

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

% Decided on: 15th February, 2017

+ CrI.M.A.14459/2016(Spl. Leave for filing appeal) & CRL.A.664/2015

K Petitioner/Appellant
Represented by: Mr. A.K. Dey, Adv.

versus

THE STATE (NCT OF DELHI) & ANR Respondent
Represented by: Mr. Hirein Sharma, APP for the
State with SI Manoj Singh, PS
Mehrauli.
Mr. Bal Kishan, Adv. for R-2.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

MUKTA GUPTA, J. (ORAL)

1. The title of the appeal and application has been changed to conceal the identity of the petitioner/prosecutrix.
2. The appellant/petitioner challenged the impugned judgment dated 26th February, 2015 passed by the learned Additional Sessions Judge acquitting the respondent for offence punishable under Section 376 IPC by filing the appeal which was numbered as CrI.A. No.664/2015. However, in view of the decision of the Supreme Court reported as 2015 (10) Scale 444 Satyapal Singh Vs. State of M.P. & Ors. the appellant/petitioner has now filed CrI.M.A. 14459/2016 seeking special leave to appeal against the impugned judgment.

3. FIR No.305/2008 was registered under Sections 376 IPC on 15th June, 2008 on the statement of the petitioner who stated that she was living with the accused/respondent, her adopted son in a rented house and working as maid. Her husband had divorced her after three months of her marriage whereafter she adopted the respondent who was son of her brother's sister-in-law. She alleged that the respondent used to beat and molest her and on 14th June, 2008 at about 2.00 am, he committed sexual intercourse with her forcibly and left the house early in the morning. The petitioner was medically examined and her underwear seized. On 26th June, 2008 statement of the petitioner was recorded under Section 164 Cr.P.C. wherein she stated that she had made a false statement to the police. The respondent had only abused and beat her. She denied that the respondent raped her.

4. The case of the respondent was that the petitioner wanted the respondent to marry a girl of her choice and when he declined, she foisted a false case against him.

5. In view of the statement of the petitioner recorded under Section 164 Cr.P.C., a cancellation report was filed by the investigating officer. On the objection raised by the petitioner, further investigation was directed. Statement of the petitioner was recorded who again leveled allegations of rape against the accused. The respondent was medically examined and his blood was taken. The exhibits were sent to FSL including the underwear of the petitioner and as per FSL report dated 25th January, 2010, neither blood nor semen could be detected on the underwear. However, human semen was detected on the vaginal smear slides of the petitioner. The blood taken on the gauze of the respondent gave no reaction. As per the first DNA Finger Print test report dated 30th November, 2010, from the vaginal smear and

blood on gauze of the accused, no DNA could be isolated. Thereafter, the underwear of the prosecutrix was sent for DNA finger printing along with the blood of the respondent taken on gauze on 26th April, 2010. The biological division found some whitish stain on very small area and separated alleles from the blood on gauze of the accused taken for the first time during the examination of the accused in the year 2009 and it was noted that the DNA profile of the alleles from the source of underwear were similar to DNA profile from the source of blood in gauze taken in the year 2009.

6. Learned Trial Court noted various statements of the petitioner wherein she changed her version repeatedly. The petitioner admitted that she and the respondent were living together for two months and she wanted him to marry with some girl. When quarrel took place, her clothes got torn and she suffered injury on ear and forehead. Though MLC of the petitioner was got conducted immediately on registration of the FIR, however no external injury was found on the body of the petitioner. In the deposition,, the petitioner reiterated that the respondent did not commit rape on her and her statement recorded by the learned Metropolitan Magistrate under Section 164 Cr.P.C. was true and correct. She stated that she was only beaten by the respondent and she was under no threat, coercion or pressure when she made the statement. Learned Trial Court also noted that since MLC of the petitioner was conducted immediately, her allegation that she was beaten was also not substantiated as no external injury was found on the body. As regards the report of the DNA Finger printing reports, learned Additional Sessions Judge in paragraph 25 noted as under:-

“25. It is relevant to mention that when DNA finger printing was done on 24.01.2014 vide report Ex.PW13/A, it was

observed that the exhibit 1 contains one black underwear with 05 cuttings already taken by biology division for biological examination, whitish stain was found on very small area. The question now arises why this stain had not appeared when it was subjected for examination for the first time. The FSL report dated 25.01.2010, clearly reveals that blood and semen could not be detected on the underwear. It was analysed by the Biological division and sealed with the seal of NK FSL Delhi. The underwear was produced in the court bearing the seal of FSL on 23.01.2012 and there was a clear cut observation and categorical statement of the prosecutrix that it is neither torn nor there is any spot on it. The question further arises how this stain had appeared during second analysis as per the report Ex.PW13/A and how the five cuttings on the underwear had appeared though as per the prosecutrix and during evidence, it was observed that there was no cutting on the underwear. The question further arises why the underwear of the prosecutrix was sent in the year 2008 itself. That being the position, it would be unsafe to rely on the DNA report dated 24.01.2010 since the possibility of the tampering of the case property or petrifying of the samples, cannot be ruled out. Even otherwise, it has corroborative value. In the instant case, the statement of the prosecutrix is not above board and unworthy of credence since there are material improvements in her testimony. Further, the accused has been able to raise suspicion on the veracity of this witness as in her statement which was recorded u/s 164 CrPC she has categorically stated that accused did not commit rape but when he refused to marry, she again made complaint after about few months making the similar allegations reiterating the incident in her subsequent statement recorded u/s 164 CrPC.”

7. As noted above, when the first time blood sample of the respondent was sent for DNA finger printing, no DNA could be separated, it is not

explained as to how from the same sample later DNA could be separated. Further as per the opinion of the FSL, no human semen was detected on the underwear of the petitioner. It is also not explained how DNA could be separated from the same underwear later on. Further from the evidence led by the prosecution, the safe custody of underwear from 2008 to 2010 when it was sent for DNA Finger Print has also not been proved. Thus the finding of the learned Trial Court that the possibility of tampering of the case property or putrefying of the samples could not be ruled out cannot be faulted with. The finding of the learned Additional Sessions that proper custody of the case property having not been proved, conviction could not be based solely on the DNA report which is only a corroborative evidence and the respondent was entitled to be acquitted cannot be held to be perverse warranting interference.

8. Application for special leave to appeal is dismissed. The appeal is also dismissed. Trial Court record be sent back.

(MUKTA GUPTA)
JUDGE

FEBRUARY 15, 2017
‘v mittal’