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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.L.P. 773/2015**
STATE

..... Petitioner

Through: Mr. Tarang Srivastava, APP for State

Versus

NEERAJ

..... Respondent

Through: Mr. Vikrant R. Sharma, Adv.

CORAM:
HON'BLE MR. JUSTICE NAJMI WAZIRI

ORDER
% **06.11.2017**

The state has impugned judgment dated 30.06.2015 on the ground that there was consistency in the statement of the prosecutrix under Section 164 Cr. P.C. and in the cross-examination during trial. The Court reasoned as under:

25. The most important witness examined by the prosecution is PW-4 -prosecutrix. It is deposed by her that she is the eldest child of her parents and has been residing with her three younger brothers and parents in Rangpuri. The accused is also residing in the neighbourhood and is known to her. It is deposed by her that one day, in the winter month of 2014, at about 05.00 pm, she had gone to the bathroom. When she opened the door to come out, the accused who had followed her, pushed the door and the prosecutrix inside the bathroom and bolted it from inside. He pinned her against the wall and took off his pants and her salwar thereafter, he inserted his hand in her Susu and then he inserted his susu inside hers. He also kissed her and held her tightly.

In the meanwhile, her mother came looking for her and the prosecutrix immediately opened the door and started crying on seeing her mother. The accused was caught by his hand by her mother and they came back to her house. Thereafter PCR was informed. Her father, who was on duty was also called and he immediately came to the spot. The police came and recorded her statement which is Ex.Pw-4/A. The accused was brought to the police station and arrested vide arrest memo Ex.Pw-3/A and his personal search was also conducted vide memo Ex.Pw-3/B. She was taken to Safdarjung Hospital for her medical examination but she refused for her internal examination vide her endorsement on the MLC Ex.Pw-4/B. She was produced before Ld. MM and her statement Ex.Pw-4/C was recorded.

26.The first significant fact which is to be kept in mind while examining the testimony of the prosecutrix is her age, which is more than 23 years. The prosecutrix in her complaint Ex.Pw-4/A has stated that on the day of incident, i.e.17.1.2014, the accused after pulling her inside the bathroom had started misbehaving with her and attempted to commit rape but her mother came near the bathroom and accused left her. The prosecutrix in her MLC Ex.Pw-4/B had also given a similar history_that on the date of incident, the accused after pulling her inside the bathroom, had opened her salwar and had put his hand inside her vagina and squeezed her breasts and kissed her over her mouth. Likewise, in her statement u/s.164 CrPC Ex.Pw-4/C, she has reiterated that the accused had misbehaved with her inside the bathroom. The prosecutrix had been consistent in her statement Ex.Pw-4/A and in her statement Ex.Pw-4/C and also in her history as narrated to the Doctor which is Ex.Pw-4/B in stating that accused had misbehaved with her while she was inside the bathroom. However in her testimony as Pw-4, she has deposed that the accused after removing his pants and her salwar, had committed rape

upon her. There is a material contradiction in the testimony of the prosecutrix and in the complaint that was originally made by her. In the complaint, the prosecutrix had stated that the accused had misbehaved with her but in her testimony, she has explained that the accused after removing their clothes - his pants and her salwar, committed rape upon her.”

However, the learned counsel for the State has relied upon the deposition and cross-examination as well as statement under Section 164 Cr. P.C. of the prosecutrix. The prosecutrix stated in her deposition before the Court as under:

“ Accused Neeraj has been made to stand behind one side view mirror screen so that he is not visible to the witness but he can hear and watch proceedings from behind it and may also communicate with his counsel if required. I am having 3 brothers who are younger to me. I am eldest one. I alongwith my parents am residing since childhood at the above mentioned address on rent. I know the accused as he is residing in our neighbourhood.

Exact date I do not remember but in the winter month of this year at about 5.00 PM I went to bathroom to ease myself. And I opened the door of the bathroom to come out, the accused who had followed me, pushed the door and myself inside the bathroom and bolted it from inside. He pinned me against the wall and took of his pant and my Salwar and thereafter he inserted his hand in my Susu and thereafter he inserted his Susu inside my Susu. He also kissed me and held me tightly. In the meanwhile my mother came looking for me and was calling my name. I immediately opened the door and started crying on seeing her. Neeraj were caught by his hand by my mother and we came to our house. My mother called the PCR at 100 number from her mobile phone. She also called my father who was on duty. The

police arrived at the spot and thereafter my father also reached. My parents and I accompanied the police to the police station. The lady police officer made enquiry from me and recorded my statement EX.PW4/A, which bears my signatures-X. Thereafter, police officer took me alongwith my parents to Safdurjung hospital where I refused to get my internal examination done vide my endorsement which bears my signatures at point-A on the MLC EX.PW4/B. The accused had been brought to the police station and arrested vide memo already Ex.PW3/A, his personal search was carried out vide memo already Ex.PW3/B. Accused made his disclosure statement vide memo already Ex.PW3/C. All memo bears my signatures at point-B respectively. He was taken to the hospital later in the night while I was also present in the hospital.

I was produced by the IO in the Court on the next day. I was called to the Court on another day and my statement was recorded by the Ld. Judge.

At this stage, sealed envelope with the seal of J.K. has been opened which contain statement U/sec. 164 Cr.PC. I had given my statement Ex.PW4/C running into three pages and each page has my thumb impression and signatures at point -A.

At this stage, accused has been asked to come out from behind the one side view mirror and witness has correctly identified the accused. At this stage, accused asked to go behind the one side view mirror. I had studied upto 4th class.

XXXXX by Sh. Vikrant R. Sharma, Ld. Counsel for the accused

Accused had followed me immediately when I entered inside the toilet. I am emotionally attached with my mother and used to tell everything to her. Accused had followed me earlier also but I did not tell my mother due to fear of the accused. The toilet where the said incident occurred is situated behind my house. It is

wrong to suggest that accused did not follow me to toilet. It is wrong to suggest that accused was talking with me and when my mother saw me talking with the accused, I made false allegations against the accused. At the time of incident only me and my mother were present. I do not know whether the accused is elder to me or not. It is wrong to suggest that I and accused person were going to marry but due to the age difference the parents of accused denied for the said marriage and I in connivance with my parents falsely implicated the accused in this case. Police brought me to PS after half an hour. I was taken to the hospital by the police in the night at around 10/10:30 PM. It is correct that I refused my internal medical Examination. It is correct that my statement u/s 164 Cr.P.C. is true. It is also correct that I made a statement in court and all my statements are true and correct.

It is wrong to suggest that I am falsely implicating the accused in the present case.”

He states that one thing is clearly established that she was sexually assaulted and to this extent there was no inconsistency in her statement. He also refers to the statement of PW-3, mother of the prosecutrix inter alia:

“ On 17.01.2014 my daughter Rakhi went to bathroom at around 5.00 PM. When after much time she did not return from bathroom, I went to see her. As soon as I reached the bathroom, Rakhi came out of the bathroom crying and when I asked her she told me that accused Neeraj has raped her in the bathroom. Thereafter, I made a telephone call to my husband and informed him about the incident, who came back home. He made enquiry from my daughter Rakhi and thereafter he made a call at 100 number. When police came, they took the accused to the police station and my daughter was taken to Safdurjung hospital for medical examination. I also accompanied my daughter to hospital. Accused present in the court today was arrested vide memo Ex.PW3/A, his

personal search was carried out vide memo EX.PW3/B. Accused made disclosure statement, same is Ex.PW3/C. All memo bears my signatures at point-A respectively. Statement of my daughter was also recorded. When I reached at the bathroom, accused was found in the same bathroom. Bathroom was bolted from inside and I got it opened. My statement was also recorded.

XXXXX by Sh. Vikrant R. Sharma, Ld. Counsel for the accused

Bathroom is separately situated at 10-15 steps at the same complex. There are 3 separate bathrooms. Drinking water tap is situated away from the bathroom in a different direction. The moment Rakhi told me about the incident, I immediately informed my husband on his mobile phone who was on duty. Within 5 minutes of call, my husband reached at home. My husband made a call at 100 number at 5.30 PM. The police had arrived at 6.00 PM. I alongwith my husband and daughter accompanied the police to the police station where we stopped for barely for few minutes and thereafter we went to Safdurjung hospital. Accused Neeraj was brought to the PS separately. I do not know if the accused is younger to the prosecutrix or if his age was around 18 years at the time of incident. It is incorrect to suggest that I wanted to marry my daughter to the accused who refused because he was younger to my daughter and for this reason he has been implicated falsely in this case.”

However, what emanates from the above is that the prosecutrix refused to get herself examined medically. She had alleged that she had been raped by the accused. The test of sexual assault could not be met by the prosecutrix because she herself refused to subject herself to medical examination. In the absence of proof, it could not be concluded that the act of rape was committed upon her. Without commenting upon whether the act of rape could be performed under the circumstances mentioned, the Court

finds that the occurrence of the offence itself was never established. There is inconsistency in her first complaint and her narration before the doctor and her subsequent testimony. The first statements did not allege rape but attempt to rape, however, the testimony alleged rape. There is no reason to interfere with the reasoning and conclusion of the impugned order. In the circumstances, there is no merit in the leave petition. Accordingly, it is dismissed.

NAJMI WAZIRI, J.

NOVEMBER 06, 2017/acm