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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A. 44/2014**

Judgment reserved on : 22nd August, 2017
Judgment pronounced on: 28th August, 2017

MINTU KUMAR

..... Appellant

Through: Ms. Inderjeet Sandhu, Advocate

versus

STATE GNCT OF DELHI

..... Respondent

Through: Mr. Akshai Malik, APP for the State.

CORAM:
HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

Crl. M. A. No. 8461/2017 (Exemption)

Exemption allowed subject to just exceptions.

Application stands disposed of.

CRL.A. 44/2014

1. The present appeal has been instituted under Section 374(2) of the Code of Criminal Procedure against the impugned judgment dated 07.11.2013 and order on sentence dated 11.11.2013 by which the appellant has been convicted for the offences under Section 328, 366, 368 and 376 of the Indian Penal Code (hereinafter referred to as 'IPC'). The present appellant has been sentenced to undergo:-

- (i) rigorous imprisonment for a period of seven years with fine of Rs.4,000/-, in default thereof to further undergo rigorous imprisonment for a period of one year U/s 328 of IPC.

- (ii) rigorous imprisonment for a period of seven years and to pay a fine of Rs.4,000/- in default thereof to further undergo rigorous imprisonment for a period of one year under Section 366 of IPC.
- (iii) rigorous imprisonment for a period of seven years and to pay a fine of Rs.4,000/- in default thereof to further undergo rigorous imprisonment for a period of one year under Section 368 of IPC.
- (iv) rigorous imprisonment for a period of ten years and to pay a fine of Rs.10,000/- in default thereof to further undergo rigorous imprisonment for a period of two years under Section 376 of IPC.

All the sentences were directed to run concurrently.

2. The case of the prosecution as observed by the Trial court is as under:

“That on 06.02.2010 prosecutrix (name withheld being a case u/s 376 IPC) came to the Police Station-Bharat Nagar and got recorded her statement to ASI Dev Raj which is to the effect that, she lives at D-629, Wazirpur J.J. Colony, Delhi with her mother in a rented house (Kiraye Ka Makaan) and she is the permanent R/o Village Harihar Bainsa, PS Banns Gaon, Distt. Gorakhpur, U.P. She studies in twelfth class (Barvi Kaksha). In the room adjacent to her rented room, one boy named Mintu lives. Who used to look at her while she going and coming and used to try to strike a conversation with her (Jo Mujhe Aate jate Dekhta Rehta Tha Aur Mere Sath Baat Cheet Karne Ki Koshish Karta Tha). On 02.02.2010, at about 12:00 noon she was basking in the sun (Dhoop Sek Rahi Thi), while sting in the Tikona Park 115 bus stop, Wazirpur J.J. Colony, then Mintu with one glass of juice after taking the same from the juice rehri which was passing, came there and asked her to drink the juice, however, she refused to drink the juice but Mintu after too much insisting her (Zid kar ke)

forcibly made her to drink the juice and thereafter she came under the influence of intoxication (Nasha ho gaya) and Mintu took her in an unknown jhuggi. When she regained consciousness, Mintu was found lying with her (leta hua tha). From 02.02.2010 to 04.02.2010 Mintu forcibly established physical relations with her without her consent. On 04.02.2010 at about 6.30 p.m. Mintu had left the jhuggi for smoking cigarette without closing the door of the jhuggi and she finding an opportunity came out from the jhuggi. Prior to this Mintu was not allowing to her go out from the jhuggi. After coming out from the jhuggi she reached at Bus Stop of (Bus No.) 115 and there, after taking mobile from one old gentleman (Bujurg) she called Nisha Aunty at Bus Stop of (Bus No.) 115 and from here Nisha Aunty took her (Prosecutrix) to her Nisha Aunty) house. Nisha Aunty called her (prosecutrix) mother at her house. On that day she (Prosecutrix) did not tell anything to her mother and Nisha Aunty. On 05.02.2010 she (prosecutrix) told about the entire incident to her mother and Nisha Aunty. Because of public shyness (lok laaj ke karan), they did not come to lodge the report with the police on 05.02.2010. That today, on 06.02.2010 she alongwith her mother and Nisha Aunty has come to the police station and has told about the incident which had taken place with her, (Apni Aap Beeti Aapko Batlai) on which her statement has been recorded.....”

3. After committal of the case, the Court of Sessions framed charges under Section 328/366/368/376 IPC against the appellant. After the prosecution examined 17 witnesses, statement of the appellant was recorded wherein he took the plea of false implication and stated that prosecutrix had been sending love letters to him.

4. Ms. Inderjeet Sandhu, learned counsel for the appellant argued that the foundation of the entire prosecution story stands demolished in view of the testimony of PW-11 Smt. Kiran; that the prosecutrix being a major of 18 years, which is duly proved as per the school records voluntarily accompanied the appellant; that the Trial Court erred in convicting the appellant on the basis of sole testimony of prosecutrix which is shaky, unreliable and not worthy of credence; that as per the history given by the prosecutrix in the MLC, she has admitted that she eloped and had an affair with the appellant; that there is no evidence of intoxication and therefore her testimony is highly improbable; that no missing complaint was lodged by the mother of the prosecutrix despite the fact that the prosecutrix was missing for 3 days. To substantiate her arguments, learned counsel for the appellant relied upon the judgment of ***Rai Sandeep @ Deepu Vs State*** reported in ***2012 (131) DRJ 3 (SC)*** to show that the solitary version of the chief examination of the prosecutrix cannot be taken as gospel truth, ***Narender Kumar Vs State*** reported in ***2012 (7) SCC 171*** to show that if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial which may lend assurance to her testimony, ***Tameezuddin @ Tammu*** reported in ***2009 (15) SCC 566*** to demonstrate that if the story of the prosecutrix is improbable and belies logic it need not be accepted.
5. On the other hand, Mr. Akshai Malik, learned APP for the State vehemently opposes these arguments and supports the judgment of conviction and order of sentence passed by the trial Court and submitted that it is a well settled law that the sole testimony of

the prosecutrix can be acted upon and made the basis of conviction without being corroborated in material particulars and that the appeal lacks merit and is liable to be dismissed.

6. I have considered the rival submissions made by learned counsel for the parties and perused the record.
7. Before proceeding to examine the impugned judgment of the court below and facts of the case, it is obligatory to refer to the sole testimony of the prosecutrix.

Testimony of the prosecutrix

8. PW1 prosecutrix in her Examination in Chief deposed as under:

“On 02.02.2010, at about 12 noon, I was sitting in Tikona Park, behind bus stop of bus no.115. I was living in my village in District Gorakhpur. I had come to Delhi for coaching and for my treatment as I had developed Jaundice. Mintu, accused present in the court resides in our neighbourhood. He came in the park. He started talking to me. He offered me juice which I refused but he again insisted to take the juice. So I took the juice offered by him. I started feeling dizziness. In my unconscious state, he took me to some jhuggi but I do not know in which jhuggi he took me. When I regained consciousness, I found that the zip of my pant was unzipped and he was lying along with me. When I objected to it, he slapped me and he started fiddling with my body and then he forcibly established physical relations with me. For three days he kept me confined in that jhuggi and he used to go himself to bring food for me and while leaving the jhuggi he used to lock it from outside. He used to accompany me for attending the call of nature and did not allow me to talk to anybody around.

On 04.02.2010 at about 6.30 or 7 p.m. he went to buy a cigarette leaving the door of the jhuggi opened. Taking advantage of the situation I ran away from that jhuggi. I was weeping at the bus stand of bus no.115. There I requested an old man to use his mobile and telephoned Nisha Aunty from his mobile phone. I told Nisha Aunty that I was standing at bus stand of bus no.115 and requested her to take me from that place. Nisha Aunty came to the bus stand and took me to her own house and from there she telephoned my mother. On that day I did not disclose anything to anybody including my mother and Nisha aunty. On 04.02.2010 my mother came to the house of Nisha aunty but did not take me back home and requested Nisha aunty to keep me in her house on that night. Next day on 05.02.2010 when husband of Nisha aunty left for his office, I disclosed everything to Nisha aunty as well as to my mother. Thereafter also we remained silent due to fear of the society.

On 06.02.2010 the family members of Mintu started abusing my mother. When my mother requested them not to misbehave Mintu extended threats to us. He also said that if any police complaint will be lodged he would kill me and my mother. Thereafter we went to police station and lodged the report. My complaint bears my signature at point A. Complaint is Ex.PW1/A. I was got medically examined from BJRM Hospital. My clothes were not seized by the police or by the hospital authorities because I had washed the clothes which I was wearing. Accused was arrested from his house in my presence on 07.02.2010. His arrest memo is Ex.PW1/B which bears my signature at point A. Personal search memo of accused is Ex.PW-1/C which bears my signature at point A. I was student of Intermediate, Inter College, Malhan Par, Gorakh Pur....”

9. During her cross examination, she denied the following suggestions put to her by the defence counsel:

- That the appellant came to tikona park to talk to her;
- that when she had regained consciousness, her pant was unzipped and that the appellant was lying by her side;
- that the appellant had slapped her and started fiddling with her body;
- that the appellant used to go out to take food for her;
- that the appellant used to accompany her for attending the call of nature;
- that the appellant did not allow her to talk to anybody while attending the call of nature;
- that her mother came to her aunt's house on 04.02.2010 and requested the aunt to keep her on that night;
- that the next day when the aunt's husband left for office, she disclosed to her aunt about the incident of rape;
- that on 06.02.2010 the appellant started threatening her mother.

10. Indisputably, it is a well settled proposition of law that the sole testimony of the prosecutrix can be made the basis of conviction without being corroborated. Infact even doctor's evidence is not required to record a finding of guilt of the offender in a rape case when the evidence of the prosecutrix is found wholly reliable. However, assistance can be had from the doctor's evidence when the evidence of the prosecutrix is found

somewhat shaky. There is no legal compulsion to look for corroboration of the testimony of the prosecutrix unless there are compelling reasons which necessitate the Court for corroboration of her statement. In the instant case, as there are many improvements, the testimony of the prosecutrix appears to be shaky, thus this court deems it appropriate to rummage through the medical evidence, FSL report and other relevant testimonies placed on record.

MLC

11. PW4 Dr. Ekta Kale had testified in court that there was alleged history of sexual assault. On examination, the patient was found in the conscious state. There was no injury mark over the whole body and that there was no injury mark over private part. There was slight white discharge present and hymen was perforated. No scar mark was present (old or habitual) and Index finger admitted easily.
12. In view of the above, it is abundantly clear that the testimony of the prosecutrix does not find support from the medical evidence on record and no definite opinion can be given regarding rape. Infact, it is revealed in the history given by the prosecutrix herself that she had intercourse with the neighbor since two months and she ran away with the boy on 02.02.2010 and returned on 04.02.2010 and later took a bath and changed her clothes. Moreover, the result of analysis as per the FSL report shows that blood and semen could not be detected on the relevant exhibits and thereby the story of the prosecution is also falsified by the FSL report.

Other relevant testimonies

13. PW5 Smt. Jamurti Devi, mother of the prosecutrix to whom the facts of the incident were narrated by the victim deposed as under:

“Earlier I used to reside at house No. 629/630, JJ Colony, Wazir Pur. My husband expired in the year 2008. Prosecutrix Geeta is my daughter. My daughter used to live in the village in District Gorakhpur. She came to me in Delhi this year from my native place. On 2.2.2010, my daughter was ill. She went to park near the bus stop of bus route No. 115. She did not returned to the home, then I traced to locate her in the locality. On 4.2.10 I received a telephone call from Nisha that my daughter was at the bus stop of bus route no. 115. Nisha has brought my daughter from the bus stop to her house. Thereafter, I went to the house of Nisha. My daughter was also present there. My daughter was weeping. My friend Nisha asked me to not to take my daughter, so my daughter remained with her for one day. I brought my daughter to my home on 5.2.2010. Then my daughter narrated me the story regarding the incident. Then accused who used to olive near my house along with his brother came to me and started fighting with us. My daughter had told me that accused had intoxicated her and had taken her somewhere and also threatened her to kill and had committed rape upon her. She further told me that she came out of the house when accused had gone out to purchase a cigratee. We went to the police station on 6.2.2010 and the case was registered on the statement after her medical examination.

14. PW12 Smt. Nisha, the aunt to whom the prosecutrix claimed to have narrated the facts of the incident deposed as under:

“I know Jmurti Devi and her family from my age of 14/15 years. On 04/02/2010, at about 7:15 pm, I

received a phone call from Geeta on my mobile phone and she asked me to come at the bus stand of bus route no. 115 and to take her along with me. I called to Jmurti Devi, mother of Geeta, about her phone call. I went to the bus stand and brought the said Geeta at my house where Smt. Jmurti Devi was also present. I offered the prosecutrix tea etc. Jmurti Devi asked me to keep the said Geeta at my house for one or two days. At that time, Geeta was scared and nervous. On 04/02/2010, she did not tell anything and she slept after having her dinner. In the afternoon of 05/02/2010, Geeta told me that she was with accused Mintu in the same locality where accused Mintu had raped her. I informed this fact to the mother of prosecutrix. On the next day, I was taken by Smt. Jmurti Devi to talk to Mintu in a park in the area where accused Mintu was not at all scared. Rather, he was showing his anger. Thereafter, in the evening, I along with prosecutrix and Smt. Jmurti Devi went to the police station and then the report was lodged. In the night, Geeta was medically examined in a hospital at Jahangir Puri. I narrated the entire facts stated above by me to the police also who recorded my statement.”

15. PW10 Sh. Om Prakash who rented out the room to the prosecutrix deposed as under:

“I am also having my another house at D 629-630, J.J. Colony, Wazirpur. I had rented out one room at the first floor of the house to Geeta, her mother and brother on a monthly rent of Rs.600/- p.m. They were residing there for the last two and half years. Accused Mintu present in court today was also my tenant in the same house on another room on the same 1st floor. He was residing there with his brother. He was also my tenant for the last two and half years....”

16. At this juncture, it is significant to reproduce the testimony of PW-11 Smt. Kiran who claims that the appellant and the prosecutrix had come to her house on 02.02.2010. She deposed in her Examination in Chief as under:

“ The above mentioned house is owned by my husband. It is two storey constructed. On the night of 02/02/10, one boy namely Mintu Kumar, who is present in the court today (witness has correctly identified the accused) along with one girl namely Geeta came to me and they asked for one room on rent. I told him the rate of rent as Rs. 700/- per month, out of which he gave Rs.200/- as advance and the rest of the amount was to be paid by him after 7th after getting his salary. The condition of the girl was normal. After two days i.e. in the evening of 04/02/10, the accused along with the said girl left my house in my absence even without informing me. Thereafter, they never visited my house. Police came and asked about the stay of the accused and the prosecutrix at my house and I narrated the above mentioned facts to the police also.”

17. This witness in her cross examination stated as under:

“Rupees 200/- were handed over to me by the girl. No toilet is constructed in my house. We use public toilet which is situated at some distance from my house. The said girl also used to go the said public toilets. It is correct that we have to go from main road to the said public toilets from our house and there is no other way. The girl used to go alone to the toilets. Accused went to his work during his stay in my house. The girl used to talk to the neighbours. The girl did not make any complaint either to me or to any other neighbours that she was forcibly brought by the accused. I asked about the relationship from them to which they replied

that they were husband and wife and belonging to the Muslim community, as I did not see any signs of Hindu married woman like mangal sutra or vermellion on her forehead. Police obtained my signature on one paper. My statement was recorded by the police on 07/02/2010. The accused and prosecutrix lived happily for two days in my house. It is wrong to suggest that I am before the court at the instance of police.”

18. From the perusal of the testimonies, it is revealed that PW10 who is the landlord, rented out one room of the first floor of his house to the prosecutrix, her mother and brother on a monthly rent of Rs.600/- p.m. who were residing there for the last two and half years. The appellant was also a tenant in the same house on another room on the same first floor for two and a half years. Thus, it appears that the prosecutrix and the appellant were acquainted to each other.
19. Moreover, PW11 stated that on 02.02.2010 the appellant went along with the prosecutrix to PW11 to ask for one room on rent. The condition of the prosecutrix was normal at the time they met PW11. After two days i.e. in the evening of 04.02.2010, the appellant along with the prosecutrix left her house without even informing PW11. Further, it shows that PW1 used to go alone to the toilets which was outside the house and she used to talk to the neighbours. Appellant went to his work during his stay in this house. The girl did not make any complaint either to PW11 or to any other neighbours that she was forcibly brought by the appellant. When PW-11 asked about the relationship from the

prosecutrix and appellant, they claimed to be husband and wife. It emerges from above that the prosecutrix infact knew the appellant very well and that the prosecutrix accompanied the appellant voluntarily from the very beginning. The history stated by the prosecutrix in the MLC reveals that she ran away with a boy cannot be lost sight of.

20. Also, it is to be noted that so far as registering of an FIR was concerned, the prosecutrix and the mother were prompt and fearless, however, the mother of the prosecutrix at the time when her daughter went missing made no effort to file a missing complaint. It has also been revealed from the testimony of PW-11 that the prosecutrix used to use the public toilets which is outside her house and she used to go alone to the toilets. Had the prosecutrix been taken forcibly by the appellant to the jhuggi, she would have raised an alarm before all the neighbours or would have availed of this opportunity to run away from the clutches of the appellant.
21. Moreover, when the victim managed to run away from the jhuggi at about 6.30 p.m or 7.00 p.m. when the appellant went to buy a cigarette leaving the door of the jhuggi opened, the first person she called to inform was her aunt (Nisha) and not the mother who took her from the bus stop. On that day, she (Prosecutrix) did not tell anything to her mother and Nisha aunty. On 05.02.2010, she (prosecutrix) narrated the entire incident to her mother and Nisha aunty. As per PW12, the mother of the prosecutrix had asked her to keep the prosecutrix at her house for one or two days. But, as per

PW10 she went to the house of PW11 (Nisha) and her daughter was weeping. Her friend Nisha (PW11) had asked her not to take her daughter, so her daughter remained with her for one day.

22. A careful analysis of all the testimonies of the prosecution witnesses shows that the story of the prosecution stands demolished by the testimony of their own prosecution witness PW11. Moreover, the sole testimony of the prosecutrix is also contradicted by the MLC report.
23. In this regard, it is important to mention the case of ***Rai Sandeep @ Deepu Vs. State*** reported in ***(2012) 8 SCC 21***, wherein it has been held that :

"15. 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."

24. In *Tameezuddin Vs. State (NCT of Delhi)* reported in (2009) 15 SCC 566, the Apex Court held as under:

"9. 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. We are of the opinion that story is indeed improbable."

24. In *Dilip and Anr. v. State of M.P : AIR 2001 SC 3049*, the Apex Court held as under:

*“The gang rape is alleged to have been committed at about 2 p.m., in her own house, situated in a populated village by the side of the main road where people were moving on account of Holi festival. The prosecutrix did raise hue and cry to the extent she could and yet none was attracted to the place of the incident. The prosecutrix is said to have sustained injuries, also bladed from her private parts staining her body as also the clothes which she was wearing. **This part of the story, is not only not corroborated by the medical evidence, is rather belied thereby.** The presence of blood-stains is not confirmed by forensic science laboratory or by the doctors who examined the prosecutrix. Her own maternal aunt to whom the story of sexual assault has been narrated by the prosecutrix gives a version which does not tally with the version of the prosecutrix as given in the Court. **The Court is finding it difficult to accept the truthfulness of the version of the prosecutrix that any sexual assault as alleged was committed on her in view of the fact that her narration of the incident becomes basically infirm on account of being contradicted by the statement of her own aunt and medical evidence and the report of forensic science laboratory.** Therefore, it is difficult to hold the prosecutrix in the case as one on whose testimony an implicit reliance can be placed.”*

25. Undoubtedly, minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. A prosecutrix complaining of having been a

victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the Court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony.

26. Though, there is no bar in convicting the appellant on the basis of sole testimony of the prosecutrix, but the same can only be done, if it inspires confidence and appears to be natural and truthful. If there are infirmities present in the sole testimony of the prosecutrix and she was contradicted by other evidence such as the medical evidence, testimony of PW11 and FSL report, a conviction would not be possible on such testimony of the prosecutrix. In the instant case, the testimony of the prosecutrix is not natural and consistent with the case of the prosecution. There is no medical evidence to support the offence of rape. The case of the prosecution appears to be highly improbable and undoubtful in the light of the evidence and circumstances of the present case.
27. In the result, the appeal is allowed.
28. The conviction and sentence awarded to the appellant is set aside and he is acquitted of the charges framed against him.
29. The jail superintendent is directed to release the appellant forthwith if not required in any other case.

Crl. M (Bail) 952/2017

In view of the order passed in the appeal, the present application is rendered infructuous.

Application stands disposed of.

SANGITA DHINGRA SEHGAL, J.

AUGUST 28th, 2017

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