

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

% Reserved on: 9th May, 2017
Decided on: 31st May, 2017

+ **CRL.A. 1123/2015**

JITENDRA @ JITU Appellant
Represented by: Mr. K. Singhal, Advocate.

versus

STATE NCT OF DELHI Respondent
Represented by: Ms. Aashaa Tiwari, APP for the
State.

+ **CRL.A. 1138/2015**

DARPAN Appellant
Represented by: Mr. K. Singhal, Advocate.

versus

STATE NCT OF DELHI Respondent
Represented by: Ms. Aashaa Tiwari, APP for the
State.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

1. Vide impugned judgment dated 27th August, 2015, Jitendra @ Jitu and Darpan were convicted for the offences punishable Section 328 read with Section 34 IPC and Section 376(2)(g) IPC. Vide order on sentence dated 8th September, 2015, they were sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹15,000/- each for offence punishable under Section 376(2)(g) IPC and rigorous imprisonment for a period of three years and to pay a fine of ₹5,000/- for offence punishable

under Section 328/34 IPC.

2. Learned counsel for the appellants submits that there was a delay of 2 days in lodging the FIR. As per the MLC of prosecutrix Ex.PW-6/A dated 12th June, 2012, there was no external injury on the body of the prosecutrix. However, nail bite mark was noticed on the prosecutrix on 13th June, 2012 as per MLC Ex. PW-14/A. The appellants cannot be held responsible for the aforesaid mark as there was one day gap in between. It was highly improbable that the prosecutrix did not report the incident to anyone. The prosecution failed to produce the CDR of the prosecutrix to fortify the fact that 'S' had called her. Husband of the prosecutrix who was a material witness was not examined. Even if any sexual intercourse took place, the same was consensual which is evident from the fact that there were no marks of struggle on the body of the prosecutrix.

3. Per contra learned APP for the State submits that the judgment of conviction and order of sentence suffer from no illegality and considering the seriousness of the allegations, the conviction should be upheld. It is well settled that if the evidence of the prosecutrix is reliable, conviction can safely be based on the said evidence. In the present case, the testimony of the prosecutrix is reliable and trustworthy. Besides, the version of the prosecutrix has been corroborated by the report of the DNA analysis Ex.PW17/A which shows that the semen found on the blanket recovered from the spot and on the underwear of the prosecutrix tallied with that of Jitender and Darpan respectively, the two appellants herein.

4. Brief facts of the prosecution case are that FIR No. 172/2012 (Ex.PW4/A) was registered at PS Badarpur under Sections 376(g)/328 IPC on the statement of prosecutrix wherein she stated that she was working in a

dye factory at Tughlakabad. She got married five years ago in Narela and her maternal home was in Vishwakarma Colony, Prahladpur. A boy named 'S' used to stay in her neighbourhood whom she knew. He used to call her as she had asked him to arrange a job for her. Around 20 days ago, she had a quarrel with her husband as a result of which she started living in a rented accommodation at Vishwakarma Colony. On 9th June, 2012, 'S' called her on phone and stated that he would get her a good job. He asked her to meet him on 10th June, 2012 between 1:00-2:00 P.M. at Badarpur border and thereafter he would take her to a company. On Sunday, she reached Badarpur border where she met 'S' at around 2:00 P.M. and from there 'S' took her in a bus to Mohan Estate near a big building where they got off. When they entered the gate of the building, three friends of 'S' were present there. One of his friends held both her hands from behind and 'S' made her drink something despite refusal. As a result of which she started feeling intoxicated/drowsy. Thereafter, 'S' and his friends took her upstairs while one of his friends was holding her hands from behind. 'S' and his friends, one of whom they were calling by the name of Junglee, other one by the name of Jitu and one more whom she can identify did "galat kaam" with her one by one against her will. Thereafter, around 6:00-7:00 P.M., they dropped her at Vishwakarma Colony in an auto when she was in the state of intoxication. Though she was not in a condition to move/walk, she, somehow, reached her home. When her condition improved on Monday, she went to Prahladpur police station, however, she did not lodge any complaint on that day. On 12th June, 2012, when her husband came, she narrated the entire incident to him. Thereafter, they went to Prahladpur police station from where the police took them to Badarpur.

5. Thereafter, PW-16 W/SI Anju Tyagi along with PW-3 W/Ct. Omwati took the prosecutrix to AIIMS Hospital for her medical examination, however, she refused for her internal examination. On 13th June, 2012, statement of the prosecutrix was recorded under Section 164 Cr.P.C by PW-7 Shri Rajender Singh, learned Metropolitan Magistrate, Saket Court. Again the prosecutrix was medically examined. In the intervening night of 13th and 14th June, 2012, Jitendra @ Jitu and 'S' were arrested vide arrest memo Ex. PW-4/C on the basis of secret information received. On 15th June, 2012, Darpan surrendered at PS Badarpur. He was also arrested vide arrest memo Ex. PW-12/A. On the same day, prosecutrix got recovered one blanket of pink colour, strands of her hair strands found lying on the blanket and one kada from the place of incident. On 16th June, 2012 PW-15 SI Amit Kumar filed an application before PW-13 Ms. Neha, Metropolitan Magistrate, Saket Court, for TIP of Darpan. However, Darpan refused to join the TIP proceedings. 'S' was found to be juvenile by the Juvenile Justice Board. Since Junglee @ Attar Singh could not be arrested, he was declared a proclaimed offender. Charge sheet was filed under Section 376(g)/120B/328 IPC against Jitender @ Jitu and Darpan and qua 'S' inquiry was conducted by the Juvenile Justice Board. Charge was framed for offences punishable with Section 328/34 IPC and Section 376(g) IPC against the appellants.

6. PW-4 the prosecutrix deposed in Court in sync with her previous statements recorded. However, she stated that during the incident, those boys were calling each other by their names i.e. Darpan, Junglee and Jeet. She also stated that initially she refused to undergo internal examination as she was scared, however on the next day, she underwent internal examination.

7. PW-6 Dr. Unnati Shende, Senior Resident, Department of Obs. &

Gynae, AIIMS Hospital stated that on 12th June, 2012, prosecutrix was brought to AIIMS casualty for her medical examination and she prepared the MLC Ex. PW-6/A. The prosecutrix refused to undergo internal examination. During her cross- examination, she stated that no external injury was noticed.

8. PW-14 Dr. Usha B.R., SR, Obs & Gynae, AIIMS, stated that on 13th June, 2016, around 10:11 P.M., the prosecutrix was brought to AIIMS hospital for her medical examination and she prepared her MLC Ex. PW-14/A. On her local examination, her left breast showed nail bite marks. No evidence of bleeding was found, however, tenderness over mons pubis and fourchette was found.

9. PW-17 Ms. Anita Chhari, Sr. Scientific Officer, Biology, FSL stated that as per the report prepared by her, on biological examination, blood was detected on exhibit '5' (gauze cloth piece having few brown stains described as 'Blood in gauze of accused Jitender), exhibit '11' (gauze cloth piece having few brown stains described as 'Blood in gauze of accused 'S'') and exhibit '17' (gauze cloth piece having few brown stains described as 'Blood in gauze of accused Darban Singh'). Human semen was also detected on exhibit '2' (one underwear described as 'Underwear of Prosecutrix') and exhibit '3' (one blanket described as 'blanket picked from the place of occurrence'). Semen could not be detected on exhibits '1a', '1b' and '1c' (three microslides having faint smear described as 'Vaginal Slides of Prosecutrix'). DNA profiling was performed on the source of exhibit '2' (underwear of prosecutrix), exhibit '3' (blanket), exhibit '5' (blood gauze of accused Jitender), exhibit '11' (blood gauze of accused 'S'') and exhibit '17' (blood gauze of accused Darban Singh as mentioned in the forwarding letter, however, as per the MLC, his name is Darpan Singh). As per Ex.PW-17/A on STR analysis, it was sufficient to

conclude that the DNA profile from the source of exhibit '5' (blood gauze of accused Jitender) was similar with the DNA profile from the source of exhibit '3' (blanket). The DNA profile from the source of exhibit '17' (blood gauze of accused Darpan) was similar with the DNA profile from the source of exhibit '2' (underwear of prosecutrix).

10. Appellant Darpan in his statement under Section 313 Cr.P.C. stated that the prosecutrix had consensual sex for which they had paid money, later on she started asking for more money and started blackmailing them. Thereafter, the prosecutrix lodged the false complaint and got him falsely implicated. Appellant Jitender in his statement under Section 313 Cr.P.C. though did not say about consensual sex, he stated that there was a dispute of money. She was blackmailing him to extort money from him. She called him on 11th and 12th June, 2012 for demanding money. He did not give money therefore she lodged the FIR.

11. The prosecutrix was extensively cross-examined. Though suggestion was given that she deliberately delayed registration of the FIR to seek money from the accused persons however no such suggestion was given that there was consensual sex between the prosecutrix and the appellants herein.

12. Contention of learned counsel for the appellants that since there was no external injury on the body of the prosecutrix and she did not resist the consensual relationship deserves to be rejected for the reason it is the case of the prosecutrix that she was made to drink due to which she felt intoxicated. Further in the absence of any external injury/marks on the body of the prosecutrix, it cannot be said that she willfully consented to have sexual intercourse with the accused. The fact that the alleged incident took place in a remote area in a building on the top floor goes to show that the prosecutrix

was taken to an isolated place then forcibly sexually assaulted. Version of the prosecutrix is further corroborated by the opinion of the expert rendered vide Ex.PW17/A which shows presence of semen of Jitender on the blanket recovered from the spot and that of Darpan from the underwear of the prosecutrix.

13. In view of the discussion aforesaid and considering the evidence led by the prosecution and the defence of the appellants, which is not probablized, the impugned judgment of conviction and the order on sentence are upheld.

14. Appeals are dismissed.

15. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record and intimation of the appellants.

16. TCR be returned.

(MUKTA GUPTA)
JUDGE

MAY 31, 2017
‘ga’