitted the correctness of his mobile number as well landline number of Police Station Bawana and also admitted the correctness of CDR of his mobile showing location of his mobile at different places other the police station.

22. PW-14 SI Mahender Pratap to whom DD No.28A was marked, has stated about his visit to the spot alongwith PW-11 Ct.Rahul Bedi and convict appellant being apprehended when he fell in the staircase in his attempt to escape through the Air Conditioner opening. He has stated that the room of the prosecutrix was locked and he alongwith Ct.Rahul Bedi, prosecutrix and accused proceeded in Maharishi Balmiki Hospital, Pooth Khurd and simultaneously requested the Duty Officer, PS Bawan to send a lady constable to the hospital. He has stated that lady Ct.Manita met them at the hospital where prosecutrix and accused were examined vide MLCs Ex.PW7/A and B. Thereafter

he recorded the statement of prosecutrix and sent the rukka through PW-11 Ct.Rahul Bedi for registration of the case. He also seized the pullandas handed over by the doctor at the hospital and thereafter left the hospital for the spot where he met the crime team. PW-14 ASI Mahender Pratap has stated that SI Joginder inspected the spot and photographs were taken by Ct.Kamal of crime team. Thereafter he prepared the site plan and seized the bedsheet lying on the double bed and arrested the accused.

23. PW-14 ASI Mahender Pratap also stated that he recorded the supplementary statement of prosecutrix and that of Ct.Rahul Bedi and thereafter the prosecutrix was relieved and he returned to the police station. On the same day accused was produced before learned MM but due to late hours, he was not taken by the Jail Authorities and he was kept in the lock up in 'Rahdari' and again produced before the learned MM next day and then sent to judicial custody.

24. In his cross examination, PW-14 ASI Mahender Pratap has stated that he recorded statement Ex.PW14/DA of SI Joginder on 23rd May, 2009. He has further stated that he was not aware whether SI Joginder proceeded on earned leave w.e.f. 23rd May, 2009 to 14th June, 2009 and had already made departure entry vide DD No.13A dated 22nd May, 2009 at Special Staff, Outer District at 5.00 pm. PW-14 has admitted that the doctor in the hospital while preparing the MLC records the name of the person who brings the patient/person to be medically examined in the hospital. He admitted that on the MLC Ex.PW7/B of the accused, in the column 'Brought By', name of Ct. Mukesh is mentioned at point-X. PW-14 has also admitted that the

tenants were present at the spot but he did not record the statement of any of those tenants or neighbours till the investigation remained with him. He was unable to recollect if the clothes of the prosecutrix were torn when he visited the spot. He denied the suggestion that the accused did not suffer injury while jumping from the window.

25. PW-12 W/Inps. Purnima, the subsequent IO has collected the DNA report Ex.PW12/A and filed the supplementary chargesheet. **During her cross examination, she stated that she collected the call details of the mobile phone of 'R' – the prosecutrix and that of accused Neeraj. She took the call details through e-mail and thereafter analysed the same. During analysis it was found that two numbers were in contact with each other but she did not remember whether on the date of incident, there were calls made from both the mobile phones to each other.**

26. PW-16 Sh.A.K.Srivastava, Assistant Director, Biology, DNA Unit, FSL, Rohini has proved the report Ex.PW12/A which is to the following effect:-

'Result of analysis, DNA profile from the source of Ex.8 (blood sample of accused Neeraj) is not matching with the DNA profile from the source of Ex.2 (underwear described as undergarment of victim). Conclusion, the DNA profiling (STR analysis) perform on exhibits provided was sufficient to conclude the source of Ex.8 (blood sample of accused Neeraj) is excluded for bring responsible for the biological fluid i.e. semen present on the Ex.2 (undergarment described as undergarments of the victim).'

27. No doubt, normally the statement of the prosecutrix does not require any corroboration and is sufficient to base the conviction of the accused if it inspires confidence but in every case her statement cannot be treated as gospel truth as held by Apex Court in the case Abbas Ahmad Choudhary V. State of Assam 2010 Cri.L.J. 2060 as under:-

“We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully.”

28. It is well settled that the testimony of the prosecutrix in a case of rape if acceptable, truthful and reliable can be utilized without corroboration. However, it has been held by the Apex Court in the decision reported as State of Maharashtra vs. Abdul Hafiz Faroki & Ors. 1998 CriLJ 3603 that if the testimony of the prosecutrix does not inspire confidence and suffers from infirmities, then conviction cannot be based on her testimony.

29. In her cross-examination PW-1 ‘R’ has stated that the tenants in her house had gone to their respective workplace during night time and their wives were sleeping on the terrace. She called the PCR by entering the room of the tenant which was not locked and the mobile was lying there in charging position. This statement of PW-1 is falsified from the statement of the PCR witness and IO SI Mahender Pratap (PW-14) who stated that the male tenants were very much

present in their respective house and one of them even accompanied her to the hospital. While in her complaint she stated that she rushed to the terrace, where Sonia, wife of her tenant, was sleeping and called from her mobile, even Sonia has not been cited as a witness by the prosecution though she was the first person to be informed about the occurrence and see her torn clothes and physical and mental condition so as to provide her necessary assistance and emotional support. Although PW-1 stated that her clothes were torn before committing the rape but the clothes seized by the Doctor were not observed to be torn by the learned Trial Court. The most important aspect of the matter is that during her examination before the Court, PW-1 has stated that she called the police thrice but as per PW-6 ASI Ram Dutt, there is only one DD entry at 11.27 p.m. and it is prosecutrix's own version that at 11.15 p.m. she left her room to check the water-motor and thereafter the convict, who reside in the same village, entered her house, dragged her to her room and after bolting the room and tearing her clothes committed the rape. The MLC of the prosecutrix does not show any injury on her person except some bruise on her left chest which she had not attributed to the convict.

30. The injuries on the person of the convict have been attributed to fall on the staircase when he was trying to escape through the Air Conditioner window. PW-1 has nowhere stated that she caused any injury to the convict while resisting as the convict was forcing himself upon her. The scene of the crime has been photographed wherein the room of the prosecutrix can be seen in locked condition and the outer frame of the window Air Conditioner also partly broken. The space is

not enough even for a grown up child to escape through that hole unhurt whereas the convict in this case was a fully grown-up person.

31. The manner in which the investigation has been conducted casts a serious doubt on the truthfulness of the version of PW-11 Ct.Rahul Bedi, PW-14 SI Mahender Pratap as well statement of the prosecutrix i.e. PW-1 'R'. PW-6 ASI Ram Dutt has specifically stated that SHO reached the spot on being insisted by the prosecutrix but the report under Section 173 CrPC is totally silent on his visit to the spot. The MLC Ex.PW7/B of the accused specifically records that he was brought by Ct.Mukesh. This lends credence to the defence version that PW-11 Ct.Rahul Bedi was not even in the police station and never visited the spot alongwith PW-14 SI Mahender Pratap which is also established from his CDR.

32. Though the PCR officials i.e. PW-6 ASI Ram Dutt and the local police i.e. PW-11 Ct.Rahul Bedi and PW-14 ASI Mahender Rana were present at the spot, it is not explained as to why she insisted for the presence of SHO. PW-6 ASI Ram Dutt has stated about the visit of SHO to the spot but no DD entry informing him about the situation or his departure entry for the spot is placed on record. Even PW-11 Ct.Rahul Bedi and PW-14 SI Mahender Pratap to whom the DD was assigned, did not state either on the endorsement on the rukka or in their statement that the SHO visited the spot and thereafter the lock was opened. Rather the endorsement on the rukka records that the crime team has been informed and after medical examination which was done at 2.20 am (date changed to 23rd May, 2009), the door was opened which is just in conflict with the statement of PW-6 ASI Ram

Dutt who stated that when the SHO came to the spot on being insisted by the prosecutrix, the room was opened.

33. The direction and distance of the place of occurrence from the police station is mentioned to be East/5 kms. Surprisingly despite PCR van being present even before the local police arrived, the time of preparation of MLCs of prosecutrix is 2.20 am though Maharishi Balmiki Hospital is in the same area i.e. Pooth Khurd. It has taken almost three hours to take the prosecutrix to the nearby hospital in the same village but when it comes to sending rukka, though it has not come on record that PW-11 Ct.Rahul Bedi was having any separate conveyance from PW-14 SI Mahender Pratap, rukka which was dispatched from Mahrishi Balmiki hospital at 3.40 am, FIR was registered at 4.05 am i.e. within 25 minutes which includes his travelling time as well.

34. It is a case where the prosecutrix is a mature lady aged about 30 years. The convict is well known to him being of the same village. The convict being not armed with any weapon at that time, did not suffer any injury at her hands while offering resistance. It was month of summer and even her tenants were sleeping at a distance of about 5 mtrs. or on the terrace and were well in a position to hear the alarm, if any, raised by her and come to her rescue.

35. In the decision reported as Pratap Misra & Ors. Vs. State of Orissa (1977) 3 SCC 41, the Apex Court has observed as under :-

“8. In the first place, the admitted position is that the prosecutrix is a fully grown up lady and habituated to sexual intercourse and was pregnant. She was experienced inasmuch as she had acted as a midwife. It is

true that the learned Sessions Judge was impressed with the demeanour of this witness, but that itself is not sufficient to prove the case if the opinions of medical experts show that it is very difficult for any person to rape single-handed a grown up and an experienced woman without meeting stiffest possible resistance from her. In the instant case, according to the evidence given by PW-1, A-1 entered the room and committed sexual intercourse with very great force and violence against her consent. Indeed if this was so, we should have expected the stiffest possible resistance from her resulting in injury over the penis or scrotum of the accused or abrasions over other parts of the body caused by the nails of the prosecutrix.'

36. Taylor, in the Principles and Practice of Medical Jurisprudence, Vol. II, dealing with the cases of rape on a grown up woman observed as follows :

'Unless under the influence of drink and drugs or asleep or ill, a fully grown girl or adult woman should be able to resist a sex assault. We should expect to find evidence of a struggle to avoid sexual contact or penetration, and may well feel uncertainty about the real nature of an alleged assault in its absence.'

37. The scientific evidence i.e. DNA report Ex.PW12/A has totally exonerated the appellant to be the person responsible for commission of offence of rape on the prosecutrix. The scientific evidence has been ignored by the learned ASJ without any justification despite the legal position being well settled in the decision reported as Premjibhai Bachubhai Khasiya vs. State of Gujarat & Anr. 2009 CriLJ 2888 and State of Gujarat vs. Jayantibhai Somabhai Khant 2015 CriLJ 3209.

38. The testimony of prosecutrix 'R' not only suffers from infirmities as pointed out above but it is not supported even by medical evidence and thus it does not inspire confidence. Therefore, in my view, the learned Trial Court grossly erred in relying upon the testimony of the prosecutrix to base the conviction of the appellant.

39. In view of above discussion, the judgment passed by the learned Trial Court holding the appellant guilty of the offence punishable under Section 458/376 IPC and the sentence awarded thereunder cannot be sustained.

40. The impugned judgment and order on sentence are set aside.

41. The appeal is allowed.

42. The appellant be released forthwith if not wanted in any other case.

43. LCR be sent back alongwith copy of this order.

44. A copy of this order be sent to the concerned Jail Superintendent for information and compliance.

45. As prayed, copy of the order be also given dasti to learned counsel for the appellant under the signature of Court Master.

PRATIBHA RANI
(JUDGE)

DECEMBER 05, 2017
'hkaur/pg/st'