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

% Date of Judgment: 9th August, 2017

+ **CRL.L.P. 434/2017**

STATE

..... Petitioner

Through: Mr. Archit Vashishta, Adv. for Ms.
Nandita Rao, ASC (CrI.), GNCTD
along with W/SI Usha, PS Mandir
Marg in person.

versus

BRIJ MOHAN @ BIRJU & ORS.

..... Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE CHANDER SHEKHAR

CHANDER SHEKHAR, J.(ORAL)

CrI.M.A.12328/2017

For the reasons stated therein, the application is allowed. Delay of 54 days in filing the present leave to appeal is condoned.

CRL.L.P.434/2017

1. The present leave to appeal has been filed by the State under Section 378 of the Code of Criminal Procedure, 1973 ('Cr.PC') against the judgment dated 06.01.2017 by the Court of Additional Sessions Judge/Spl. Fast Track Court, Patiala House Court, New Delhi in SC No.9154/2016 titled State v. Brij Mohan @ Birju under Sections 376D/376E/392/394/34 Indian Penal Code, 1860 ('IPC'), whereby accused/respondent Tarun @ Golu, Shri Krishan and Brij Mohan were acquitted of all the charges framed against them.

2. The case of the prosecution, as noticed by the Trial Court is that, prosecutrix assumed name 'B' (identity of the prosecutrix is withheld with a view to conceal her identity) with her husband Vicky had proceeded to the RML Hospital from their house on 06.05.2014 for the purposes of examination of Vicky in the hospital. However, Vicky took liquor on the way and got drunk thereafter, instead of going to the hospital, they returned to their house on foot. On the way back to their house, at about 9 pm the prosecutrix 'B' had gone to ease herself through the portion of broken wall towards the bushes, that was when all the three respondents herein came and caught hold of the prosecutrix 'B', thereafter Vicky came there for her rescue after hearing her scream. However, all the respondents caught hold of both of them started beating them and then took them inside the jungle. One of the respondents, who was aged about 45/50 years, committed rape upon the prosecutrix, while the other two respondents caught hold of Vicky, thereafter the second respondent committed rape upon the prosecutrix while the third respondent caught hold of Vicky, then the first respondent robbed both of them and snatched Rs.1500/- and mobile phone of the prosecutrix and Rs.500/- from Vicky and they threatened the prosecutrix and Vicky and asked them to leave quietly. They came outside the jungle and stopped the police for help and reported the matter to the police, the police immediately went inside the jungle, but none of the respondents were present there. Thereafter, the prosecutrix and Vicky were brought to the hospital and the prosecutrix was medically examined.

3. The prosecutrix pointed out the place of incident and the statement of the prosecutrix was recorded, wherein she stated that she could identify the respondents. Based on these allegations, the FIR No.122/2014 was registered against the accused/respondents u/s 376/376E/392/394/34 of IPC. Thereafter, investigation was conducted, during the investigation IO seized the exhibits / Gynae Test Kit, thereafter called the Crime Team at the place of incident and got the place of occurrence photographed, rough site plan was prepared at the instance of the prosecutrix. Further at the instance of the prosecutrix and Vicky, respondents Brij Mohan @ Birju and Tarun @ Golu were arrested on the next morning i.e. 07.05.2014. Their disclosure statements were recorded, in his disclosure statement, respondent Brij Mohan admitted that he had committed rape along with the respondent Shri Krishan @ Chacha, while respondent Tarun had caught hold of Vicky. On 08.05.2014, the respondent Shri Krishan @ Kishan @ Chacha was arrested based on the secret information received at Nehru Chowk Red Light, he disclosed that he had committed rape upon the prosecutrix, while he was carrying a *Danda* and snatched the mobile phone of the prosecutrix as well as cash from the prosecutrix and Vicky, he also disclosed that, he had sold the mobile phone to the passerby and had spent the money. The *Danda* was recovered and seized from Mandir Lane at his instance.

4. On 23.07.2014, charges were framed against all the three respondents for the offences punishable u/s 376D/392/394/ 34 of IPC and against the respondent Shri Krishan separately for the offence

punishable under Section 376 E of IPC by Ld. Predecessor Court to which they pleaded not guilty and claimed trial.

5. We have heard learned counsel for the State and have carefully examined the judgement of the Trial Court.

6. In this case, on consideration of evidence and material placed on record and after considering the argument advanced, we have found that the following circumstances were relied upon by the Trial Court to acquit the respondent persons:-

(a) Prosecutrix “B” with her husband Vicky had proceeded to RML Hospital from their house on 06.05.2014 for the purpose of examination of Vicky.

(b) Vicky took alcohol and got drunk, therefore started returning home on foot.

(c) About 9p.m. the prosecutrix “B” went to ease herself through the portion of broken wall towards the bushes.

(d) Three respondents came and caught hold of the prosecutrix “B”. There, the respondent aged about 45/50 years committed rape, thereafter, second respondent committed rape on the prosecutrix “B”.

(e) First respondent robbed the prosecutrix “B” and Vicky and snatched phone and Rs. 1500 from Vicky.

(f) They came out of the jungle and reported the matter to the police.

(g) The prosecutrix “B” was examined and the statement was recorded wherein she stated that she could identify the respondents.

(h) Thereafter the case under section 376D/376F/392/394/34 IPC.

(i) Prosecutrix “B” in her examination- in-chief stated that none amongst the respondents had raped her, they were some other person.

- (j) PW-3 and PW -12 both declared hostile on behalf of the State on the point of identification of the respondents.
- (k) No serological report regarding the blood group/group of the semen was filed on record.
- (l) MLC report made it clear that the prosecutrix “B” did not sustain any injury on her despite forcible gang rape.
- (m) Though the DNA report supports the story of the prosecution to the extent that the physical relationship was there, but serological report was absent.

7. To bring home the guilt of the respondents herein, the prosecution examined witnesses. The statement of the respondents were recorded under Section 313 Cr.P.C, wherein they pleaded false implication.

8. On 03.09.2014 the learned Trial Court proceeded with the evidence in order to substantiate the allegations against the respondents. The prosecution examined PW-1 Dr. Sonia Raghav who had examined the prosecutrix and accused/respondent Shri Krishan.

9. PW-2 Sh. Samsheer Singh, Duty Officer who had recorded the present FIR No.122/2014 as ExPW2/A and endorsed as ExPW2/B on the original *rukka*. PW-3 Prosecutrix was also examined, to prove her allegation based on her complaint, thereafter, she was cross examined on behalf of the State and was declared hostile. PW-4 Ct. Ankit was examined who deposited the sealed *pullandas* with FSL, Rohini. PW-5 Dr. Sandeep Kumar proved the potency test of respondent Brij Mohan as Ex.PW5/D. PW-6 Dr. Sakshi Mittal prepared the MLC as

Ex.PW6/A, of the respondent Brij Mohan. PW-7 ASI Kavita proved the seizure memo as Ex.PW7/A, of the medical Kit of the prosecutrix which was handed over by the doctor. PW-8 Ct. Ram Niwas proved the photographs as Ex.PW8/A (colly), of the spot along with the negatives as ExPW8/B. PW-9 Dr. Madhurima Taneja proved the MLC of the accused/respondent Brij Mohan and Tarun as Ex.PW9/A. PW-10 Dr. Urvarshi Miglani was also examined to prove the MLC of prosecutrix Ex.PW1/B. PW-11 Ct. Ved Prakash proved the arrest of accused/respondent Birju and Tarun in his presence. PW-12 Mr. Vicky was examined and cross examined at length after which he was declared hostile. PW-13, Dr. Rajeev Sood proved the potency test Ex.PW5/A and investigation for potency test Ex.PW13/A of respondent Shri Kishan. PW-14 ASI Virender Singh who had met the prosecutrix and Vicky first on the road side outside the jungle along with PW-15 Ct. Manoj Kumar were examined, who had joined the investigation with the IO. PW-16 SI Harkesh received the first DD entry and reached the hospital. PW-17 HC Satish Kumar joined the investigation with the IO to arrest the respondents. PW-18 SI Usha was the Investigating Officer of the case, PW-19 SI Prashant Yadav was the In-charge of the Crime Team who had inspected the place of occurrence. PW-20 Ct. Rahul joined the investigation with SI Harkesh after receiving the DD entry no.39A. PW-21 Dr. Poonam Sharma prepared the FSL Result as ExPW21/A.

10. Learned APP for the State has strongly urged before this court that the Trial Court has erred in passing the impugned judgement dated 06.01.2017, it has wrongly appreciated the facts and passed the

judgement contrary to law. It has been strongly urged by the learned APP before this court that the R-1 Brij Mohan and R-2 Tarun were apprehended just after the incident. The learned APP for the State further submitted that the reason for the witnesses to have turned hostile was due to fear and intimidation.

11. In ***Paramjeet Singh v. State of Uttarkhand, (2010) 10 SCC 439***, it is held as under:

“....Testimony of hostile witness need not be disregarded in toto and the part of the testimony inspiring confidence may be relied upon.”

12. Learned APP submitted that the refusal of TIP by the respondents can be made as a sole ground to hold them guilty.

In ***Prem Singh v. State of Haryana (2011)*** it is held as under:

“.....It is not open to the accused to refuse TIP and adverse inference can be drawn against the accused to corroborate the case of the prosecution”.

13. It is evident from the record that the prosecutrix “B” had clearly refused to identify the respondents. Also, it was the case of the prosecution that the gang rape was committed upon the prosecutrix “B” but however there was no evidence of torn clothes which were produced or seized during the investigation, further from the MLC of the prosecutrix “B” it is clear that she had not sustained any injury despite forcible gang rape as per the prosecution story. Though the DNA profiling generated from the source of Ex.1g1 (microslide), 1 g2 (microslide), 1h (cotton wool swab) and 2a(pyjama) was similar with the DNA profile from the source of Ex.4d(blood sample of Brij

Mohan), but it is to be noted here that no serological report regarding the blood group/group of the semen was filed on record. On the basis of the DNA report, it cannot be said that the physical relationship was against the wishes of the prosecutrix “B” with respondent Brij Mohan, on the date of the incident itself. The manner of arrest of the respondents also appeared to be doubtful as the prosecutrix had outrightly denied that they were arrested at her instance. The weapon of offence i.e. *Danda* was shown to have been recovered from different person i.e. Shri Krishan instead of Brij Mohan who has alleged to have used it as per the statement of the prosecutrix and Vicky. Refusal of the TIP by the respondent cannot be made as a ground to hold the respondent guilty of the offence charged. In a criminal trial, the prosecution can get the benefit of the weakness in the defence of accused and the prosecution has to prove its case and stand on its own leg. Mere matching of DNA cannot be made as a ground to convict the respondent, the prosecution had failed to prove its case beyond doubt that all the respondents in furtherance of their common intention constituting a group committed gang rape upon the prosecutrix and robbed the prosecutrix and her husband. Prosecution has failed to prove that there was any forcible physical relationship of the respondent Brij Mohan with the prosecutrix.

14. In the light of the above discussion, we hold that the prosecution has failed to prove its case beyond any shadow of doubt against the respondents and we are in agreement with the conclusion arrived at by the learned trial Court, consequently the leave to appeal is held to be devoid of any merit.

15. Accordingly, we find no ground to interfere in the impugned judgement dated 06.01.2017 of the Trial Court. The personal bonds and the sureties under Section 437-A Cr. P.C. are discharged.

16. The leave to appeal is dismissed.

CHANDER SHEKHAR, J

G.S.SISTANI, J

AUGUST 09, 2017/b