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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **CRL.A. 471/2016**

SHIV KUMAR YADAV

..... Appellant

Through: Mr. Raman Yadav with
Ms. Varnita Rastogi,
Advocates.

versus

THE STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Kewal Singh Ahuja,
APP.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VINOD GOEL

JUDGMENT

10.09.2018

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Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 20th October 2015 passed by the learned Additional Sessions Judge, Special FTC-02 (Central) in Sessions Case No.02/2015 arising out of FIR No.1291/2014 registered at PS Sarai Rohilla convicting the Appellant for the offences under Sections 323/366/376(2)(m)/506 IPC.

2. The appeal is also directed against the order on sentence dated 3rd November 2015 whereby by the trial Court sentenced the Appellant as under:

- (i) For the offence punishable under Section 376 (2) (m) IPC, to Rigorous Imprisonment ('RI') for life, which shall mean imprisonment for the remainder of the convict's natural life, and fine of Rs.10,000/-, in default whereof, he shall undergo Simple Imprisonment ('SI') for 2 years.

- (ii) For offence punishable under Section 366 IPC, to RI for 10 years, and fine of Rs.5000/-, in default whereof, he shall undergo SI for 2 years.
- (iii) For offence punishable under Section 506 IPC, to RI for 7 years and fine of Rs.5000/-, in default whereof, he shall undergo SI for 2 months.
- (iv) For offence punishable under Section 323 IPC, to RI for 1 year, and fine of Rs. 1000/-, in default whereof, he shall undergo SI for 1 month.
- (v) The sentences were directed to run concurrently.

3. The trial Court also recommended payment of compensation to the victim in terms of the Victim Compensation Scheme under Section 357A Cr PC and referred the matter to the District Legal Services Authority (Central District) ('DLSA'). The DLSA was also asked to consider making provision for the care and maintenance of the aged parents, wife and children of the convict.

Background

4. The background to the appeal is that the victim (PW-2) who was aged around 25 years at the relevant time was working in a finance company in Gurgaon, Haryana for nearly three years. She would commute to and from her work in a cab arranged for by the company.

5. On 5th December 2014, PW-2 left her office at around 7 pm. She went to a restaurant in Gurgaon for dinner with her friends. She left the restaurant at 9:30 pm along with her friend (PW-23). After reaching Vasant Vihar, PW-23 booked a cab for her at around 10:15 pm using the Uber application on his mobile phone.

6. After around half an hour, a white coloured Maruti Suzuki Swift Dzire cab having registration number DL-1YD 7910 reached near the 24x7 outlet near Priya Cinema at Vasant Vihar. The mobile number of the cab driver ended in '8777'. It was around 11 pm when PW-2 sat in the rear seat of the cab. After a while, during the commute, she fell asleep.

7. When PW-2 awoke, she realised that the cab was parked at an isolated spot. The cab driver, correctly identified by PW-2 in the trial as the Appellant, was in the rear seat and upon her and was doing "*cherkhani*" with her. According to PW-2, she tried to push him away and also tried to open the door of the vehicle. However, the doors were locked and she could not open them despite her best efforts. When she raised an alarm, the Appellant slapped her 3-4 times and then pressed her neck forcefully stating, "*Agar mujhe nahi karne degi to saria ghusa dunga*".

8. PW-2 got very scared on hearing the threat as she was reminded of the horrific gang rape that took place in Delhi on the night of 16th December 2012 that shocked the nation. PW-2 stated that the Appellant beat her, bit her lower lip, and scratched her neck, breast, shoulder, and back. She then states that the Appellant "lowered my jeans and my underwear. He also lifted my top and my brassiere. Accused overpowered me. Accused committed sexual intercourse with me and also tried to do unnatural sex, i.e. anal sex, with me".

9. Whilst PW-2 was asleep, the Appellant had taken away her mobile phone. After committing the rape, he made a missed call to his own mobile phone from hers. PW-2 then pleaded with the Appellant to let her go. She assured him that she would not reveal the incident to anyone. The Appellant then started driving the cab, and on the way, they crossed

Inderlok metro station which made PW-2 realise that the Appellant had taken her to an isolated spot which was much farther than her house.

10. On the way back home, PW-2 sent a text message to her fiancé stating, “I was raped”. However, the said text message was inadvertently sent to the mobile number of the Appellant as his number was the last dialled from her phone. The Appellant then stopped the cab near her house. According to PW-2, she got down from the cab and immediately clicked two photographs of the cab’s number plate from her mobile phone. She then called ‘100’ from her mobile phone.

Information to the PCR

11. The Police Control Room (PCR) Information sheet (Ex.PW-16/A) shows that the call was made at 1:11 am on 6th December 2014. The caller’s name was registered as the fiancé of PW-2. It is obvious that it is PW-2 who called the PCR because the information noted was: “*Caller Kah Rahi Hai Ki Car No. DL-1Y D 7910 Wale Ne Mere Sath Rape Kiya Hai Ab Main Ghar Par Hun*”. The police, after reaching her house, noted in the PCR form at 2:18 am:

“Mauka mil gaya hai yaha par ladki ___ D/o___, Aged 26 years, R/o above Ne Bataya Mein Gurgaon Mein ___ Company Mein Analyst Ka Kaam Karti Hu Raat Ko 9.30 pm Par Cab Gaadi No. DL1Y D 7910 Mein Ghar Jaane Ke Liye Baithi Thi Gaadi Mein Driver Or Mein Akeli Thi. Thodi Door Jaane Ke Baad Mein So Gayi Thi Jab Meri Neend Khuli To Ek Sunsaan Jagah Par Gaadi Khadi Thi Place Mere Ko Pata Nahin Hai. Above Gaadi Ka Driver Mere Saath Rape Karne Ki Koshish Kar Raha Tha. Meine Uske Saath Hathapai Bhi Kiya Usne Mere Ko Jaan Se Maarne Ki Dhamkji Diya Or Mere Saath Rape Kiya----- Call Se 10 Minutes Pehle Mein Apna Ghar Pahunchi Hai Or PCR Ko Call Kiya Hai--- Ladki Ke Hoth Par Teeth Se Kaatne Ki Injury Bhi Hai—Ladki Ne Bataya Above Gaadi Ka Driver Ka Number Jo Usko Company Wale Ne Diya Tha Ghar Jaane Ke Liye Hire Karne

Ke Liye Jiska Number __8777 Hai---Baaki Driver Ladki Jaanti Nahin Hai---SHO Sarai Rohilla Chowki Incharge with Staff Mauke Par Hai. HC Bal Hussain Number 517/N Also Mauke Par --- (C/Room Informed) 6.12.2014.”

12. Thereafter, the noting made at 2:41 am read:

“2.41: 07 (Above Ladki Ne Bataya Driver Ko Woh Janti Nahin Hai Or Gaadi Ki Back Seat Par Baithi Thi Or Gaadi Mein Hi Back Seat Par Uske Saath Driver Ne Rape Kiya.”

13. Woman SI Alma Minj (PW-22) was on emergency duty at PS Sarai Rohilla on the intervening night of 5th-6th December 2014. She received DD No.2PP Inder Lok (Ex.PW-21/A) at 1:30 am on 6th December 2014. Accompanied by Ct. Tej Pal and Lady Ct. Indu, PW-22 reached the house of PW-2. There, PW-22 met PW-2 and her mother. The statement of PW-2 (Ex.PW-2/A) was recorded. PW-2 was taken to Hindu Rao Hospital (‘HRH’) for medical examination by PW-22.

Medical examination of PW-2

14. The MLC of PW-2 (Mark ‘X’) prepared at HRH in the hand writing of Dr. Neelam Saraswat (PW-12) shows that upon local examination, PW-12 found swelling on the lower lip of PW-2 along with a linear cut mark. There were scratch marks on both the breasts, as well as scratches on the right and left side of the back. These injuries were fresh. According to PW-12, she collected all the clothes of PW-2 including her undergarments and “all samples including nail clippings, swab from in between the fingers, swab from both the breasts, oral swab, anal swab, pubic hair combing, pubic hair clipping, cervical swab, vaginal swab, washing from vagina, blood culture, urine sample etc. as per sexual assault kit”. The clothes were converted into parcels and affixed with the hospital seal. The Sexual Assault Kit was also sealed with the seal of the

hospital. The time when PW-2 was brought to the hospital was noted as 3:25 am on 6th December 2014.

15. In the MLC, it was noted that there was no visible sign of injury and no bleeding and that “hymen appears to be intact”. It was also noted that the “patient smelt of alcohol but conscious and oriented”. PW-2 was taken back to PW-12 for a second opinion at 7:30 pm on the same day. This time, PW-12 noted that there was a scratch mark present over her neck, the hymen was intact with “redness present over the introitus”.

16. While deposing in the trial, PW-12 stated in her cross-examination as under:

“I have not given any opinion in the MLC Ex. PW-3/A as to whether victim was raped or not. I have not mentioned the time of completion of medical examination of victim. After examining the patient and upon considering the observations made by me in the MLC, I can say that the patient was raped. I have not mentioned any reason/opinion in the MLC prepared by me. It is wrong to suggest that I prepared the MLC only as per alleged history given by patient. [Vol. I recorded my observations after due examination of the patient.]”

17. After returning from HRH after the first examination of the victim at 3:25 am, PW-22 prepared the *rukka* for registration of FIR for the offences under Sections 376/506/323 IPC. The *rukka* (Ex.PW-22/A) was handed over to Ct. Tej Pal at 5:30 am for getting the FIR registered. Ct. Tej Pal returned with the FIR (Ex.PW-1/A), after which the particulars of the clothes and other case property were written on the seizure memo which was handed over to PW-22 by PW-12. PW-22 then deposited the case property with MHC(M), HC Veer Sain (PW-9).

Statement under Section 164 Cr PC

18. An application was filed by PW-22 in the Court of the learned Metropolitan Magistrate ('MM') for recording the statement of PW-2 under Section 164 Cr PC. The MM adjourned the proceedings to 8th December 2014. PW-2 was counselled by an NGO counsellor.

19. PW-2's statement under Section 164 Cr PC was recorded by the learned MM on 8th December 2014. Therein, she stated that she was 25 years old and was working in a company in Gurgaon. On 5th December 2014, she and her friends went for dinner to a restaurant in Gurgaon after office hours. At around 9:30 pm, she left there with her friend (PW-23) in his car and came up to Priya Cinema in Vasant Vihar. PW-23 used the Uber application on his mobile to book a cab for her. The cab was booked at around 10:15 pm and arrived at around 10:50 pm. She sat in the rear seat and told the driver where he should take her. She fell asleep thereafter and when she awoke, she found that the cab had stopped at an isolated area and the driver had come to the rear seat and lay on top of her. He then beat her 3-4 times and when she screamed, he threatened to kill her and very forcefully pressed her neck and asked her to keep quiet saying that otherwise, he would insert a "saria" into her. He slapped her face several times. She then described the rape committed on her in the following terms:

"His male private part was inserted into my private parts to a certain extent. I was feeling a lot of pain and I was screaming but he had overpowered me. During this scuffle, I received scratch marks on my breast, arms and back."

20. She further mentioned that she tried to open the doors of the car but they were locked. She mentioned that the Appellant bit her lip very hard, as a result of which, she had started bleeding from there. She also mentioned that once the accused had committed the rape, he gave a

missed call on his mobile phone using hers, which he had already snatched beforehand. She then pleaded with him to drop her home and asked him to let her go as she would not tell anyone about the incident. She mentioned that at the time, she thought that he had taken her number only to threaten her in the future.

21. PW-2 also mentioned that she intended to send a text message to her fiancé informing him that she had been raped but it inadvertently got sent to the Appellant instead and he even asked her about the same. She also mentioned about getting off the vehicle at her house and taking pictures of the number plate of the vehicle. She gave a brief description of the Appellant and of the car and that she would be able to identify him if he was produced before her. PW-2 stated that when she used the TrueCaller application, the number of the Appellant was shown to belong to one Gaurav.

Investigation

22. On 6th December 2014, SI Sandeep (PW-14) of PS Sarai Rohilla was deputed to search for the Swift Dzire vehicle involved as well as the Appellant. PW-14 confirmed the address of the owner of the vehicle through 'Auto Match'. The owner of the vehicle was revealed as the Appellant with an address in Raju Park in Delhi. On reaching the said address with Ct. Sant Ram, PW-14 came to know that the Appellant was a permanent resident of Chander Puri, Mathura, Uttar Pradesh. He discussed the above development with the Station House Officer (SHO) and left immediately for Mathura.

23. SI Devender Pranav (PW-13) was part of the team constituted, which consisted of ACP Devesh Mahla of PS Kotwali, Inspector Sunil Talwar of PS Lahori Gate, Ct. Raj Pal, and himself. PW-14 as well as PW-13 and

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the other team of officers reached PS Mathura Highway and met the in-charge, SI Surinder Singh (PW-24). PW-24 then sent a constable to locate the house of the Appellant.

24. Secret information was received that the Appellant was hiding somewhere near the Meera Magan Paradise Marriage Home in Mathura. A raid was conducted at that place and the Appellant was apprehended. Upon his personal search, two driving licences issued in his name (one from Mathura, UP and the other from Delhi), the Registration Card ('RC') of his vehicle, one key attached key ring with 'Uber' written on it, and one phone of Micromax make having two SIM cards apart from other articles mentioned in the personal search memo were recovered. The Appellant was then arrested. The arrest memo (Ex.PW-13/A) notes that he was arrested at 6:45 pm on 7th December 2014.

25. Parked outside the Appellant's house in Mathura, was the Swift Dzire vehicle. It was taken into possession as reflected in the seizure memo (Ex.PW-14/A). The vehicle was locked from the outside. No attempt was made to try to open the vehicle. At the request of PW-14, PW-24 provided a crane for towing the vehicle. The vehicle was brought to PS Highway and parked there. PW-14 hired a vehicle for towing the Swift Dzire and brought it to Delhi, where he parked it at the office of the Operation Cell (North District).

26. The Appellant was handed over to PW-22 at around 10:30-11 pm at PS Sarai Rohilla along with articles recovered from his person and the arrest memo. Those were deposited in the *malkhana* of the PS. While the Appellant was being interrogated, PW-22 received instructions from senior officers that the further investigation of the case would be undertaken by woman SI Renu (PW-27).

27. PW-27 then took over the investigation, interrogated the accused, and recorded his disclosure statement (Ex.PW-27/A). The Appellant was taken to HRH for medical examination. His MLC (Ex.PW-4/A) was prepared by Dr. Jitendra Nigotia (PW-4). Significantly, PW-4 found multiple abrasions (scratches) on the face of the Appellant. His blood collected on gauze and his clothes were converted into cloth parcels, sealed with the seal of the hospital, and handed over to the police. These were also deposited at the *malkhana* of the PS. This medical examination took place at around 4 am on 8th December 2014. On 9th December 2014, the Appellant took the police team to his house at Mathura and handed over a mobile phone containing a Uninor SIM card.

28. Meanwhile, the Appellant took the police to the place of occurrence. He was produced before the MM with a muffled face and a request was made for conducting his Test Identification Parade ('TIP'). The proceedings of the TIP (Ex.PW-27/G) reveal that the Appellant refused to participate in the TIP. According to PW-27, after coming out of the Court room, the Appellant removed the cloth from his face and uncovered his face and in the meanwhile, PW-2 came there and identified him as the person who had raped her.

29. A notice was served upon Eric Alexander (PW-28), a representative of Uber Cab Services, India. He submitted his reply to the said notice. On 23rd December 2014, Sections 376 (2) (m) and 366 IPC were added to the FIR on the basis of the evidence collected.

30. On 24th December 2014, a scaled site plan (Ex.PW-6/A) was prepared by Inspector Mahesh Kumar (PW-6) and handed over to PW-27. The RC

and driving licences of the Appellant were got verified from the respective Transport Authorities in Mathura and Delhi.

Inspection of the cab

31. PW-27 sent a letter to the Central Forensic Science Laboratory (CFSL), Lodhi Colony to inspect the vehicle. Four experts from the CFSL, CBI Lodhi Colony, viz. Dr. B.K. Mahapatra (PW-26), Dr. Harender Prasad (PW-19), Mr. A.H. Ganvir (PW-18) and Mr. U.S. Thakur (PW-17) inspected the said car. PW-26 stated that the samples lifted by them included a few strands of black hair, cuttings taken from the rear side of the driver's seat, flaky material having reddish brown stains lifted from the back seat cover, and the brake light of the vehicle.

32. PW-19 stated that five chance prints were developed during the inspection of the car. PW-18 took photographs of the said chance prints. The five chance prints taken from the car were numbered as Q1 to Q5. The specimen finger prints later collected from PW-2 were numbered as S1 to S5 and the specimen finger print of the Appellant numbered as S6.

33. It must be mentioned at this stage that, subsequently, a report was given by PW-19 comparing the chance prints with the specimen finger prints. The chance palm print Q1 was found to be identical to the left palm print of PW-2.

34. The charge sheet was filed on 24th December 2014 and by an order dated 13th January 2015, charges were framed as noted hereinbefore.

Trial

35. The prosecution examined 28 witnesses. When the incriminating circumstances were put to him under Section 313 Cr PC, the Appellant

denied some of them and admitted some. The circumstances not denied by him were as under:

- (i) That he is the registered owner of Swift Dzire bearing registration DL 1Y D7910;
- (ii) That he was operating the said car as a cab and as a driver partner with Uber Services Private Limited.
- (iii) PW-23 had booked the said cab by using the Uber application on his mobile phone.
- (iv) The Appellant reached Vasant Vihar in front of one 24x7 outlet at the Indian Oil petrol pump. PW-2 sat in the rear seat and told him that she had to go to the locality where she was residing.

36. What the Appellant denied was that PW-2 fell asleep while sitting in the rear seat of his cab. According to him, she had started crying after sitting in the car. He denied having done “*cherkhani*” with her and then having forcibly confined her in the rear seat by lying on top of her and committing rape. He also denied as incorrect that he gave a missed call from the mobile of PW-2 to his own mobile number. He admitted as correct that his mobile number ended ‘8777’. When asked whether a text message meant for PW-2’s fiancé stating “I was raped” was accidentally sent by her to his mobile number, the Appellant replied: “I cannot tell if I had received any such message as I keep deleting the messages from my phone”.

37. The Appellant admitted to having refused to participate in the TIP and that he was unmuffled by Inspector Anil Dureja after coming out of the Court of the learned MM. He also admitted as correct that his mobile number ending ‘8777’ was registered in the name of Gaurav Thakral (PW-7) who had given his old Nokia phone along with an old SIM card

to the Appellant as both of them were working in the same company and that he had not returned the mobile phone to PW-7 till date.

38. Question no.38 and the answer thereto are significant:

“Q.38 It is in evidence against you that during trial, PW2 also identified the clothes which were worn by you at the time of incident, i.e. one black colour full pant, gents underwear and full sleeve shirt Ex.PW2/PF to Ex.PW2/PH. What have you to say?

Ans: It is a matter of record.”

39. The Appellant admitted as correct that his blood sample was taken by the doctor. According to him, his clothes were not taken by the doctor on 8th December 2014 but only on 11th December 2014. He admitted as correct that he was issued a driving license from Delhi which had been seized.

40. The CDR of the mobile number ending ‘8777’ (Ex.PW-8/A) for the period 5th-7th December 2014 was admitted to by the Appellant as being “a matter of record”. The customer application form (‘CAF’) of the mobile number ending ‘0362’, which was ascribed to the fiancé of PW-2, and the CDR of which was collected for the period 5th-6th December 2014 (Ex.PW-8/E) was also admitted to as being “a matter of record”.

41. The Appellant also did not dispute the entries in the *malkhana* register regarding deposit of the case properties. He also did not deny that his mobile phone along with the key of his car was taken by the police officials from his house. He also stated as being a matter of record that Ex.PW-11/A was the CAF pertaining to the mobile number in the name of PW-23 and that Ex.PW-11/B was the CDR of that number from 5th-6th December 2014. He claims to have himself surrendered to the police at PS Highway on 7th December 2014. He claimed not to know

how the vehicle was brought to Delhi. According to him, he had been acquitted in FIR No.521/2011 registered at PS Mehrauli under Sections 376 and 506 IPC. The Appellant claimed that certain other FIRs lodged against him were all false cases. He admitted as correct that he had another driving licence issued in his name from the Mathura Transport Authority.

42. When asked whether he had anything else to say, the Appellant answered:

“I am innocent and have been falsely implicated in this case. After sitting in the car, PW2 started crying after telling me the destination i.e. Inderlok via Daula Kuan and Punjabi Bagh. When I asked her as to why she is crying, she told me that it is not my business to ask her. Thereafter, I kept quiet. I overheard her talking to someone on her mobile phone. She was saying that though she will marry her fiancée ____, but "__(PW-23) *ne mere saath achhaa nahi kiya*". As there was traffic jam at Punjabi Bagh, I took a detour and reached her house through Rampura. I dropped her outside her house and thereafter, I parked my car near Chhapan Bhiga Park as there was probability of getting passengers from that place. After sometime, I noticed that mobile phone of prosecutrix was lying on the rear seat of the car. I received her call on her mobile and she requested me to return her mobile and accordingly I went to her house and handed back her mobile to PW2. She asked me for my mobile number. I gave her my mobile number and left. I did not commit rape upon PW2. The case against me is false.”

43. No defence evidence was led by the Appellant.

Impugned judgment of the trial Court

44. In its impugned judgment dated 20th October 2015, the trial Court came to the following conclusions:

- (i) The Appellant had admitted that the statement of PW-2 was recorded under Section 164 Cr PC; that he had refused to

participate in the TIP; that his potency was affirmed by Dr. Ashish Tyagi (Ex.PW-27/F); that he is the registered owner of the Swift Dzire car in question; that he was issued a driving licence (Ex.PW-5/A) from Delhi; that he was operating the Swift Dzire cab as driver-partner with Uber India Systems Private Limited; that PW-23 had used the Uber application from his mobile phone with number ending '2388' to book a cab from near Priya Cinema in Vasant Vihar; that on 5th December 2014, PW-2 sat on the rear seat of his cab; that he was using mobile number ending '8777' which was actually registered in the name of PW-7; that his blood sample had been taken by the doctor during his medical examination; and that FIR No.521/2011 had previously been registered at PS Mehrauli under Sections 376 and 506 IPC but that he had been acquitted in the said case. He also admitted to being involved in other cases in UP as mentioned in the report (Ex.PW-25/B) but maintained that they were all false cases. He also admitted to pointing out the pickup point from where he picked up the victim on 5th December 2014.

- (ii) PW-2 was a reliable and truthful witness. There was consistency in the versions given by PW-2 under Section 164 Cr PC as well as in her deposition in Court. In her statement under Section 164 Cr PC, PW-2 had stated before the learned MM that "male private part of the accused had entered her private parts" to some extent. The use of the phrase "private parts" by the prosecutrix in her statement under Section 164 Cr PC (Ex.PW-2/B-1) is sufficient to show that it was not for the first time before the Court that she mentioned that the Appellant had committed anal sex with her.
- (iii) As per the report of the FSL Biological Division (Ex.PW-26/B), semen of the accused was found in the vaginal swab, cervical

mucus, swab of rectum, jeans pant, and underwear of the prosecutrix.

- (iv) The Appellant had refused to give semen sample at the time of his medical examination. In any event, his DNA profile was generated from the blood sample taken on gauze. There could be no other reason for the presence of the semen of the Appellant in the vaginal swab, cervical mucus swab, and rectal swab of the prosecutrix and in any event, no explanation for the same was offered by the Appellant.
- (v) The testimony of PW-2 that the Appellant forcibly committed rape on her and even attempted anal sex was fully proved by the scientific evidence by way of the DNA Examination Report (Ex.PW-26/B). There was no force in the submission that the report of the CFSL was manipulated or tampered with.
- (vi) There was also no delay in sending the exhibits to the CFSL. There was no manipulation of the MLC of the victim either.
- (vii) There was no merit in the contention of the defence that PW-2 testified about the Appellant pressing her neck forcibly only to bring the case under Section 376 (2) (m) IPC when in fact there was no danger to her life. In any event, in her statement under Section 164 Cr PC, PW-2 had clearly stated that the Appellant had pressed her neck with great force. This was not in any event an improvement.
- (viii) The PCR form was not expected to contain the entire and complete account of the incident. It was just meant to provide information regarding the commission of the offence.
- (ix) As regards PW-2 giving different versions about the alleged taking of her mobile phone by the Appellant during the course of the incident, it could not be considered a material improvement by

PW-2. The DNA report as well as the testimony of PW-2 remained unimpeached and consistent with her version of events.

- (x) There was not an iota of evidence to show that PW-2 talked to her mother for 16 seconds at 12:15 am on the night of the incident. The mere fact there was an incoming call of 16 seconds duration reflected in the CDR was not sufficient per se to hold that PW-2 had talked to her mother at that time.

45. Consequently, it was concluded that the Appellant was guilty of the offences with which he had been charged. By a separate order on sentence dated 3rd November 2015, the Appellant was sentenced in the manner indicated hereinbefore.

46. This Court has heard the submissions of Mr. Raman Yadav, learned counsel for the Appellant, and Mr. Kewal Singh Ahuja, learned APP for the State.

PW-2: a truthful and reliable witness

47. The first attempt by the learned counsel for the Appellant was to show that PW-2 was not truthful or reliable as a witness. The Court finds that in the cross-examination of PW-2, she was only contradicted on one small aspect which was sought to be shown as an improvement. When she replied to the same stating that she had told the police that the Appellant had already taken away her mobile phone whilst she was asleep on the rear seat of the cab, she was confronted with the complaint (Ex.PW-2/A) where it was not so recorded. Nevertheless, she clarified that she had in fact said so in her statement under Section 164 Cr PC. This cannot, therefore, be seen as a material inconsistency in her testimony.

48. Learned counsel for the Appellant referred to the PCR form and what had been recorded there and tried to contend that PW-2's deposition in Court was a huge improvement over that. As pointed out by the trial Court itself, what is written in the PCR form cannot be elevated to the level of a deposition in Court or even a statement made under Section 164 Cr PC.

49. The determination as to whether a witness is truthful or reliable can be made only upon comparing her confession under Section 164 Cr PC to her deposition in Court. If these two were very different from her initial statement to the police under Section 161 Cr PC, then she could always be confronted while deposing with what she had stated in her initial statement under Section 161 Cr PC. However, entries in the PCR form cannot be said to constitute a previous statement recorded by the police under Section 161 Cr PC. Learned counsel for the Appellant was therefore unable to point out whether any significant improvement was made by PW-2 in her deposition in Court over what she had stated under Section 164 Cr PC. The Court is unable to find any such major improvement.

50. In this context the law in relation to appreciation of the testimony of a rape victim as explained by the Supreme Court in the following words in *State of Maharashtra v. Chandraprakash Kewalchand Jain (1990) 1 SCC 550* is relevant:

“15. It is necessary at the outset to state what the approach of the Court should be while evaluating the prosecution evidence, particularly the evidence of the prosecutrix, in sex-offences.

Is it essential that the evidence of the prosecutrix should be corroborated in material particulars before the Court basis a conviction on her testimony? Does the rule of prudence

demand that in all cases save the rarest of rare the Court should look for corroboration before acting on the evidence of the prosecutrix?

Let us see if the Evidence Act provides the clue. Under the said statute 'Evidence' means and includes all statements which the Court permits or requires to be made before it by witnesses, in relation to the matters of fact under inquiry. Under Section 59 all facts, except the contents of documents, may be proved by oral evidence. Section 118 then tells us who may give oral evidence. According to that section all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. Even in the case of an accomplice Section 133 provides that he shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. However, illustration (b) to Section. 114, which lays down a rule of practice, says that the Court 'may' presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. Thus under Section 133, which lays down a rule of law, an accomplice is a competent witness and a conviction based solely on his uncorroborated evidence is not illegal although in view of Section 114, illustration (b), courts do not as a matter of practice do so and look for corroboration in material particulars. This is the conjoint effect of Sections 133 and 114, illustration (b).

16. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no C more. What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge

levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence.

We have, therefore, no doubt in our minds that ordinarily the evidence of a prosecutrix who does not lack understanding must be accepted. The degree of proof required must not be higher than is expected of an injured witness.”

51. In *State of Punjab v. Gurmit Singh (1996) 2 SCC 384*, the above legal position was reiterated thus:

“The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self respecting woman would come forward in a court just to make a humiliating” statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.

The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not over-look.

The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.

Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satiate its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape.

Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

It must not be over-looked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny

making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole the case spoken of by the victim of sex crime strikes the judicial mind as probable.”

52. In the present case, PW-2 has been consistent on the material particulars of her version throughout: first in her statement to the police, then before the learned MM, and finally while deposing in Court. She has withstood rigorous and unrelenting cross-examination. Further, as will be seen hereafter, the medical and forensic evidence fully corroborates the version of PW-2 that the Appellant confined her in the rear seat of the cab and raped her. In *Om Prakash v. State of U.P. (2006) 9 SCC 787*, it was held: “If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence”.

53. This Court also concurs with the trial Court on the series of admissions made by the Appellant which makes it unnecessary for the prosecution to have to prove that he was driving the Swift Dzire car which was being operated as an Uber cab in which PW-2 took a ride on the fateful night of 5th December 2014.

54. Learned counsel for the Appellant then dwelt on the ‘reddishness’ noticed on the introitus of PW-2 by PW-12 who saw her for the second time at 7:30 pm on 6th December 2014. Learned counsel for the Appellant made a preposterous submission that the said reddishness and scratch marks on the neck which were noticed for the first time by PW-12 were “self inflicted”. The Court makes it clear that such submissions require to be noted merely for the purpose their being rejected as wholly improbable and a figment of the imagination of the

learned counsel for the Appellant. No such suggestion was put to PW-2 when she was cross-examined. In fact, there is very little confrontation of PW-2 about anything stated by her in her initial statement to the police which could demonstrate that she was neither truthful nor reliable. On the other hand, on the material aspects of the rape having been committed by the Appellant in the rear seat of the Swift Dzire cab, PW-2 is entirely consistent at every stage of the investigation. Whatever omissions or additions were made in her statement under Section 164 Cr PC and later in the trial Court are not material enough to shake the truthfulness or reliability of the deposition of PW-2 as regards the actual commission of rape on her by the Appellant in the rear seat of the cab.

55. Learned counsel for the Appellant then urged that the evidence of PW-12 shows that the clothes of PW-2 were not collected at the earliest point in time and handed over to the police and, therefore, any semen stains on such clothes of PW-2 should be kept out of the reckoning. The above submission overlooks the fact that apart from the clothes of PW-2, semen was found in her vaginal and anal swabs. The FSL report, as noticed by the trial Court, recorded as under:

“As per Biological Examination and DNA Profiling Report Ex.PW-26/B, semen was detected on exhibits 1j (vaginal swab of Prosecutrix), 1k (cervical mucus of Prosecutrix), 1n (swab of rectal examination of Prosecutrix), 2a (Jeans Part of Prosecutrix) and 2c (Underwear of Prosecutrix). Further, as per Report Ex.PW-26/B, the DNA profile generated from male fraction DNA obtained from the source of exhibits: 1j (vaginal swab and smear), 1k (Cervical mucus swab), 1n (Rectal swab & smear), 2a (Jeans pants), 2c (Underwear), 3b (Shirt), 3c (Underwear), 5 (Pubic hair) and 10 (Nail Clippings) was found to be human male in origin and consistent with the DNA profile of Shiv Kumar Yadav (Source of exhibit-4: Blood stained Gauze). Thus, as per report Ex.PW-26/B, semen of Accused was found in vaginal

swab, cervical mucus, swab of rectal, jeans part and underwear of the Prosecutrix.”

56. Therefore, the connection of the Appellant with the crime was unmistakably established by the medical and scientific evidence.

Section 376 (2) (m) IPC

57. Learned counsel for the Appellant then dwelt on Section 376 (2) (m) IPC which reads as under:

“376. Punishment for rape.—(1)

(2) Whoever,—

.....

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

.....

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that natural person’s natural life, and shall also be liable to fine.”

58. He contends that none of the ingredients of Section 376 (2) (m) IPC stand attracted in the present case, particularly since PW-2 was not in danger by any overt act of the Appellant except the pressing of her neck which again did not result in any injury.

59. The Court is unable to agree with the above submission. As noted by the trial Court, even in the statement under Section 164 Cr PC, PW-2 spoke about the Appellant pressing her neck very hard while committing the rape. Given the limited space in the rear seat of a car and the fact that the Appellant was lying over her, she was virtually unable to move, much less free herself, while the Appellant was committing rape. With the

Appellant threatening her with bodily harm with a *saria* if she made any noise, PW-2 must have been in a state of panic. In the considered view of the Court, the key ingredient of Section 376 (2) (m) IPC, viz. that the perpetrator must endanger the victim's life, is satisfied in the facts and circumstances of the present case. The Court concurs with the trial Court that the offence punishable under Section 376 (2) (m) IPC stands attracted in the present case.

60. The bite mark on the lower lip of PW-2 fully justifies the finding of guilt of the Appellant for the offence under Section 323 IPC. Confinement of PW-2 in the rear seat by locking the door and committing rape and criminal intimidation attract the offences punishable under Sections 366 and 506 IPC.

61. Consequently, the Court finds no grounds made out for interfering with the conviction of the Appellant by the trial Court for the offences under Section 376 (2) (m), 323, 366, and 506 IPC.

Sentence

62. Learned counsel for the Appellant then argued that the sentence of life imprisonment for the offence punishable under Section 376 (2) (m) IPC was unduly harsh and that this Court should consider awarding a lesser sentence of ten years imprisonment, i.e. the minimum sentence for the offence under Section 376 (2) (m) IPC.

63. The Court notes that instances of rape have been on the rise, notwithstanding more stringent provisions being inserted in the IPC post 16th December 2012. Section 376 (2) (m) IPC came into force pursuant to the recommendations on changes to the IPC made by the Justice Verma Committee. Yet, statistics collated by the National Crime Records

Bureau for 2016 show that 38,947 women were raped that year. In other words, nearly five rapes were committed every hour in that year!

64. Despite his previous criminal record of being involved, amongst others, in cases punishable under Section 376 IPC, the Appellant does not appear to have learnt anything from those experiences. While one of the cases against him under Section 376 IPC ended in his acquittal, there is at least one other case involving the same offence pending against him. Given the track record of the Appellant and the extreme physical and mental trauma suffered by PW-2, there is absolutely no scope for any leniency as far as the sentence is concerned.

65. Consequently, this Court affirms the order on conviction as well as the order on sentence passed by the trial Court. The appeal and the pending applications are dismissed.

S. MURALIDHAR, J.

VINOD GOEL, J.

SEPTEMBER 10, 2018

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