

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Reserved on : 7th December, 2021**
Pronounced on: 23rd December, 2021

+ CRL.A. 226/2007
RAM BAX Appellant/Accused
Through: Mr. Anuj Kapoor, (DHCLSC)
alongwith Appellant/Accused.

versus

THE STATE OF NCT DLEHI Respondent
Through: Mr. Panna Lal Sharma, APP with
SI Narasi Prasad Meena, P.S. New
Friends Colony

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The instant Criminal Appeal under Section 374 (2) of Code of Criminal Procedure, 1973 (hereinafter "Cr.P.C.") is filed against the impugned judgment dated 18th July, 2006 and order on sentence dated 20th July 2006 passed by the learned Additional Sessions Judge, New Delhi, wherein the Appellant/Accused is convicted for the offence punishable under Section 376 of the Indian Penal Code, 1860 (hereinafter "I.P.C."), and he was sentenced to undergo eight years of Rigorous Imprisonment and to pay a fine of Rs.1,000/-. In default of payment of fine, the Appellant/Accused is to further undergo Simple Imprisonment for one month.

FACTUAL MATRIX

2. The brief facts and circumstances giving rise to this case, are that: -
- i. The Prosecutrix/Complainant made a complaint in the Police Station Jamia Nagar, New Delhi upon which FIR bearing No. 425 of 2004 dated 06th September, 2004 under Sections 376/506 IPC was registered.
 - ii. Prosecutrix/Complainant used to reside along with the Appellant/Accused, her mother-Suman and younger step brother-Raju at Gaffar Manzil adjoining to plot B-29.
 - iii. It is alleged that on 14th July 2004, at about 5 A.M. in the morning, the Prosecutrix/Complainant was called by the Appellant/Accused inside the room. The Appellant/Accused asked the Prosecutrix/Complainant to massage his head as he was having some pain in his head. When the Prosecutrix/Complainant entered inside the room, she saw the Appellant/Accused standing naked.
 - iv. It is alleged that the Appellant/Accused committed rape on her. When Prosecutrix/Complainant tried to raise alarm, the Appellant/Accused gagged her mouth. It is further alleged that thereafter the Appellant/Accused continued to commit rape on her.
 - v. On 6th September, 2004 at about 12:30 P.M., the Appellant/Accused again committed rape upon the Prosecutrix/Complainant. The Prosecutrix/Complainant filed a complaint with the Police on the same day. On the basis of said complaint, F.I.R. No. 425/2004 was registered at Police Station New Friends Colony under Sections 376/506 of I.P.C. Thereafter,

the Appellant/Accused was arrested by the Police on 07th September, 2004.

- vi. Statement of the witnesses were recorded under Section 161 of Cr.P.C. After the completion of investigation, charge-sheet was prepared and submitted in the Court of Metropolitan Magistrate concerned. The case was committed to sessions and a charge under Section 376 IPC was framed by the Trial Court.
- vii. The prosecution examined PW-1 Lady Constable Anju, PW-2 HC Prithvi Raj, PW-3 Dr. Minakshi Sharma, PW-4 Savita Sharma, PW-5 HC Prakash Chander, PW-6 Ms. Illa Rawat, PW-7 Naresh, PW-8 Prosecutrix/Complainant "X", PW-9 ASI Rajender and PW-10 HC Ranga Rao, to prove its case.
- viii. The statement of the Appellant/Accused was recorded under Section 313 of Cr.P.C. The Appellant/Accused denied his involvement in the commission of the offence. The plea of the Appellant/Accused was that he has been falsely implicated in the case. The Prosecutrix/Complainant is his step daughter who was having an affair with a boy, namely, Amir.
- ix. It is further stated in the statement of the Appellant/Accused under Section 313 of Cr.P.C that the area where he resided was dominated by Muslims and some local Muslim influential persons supported the said boy and on the influence of the local persons and Amir, Prosecutrix/Complainant has falsely implicated him. The Appellant/Accused also denied the fact that he raped the Prosecutrix/Complainant, but he has not led any evidence in his defence.

- x. The Sessions Court relied upon the evidence led by the prosecution to record the finding that the Appellant/Accused being a step father of the victim committed an offence of rape upon her. It held that the Appellant/Accused did not give any plausible explanation to the incriminating circumstances appearing against him in the statement recorded under Section 313 of Cr.P.C. He did not examine any witness in defence to falsify the statements of the Prosecutrix/Complainant.
- xi. The Sessions Court further held that the testimony of the Prosecutrix/Complainant herself was sufficient to prove the guilt of the Appellant/Accused. It held that the sexual assault had been proved and the prosecution had established its case beyond reasonable doubt that the Appellant/Accused committed rape on the Prosecutrix/ Complainant during her stay with him. It also held that conviction in the case of offence punishable under Section 376 of Cr.P.C can be based on the sole testimony of the Prosecutrix/Complainant. Thereby, vide judgment dated 18th July, 2006 and order on sentence dated 20th July 2006, the Learned Additional Sessions Judge, New Delhi convicted the Accused/Appellant for commission of the offence punishable under Section 376 of I.P.C and sentenced to suffer eight years of Rigorous Imprisonment and to pay a fine of Rs.1,000/-. In default of payment of fine, the Appellant/Accused is to further undergo Simple Imprisonment for one month.

xii. Hence, the instant criminal appeal has been filed by the Appellant/Accused challenging the judgment dated 18th July, 2006 and order on sentence dated 20th July 2006.

SUBMISSIONS

3. Mr. Anuj Kapoor, learned counsel appearing for the Delhi High Court Legal Services Committee (DHCLSC) submitted that the Prosecutrix/ Complainant as PW-8 cannot be relied upon because there have been material contradictions in her depositions. It is further submitted that the admitted facts in light of which her testimony is to be examined for its inherent credibility are: -

- i. A family of four members was living in a one room house and the Prosecutrix/Complainant was being allegedly raped continuously by the Appellant/Accused in the same house where other two persons i.e. mother and step brother were residing.
 - ii. Prosecutrix/Complainant had been living with the Appellant/Accused since her childhood. There was delay in the lodging the FIR as the first instance of the alleged rape was of 14th July, 2004 and the FIR was lodged on 06th September, 2004.
4. The learned counsel appearing on behalf of the Appellant/Accused submitted that the Prosecutrix/Complainant's testimony is conspicuously silent on the facts that the FIR and statements under Section 161 and 164 have no details about where, what time and under what circumstances the Appellant/Accused would have allegedly raped the Prosecutrix/ Complainant repeatedly from 14th July, 2004 to 06th September, 2004. It is also not stated or explained anywhere as to how the Appellant/Accused

would ensure absence of his wife/ Prosecutrix/Complainant's mother, during such alleged transgressions.

5. It is also submitted by the learned counsel appearing on behalf of the Appellant/Accused that Prosecutrix/Complainant had been confronted on large number of issues/facts with her statement under Section 161 of Cr.P.C. The improvements had been of such a large magnitude that her statement itself became unreliable. It is further submitted that the Prosecutrix/Complainant had a relationship with one local boy i.e. Amir and later on she got married to him. It is further submitted that the key witnesses i.e. the mother and the step brother of the Prosecutrix/Complainant were not even examined. Therefore, the statement of the Prosecutrix/Complainant before the Trial Court has not been corroborated to the extent that she had informed her mother about the continuous rape committed by her step father, and that the step father allegedly raped her by sending her step brother outside the house.

6. It is also submitted by the learned counsel appearing on behalf of the Appellant/Accused that the neighbours and others persons who allegedly warned the Appellant/Accused to keep his behavior good towards Prosecutrix/Complainant, were also not examined. It is further submitted that the credibility of the prosecution's story further diminished, when it is observed that none of the persons, which were mentioned by the Prosecutrix/Complainant in her statement under Section 164 of Cr.P.C., were examined. It is also submitted that the Prosecutrix/Complainant has categorically stated in her statement under Section 164 of Cr. PC and before the Trial Court that she informed about the incident

to one aunt who was her neighbour, one uncle Firoz Islam, her mother, Rafiq Uncle, Santosh Mama and Shafeeq. Such a long sequence of persons who have allegedly been informed about the alleged repeated rape being committed by the Appellant/Accused on the Prosecutrix/Complainant, were not examined by the prosecution to corroborate the statement of the Prosecutrix/Complainant. It is submitted that a person Shafeeq who is said to have called the persons from National Commission for Women, was also not examined as witness by the prosecution. Even the Investigating Officer was not examined. Non-examination of these witnesses and the material contradictions in the statements of the Prosecutrix/Complainant leaves no doubt that the Appellant/ Accused has been falsely implicated in the present case by the Prosecutrix/Complainant as he was one of the persons who did not like her affair with the neighbour boy who belongs to another faith/religion. Therefore, it cannot be denied that the instant criminal case was initiated in the influence of the said boy.

7. It is further submitted that the mere perfunctory reiteration by the Prosecutrix/Complainant of her version in her statements under Section 161 and 164 of Cr.P.C., and the statements given in her examination-in-chief and cross examination before the Trial court could not have been enough to convict the Appellant/Accused, especially when it was extremely improbable, inherently weak and no corroboration in any manner whatsoever.

8. Learned counsel appearing on behalf of the petitioner further submitted that it is an admitted fact, and not denied by the

Prosecutrix/Complainant, that she had an affair with one local boy i.e. Amir. As per the medical report, there were no sign of injury on her private part. It is stated that her hymen was torn, and she was not virgin at the time of medical tests. She was habitual to sexual intercourse. It is to be appreciated in light of the facts that the Prosecutrix/ Complainant admitted, during her evidence recorded on 27th January, 2006, that she had been married to Amir with whom she was in relationship.

9. As per the FSL and Serological report, it cannot be treated as an incriminatory piece of evidence, as they did not find the Appellant/ Accused's semen on the Prosecutrix/Complainant's clothes. Human semen was nevertheless detected. Learned counsel appearing on behalf of the Appellant/Accused submitted that the Trial Court has not considered the aforesaid aspects while passing the impugned order. The impugned order passed by the Court below has been passed in mechanical way without application of judicial mind and proper appreciations of the evidences on record. Learned counsel submitted that the Appellant/Accused has already under gone more than 4 ½ years in custody. The incident took place in the year 2004 i.e. more than 17 years back. It is vehemently submitted that in view of the above facts and circumstances, the conviction of the Appellant/ Accused has to be set aside and the criminal appeal deserved to be allowed.

10. *Per contra*, Mr. Panna Lal Sharma, learned APP appearing on behalf of the State has vehemently opposed the criminal appeal and contended that the Appellant/Accused has been rightly convicted on the sole testimony of the Prosecutrix/Complainant and the Court below has

appreciated the facts in the correct perspective. The findings so recorded by the Court below do not require any interference, thus, the appeal is liable to be dismissed.

ANALYSIS AND FINDINGS

11. I have considered the rival submissions made by the learned counsel for the parties and perused the record.

12. The Trial Court recorded conviction of the Appellant/Accused merely by placing very heavy reliance upon the deposition of the Prosecutrix/Complainant. Advertently, the defence was taken by the Appellant/Accused in his statement under Section 313 of Cr. PC that the Prosecutrix/Complainant had developed her relationship with one boy, namely, Amir and the Appellant/Accused did not like her relationship with the said boy as he has raised the Prosecutrix/Complainant as his own daughter since her childhood. The Appellant/Accused tried to stop her daughter i.e. Prosecutrix/Complainant from meeting the said boy but she did not like the way in which she was stopped. It is also stated in the statement under Section 313 of Cr.P.C. given by the Appellant/ Accused that by virtue of influence by the said boy and others influential persons of the area who belong to another religion, the Prosecutrix/Complainant has made false and frivolous criminal case against the Appellant/Accused. The same facts and circumstances have not been referred or appreciated by the Trial Court while passing the impugned judgment and order on sentence, even though, the law requires the Court to appreciate the defense version and decide its veracity in accordance with law.

13. In order to test the veracity of the depositions of the Prosecutrix/Complainant (PW-8), it may be relevant to make reference to her examination-in-chief, in which she stated as under:

“The accused..... On 14.07.04, the accused now present before the court today called at about 5 am in his room to press his head. When I went inside the room, I saw the accused standing naked. Thereafter the accused put off my pajama after calling me inside the room. The accused attempted to commit rape with me forcibly. I started raising alarm. However, the accused gagged my mouth. Thereafter someone called from outside and the accused left the room. I disclosed the incident to my mother. When my mother objected to the accused, he gave beatings to her. Thereafter, the accused continued to have sexual relations / rape with me once or twice in a week without my consent.....”

14. The relevant reference of the cross examination of the Prosecutrix/Complainant is stated as under:

“I remember the date 14th of July as I was raped on that day. I remember the date for today. It is 27th of January 2006. On 14th July, I was raped by the accused when he had called me to press his head at about 5 am. (Vol. the accused had continued to have sexual relations with me for about 15 minutes and thereafter someone had called from outside and the accused had left). I had attempted to raise alarm but the accused had gagged my mouth and had threatened to kill my brother and mother. My brother is not my real brother. The said brother is the real son of the accused and he is my step brother. The accused used to send my mother outside after giving her beatings. My mother was also under fear as I had disclosed to her about the threat extended by the accused. (Vol. on one occasion complaint was lodged to the

neighbours and they had also threatened the accused to keep his behaviour good or else they will report the matter to the police.....My maternal uncle had visited us once. His name is Raju. I have visiting terms in 2 or 3 houses in my neighbourhood. The neighbours also used to visit us in our house but we were not having any deep relations with them..... I was aware that the accused was interested to have second marriage. I do not know with whom he wanted to have second marriage. I do not know if no marriage took place between the accused and my mother..... I know Santosh. He has been made a brother by my mother, when I narrated the entire incident to Shafeeq, the friend of my father, (accused present before the court). He called NGOs from National Women Commission. At present, I am muslim..... At present my name is Shaba. At present I am a married girl. I have married Amir about 6 or 7 months back. I do not remember the date of my marriage.....”

15. There are several contradictions in the statement of the Prosecutrix/ Complainant given under Section 161, 164 of Cr.P.C. examination in chief and cross examination.

Statement under section 161 of Cr.P.C. of the Prosecutrix/ Complainant is read as under:

“.....डेढ़ दो महीने पहले दिनांक 14 जुलाई 2004 को सुबह करीब 5 बजे जब मेरी मम्मी भहर आंगन में तक्थ पर सोई थी और मे भी मेरी मम्मी के साथ तक्थ पर सोए थी मेरे भाई पापा के साथ अंदर कमरे में तक्थ पर सोया था। मेरे पापा ने आके मुझे जगाया की मेरी कमर में दर्द है दबा दे, जिस पर मे अन्दर कमरे में गई तो कमरे में अँधेरा था मेरे पापा बिना कपड़े के खड़े थे तो अचानक किसी व्यक्ति की आवाज़ सुन कर मेरे पापा भहर चले गए उसके बाद मेरे पापा मेरे साथ हफ्ते में अक्सर एक बार बलात्कार करते रहे.....दिनांक 06.09.2004 को भी मेरे पापा ने दिन में करीब 12:30 बजे दिन में मुझे कमरे में बुलाया और मेरी मम्मी जो की कमर के नीचे से अपाहीच

है को उठा के तख्त पर बैठा दी और मुझे सर दबाने के भने कमरे मे बुलाया और ज़बरदस्ती बेड पर लिटा दिया....."

Statement under section 164 of Cr.P.C. of the Prosecutrix/ Complainant is read as under:

"Ques: आप कहाँ रहते हो

Ans: पता नहीं

.....पांच बजे पापा रामबख्श ने आकर मुझे जगाया। कहा कमर मे दर्द हो रहा है आके दबा दे। मे पापा के कमरे मे गई तो देखा पापा नंगे खड़े थे। ज़बरदस्ती मेरा पजामा उतरने लगे। फिर ज़बरदस्ती करने लगे। जब ज़बरदस्ती कर रहे थे तो किसी ने बाहर से आवाज़ दी। पापा जल्दी से कच्ची पहन कर चले गए। मैने चिल्लाने की कोशिश करी तो पापा ने मुझे मुँह दबा लिया मम्मी मजबूर थी क्युकी उनके पैर तोड़ रखे है। मैने घर के पास आंटी को बताया। उन्होंने अंकल फ़िरोज़ इस्लाम को बताया। उन्होंने फैक्ट्री के मालिक हो बताया। सब ने पापा को बुलाया और डंडा"

16. The Contradictions in the statements of Prosecutrix/ Complainant recorded at different stages of investigation, enquiry and trial are discussed as follows:

- i. In the FIR the Prosecutrix/Complainant stated that the Accused/Appellant called her inside the room in the morning at 5:00 AM to massage her back, whereas in the examination-in-chief and cross examination she has categorically stated that the Accused/Appellant called the Prosecutrix/Complainant to massage his head.
- ii. In the FIR the Prosecutrix/Complainant stated that her brother was sleeping inside the same room, where the alleged rape was committed, whereas in cross examination the Prosecutrix/Complainant categorically stated that Appellant/Accused used to send the brother of the

Prosecutrix/Complainant outside after giving him money and the accused/ appellant continued sexual relation for about 15 minutes in the room, after which someone called the Accused/Appellant, due to which he left the room. After the Accused/ Appellant left the room the prosecutrix tried to raise the alarm, however the Accused/Appellant gagged her mouth.

- iii. In FIR the Prosecutrix/Complainant stated that on one occasion, she informed her neighbours about the alleged behavior of the Appellant/Accused and they had also threatened the Appellant/Accused to keep his behavior good or else they will report the matter to the police, whereas in cross examination the Prosecutrix/Complainant categorically stated that the neighbours also used to visit us in their house but they were not having any deep relations with them.

17. So far as the injury on her person, is concerned Dr. Minakshi Sharma PW-3, did not find any injury on her private part. The relevant portion of the statement of Dr. Minakshi is as under:

“I have seen MLC: No. 061 dated 6.9.04 pertaining to Poonam D/o Ram Bax aged 16 years Female. She was brought for her medical examination with the allegedly history of rape by her father. I examined her and prepared MLC Ex. PW 3/A which is in my hand writing and bears my signatures. During examination, I found bruises on left upper arm, hymen was torn and there was no external injury on the private area. The vaginal smear was collected, slide was prepared, sealed and handed over to the Lady Constable alongwith the sample seal.”

18. The relevant portion of the statement of the Counselor of National Commission for Women is as under: -

“On 5.9.04, I was working as Counsellor in National Commission for Women. On that day, I received an information from my senior Member Nafisa that one minor girl was raped in Okhla and she has received the information from one Santosh. On 6.9.04, I alongwith Madam Nafisa went to the house of prosecutrix in a govt. vehicle. We met with the mother of the prosecutrix and prosecutrix Poonam and both told us that prosecutrix was raped by father of the prosecutrix. Thereafter, we took the prosecutrix and her mother to the PS. Police recorded the statement of the prosecutrix and then, we left the Police Station.”

19. It is admitted that the Investigating Officer has not been examined.

20. The Appellant/Accused in his statement under Section 313 of Cr. PC stated as under:

“Q2 It is further in evidence against you that PW 8 Poonam was residing with you along with her mother and younger brother at a plot near B-29, Gafar Manzil, Jamia Nagar, New Delhi in 2004. What have you to say?

Ans It is correct.

Q3 It is further in evidence against you that in 14/7/2004 you called PW 8 Poonam at about 5 AM in your room to press your head. When PW 8 Poonam went inside the room, she saw you standing naked. What have you to say?

Ans It is incorrect. At that time, I was on duty.

Q4 It is further in evidence against you that thereafter you put off pyjama of PW 8 Poonam after calling her inside the room. You attempted to commit rape with PW 8 forcibly. PW 8 started raising alarm. You gagged her mouth. What

have you to say?

Ans It is incorrect. I was on duty at that time in Jamia University.

Q6 It is further in evidence against you that thereafter you continued to have sexual relations/rape with PW 8 Poonam once or twice a week without her consent. What have you to say?

Ans It is incorrect.

Q7 It is further in evidence against you that on 14/7/2004 at about 5 AM, you also raped the prosecutrix PW 8 Poonam. What have you to say?

Ans It is incorrect.

Q8 It is further in evidence against you that on 6/9/2004 PW 8 lodged complaint with police. On that day also you had committed rape with her at noon time. What have you to say?

Ans It is incorrect. I was on duty at that time.

Q21 Have you to say anything else?

Ans I am working as a security guard in Jamia Hostels at Jamia Millia University at Delhi. I reside at Gaffar Manzil. This locality is Muslim dominated area. I am only Hindu reside there. Prosecutrix Poonam my step daughter was having an affair with a Muslim Boy namely Amir. I am a religious person and against their affair. So, I always check out and stopped her meeting with the said muslim boy. One day my real son told me that someone is coming in home and meet Poonam so I beat Poonam/ prosecutrix and also my wife because she supported the prosecutrix. On that issue prosecutrix Poonam falsely implicated me in this case and send me behind the bars and got married to the said boy. No body supported me because of Muslim dominated area and some local Muslim influential persons supported

the said boy. I never raped the prosecutrix. It is totally false case against me.”

21. If the evidence on record referred hereinabove, is appreciated, the following picture emerges,

- i) The Prosecutrix/Complainant is step daughter of the Appellant/Accused and she was raised as a daughter since childhood by the Appellant/Accused.
- ii) The Prosecutrix/Complainant had a love affair with one boy Amir and later on she got married to that same boy.
- iii) There are several contradictions in the statements of the Prosecutrix/Complainant and also as per the medical report, no firm opinion had been given by the Doctor that rape was committed. Therefore, the medical evidence, does not positively support the case of the prosecution.
- iv) As per the FSL report, the semen of the Appellant/Accused was also not found on the clothes of the Prosecutrix/Complainant. Therefore, the FSL report does not positively support the case of the prosecution.

22. It is a settled legal proposition that once the statement of the Prosecutrix/Complainant inspires confidence and is accepted by the Court as such, conviction can be made based only on the sole evidence of the Prosecutrix/Complainant and no corroboration would be required unless there are compelling reasons which necessitate the Court for corroboration of her statement. Corroboration of the testimony of the Prosecutrix/Complainant as the condition for judicial reliance is not requirement of law but a guidance of prudence under the given facts and

circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case.

23. The testimony of Prosecutrix/Complainant has to be appreciated on the principle of probabilities just as the testimony of any other witness. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony.

24. In ***Vimal Suresh Kamble v. Chaluverapinake Apal S.P. (2003) 3 SCC 175***, the Hon'ble Supreme Court has held as under: -

“21. On an overall appreciation of the evidence of the prosecutrix and her conduct we have come to the conclusion that PW 1 is not a reliable witness. We, therefore, concur with the view of the High Court that a conviction cannot be safely based upon the evidence of the prosecutrix alone. It is no doubt true that in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. The evidence of the prosecutrix in this case is not of such quality, and there is no other evidence on record which may even lend some assurance, short of corroboration that she is making a truthful statement. We, therefore, find no reason to disagree with the finding of the High Court in an appeal against acquittal. The view taken by the High Court is a possible, reasonable view of the evidence on record and, therefore, warrants no interference. This appeal is dismissed.”

25. In ***Suresh N. Bhusare v. State of Maharashtra (1999) 1 SCC 220***, the Hon'ble Supreme Court has held that where evidence of the

prosecutrix is found suffering from serious infirmities and inconsistencies with other material, the prosecutrix making deliberate improvement on material point with a view to rule out consent on her part and there being no injury on her person even though her version may be otherwise, no reliance can be placed upon her evidence.

26. In ***Jai Krishna Mandal v. State of Jharkhand*** (2010) 14 SCC 534, the Hon'ble Supreme Court while dealing with the aforesaid issue held as under:

“4. ... the only evidence of rape was the statement of the prosecutrix herself and when this evidence was read in its totality the story projected by the prosecutrix was so improbable that it could not be believed.

7. We find this statement to be contrary to the statement of the lady doctor who deposed that she had taken the saree from the prosecutrix and handed it over to the investigating officer. The doctor also does not support the prosecution story. She stated that there was no evidence of rape, no injury on her person and that she was a “multi-persons lady”. We are unable to comprehend what exactly this term means and in the context that it had been used, we assume that she was a lady having regular sexual intercourse with several persons.

8. We also find that as per the prosecution story the appellants were missing from the village on the date that the prosecutrix also disappeared that is 7-2-1999 and though they came back to the village on 11-2-1999, the FIR had been recorded after three days although they had been interrogated by the investigating officer on 11-2-1999 itself. The very fact that the investigating officer has not been examined also causes prejudice to the appellants. As per the

doctor's evidence the petticoat and saree had been handed over to the IO. These articles were not sent for examination nor even produced in evidence.”

27. In the case of ***Johny @ John David Sheri v. The State of Maharashtra*** 2018 SCC OnLine Bom 981, the Hon’ble High Court of Bombay has observed that non-examination of the mother, when the testimony of prosecutrix suffers from infirmities, becomes an important factor to cipher the suspicion. The relevant paragraph has been reproduced as under:

“14. It is well settled that when the available evidence against the accused suffers from infirmities and is doubtful, then non-examination of the material witness becomes an important factor to cast shadow of doubts on the prosecution case. In the case in hand, the prosecutrix has initially disclosed the incident to her mother. As per the prosecution case and version of the prosecutrix, it was her mother, who had insisted her to lodge report against her father. That is how, the prosecutrix went to P.W. No. 2 Manda Alfred Sheri. The first version of the incident was heard by the mother of the prosecutrix from her. Therefore, mother of the prosecutrix was an important witness in this case. No reason can be gathered from the Record and Proceedings as to why the mother of the prosecutrix is not examined by the prosecution apart from not cross-examining the prosecutrix by declaring her as hostile.”

28. In ***Raju v. State of M.P.*** (2008) 15 SCC 133 the Hon’ble Supreme Court has held as under:

“10.... that ordinarily the evidence of a prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on a par with that of an

injured witness and if the evidence is reliable, no corroboration is necessary.

“11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication ... there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.”

29. In ***Tameezuddin v. State (NCT of Delhi) (2009) 15 SCC 566***, the Hon’ble Supreme Court held as under:

“9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.”

30. In the case of ***Manoharlal v. State of Madhya Pradesh (2014) 15 SCC 587***, the Hon’ble Supreme Court has observed that in cases where any parent or brother has not been examined to corroborate the version of the Complainant, the court cannot rely upon the sole testimony of the Complainant, and shall grant the appellant benefit of doubt. The relevant paragraph has been reproduced as under:

“9. Having found it difficult to accept her testimony on its face value, we searched for support from other material but find complete lack of corroboration on material particulars. Firstly, the medical examination of the victim did not result in any definite opinion that she was subjected to rape.

Secondly, Riyaz who was like a brother to the victim and thus a close confidant, has not supported the case of the prosecution and has completely denied having met her when she allegedly narrated the incident to him. Thirdly, the person who was suffering from fever and to whose house she was first taken by the appellant was not examined at all. Fourthly, the policeman who the victim met during the night was also not examined. Fifthly, neither the brother nor any of the parents of the victim were examined to corroborate the version that she had come from the village of her brother and alighted around 10.00 p.m. at Bajna Bus-Stand. Lastly, the sequence of events as narrated would show that she had allegedly accompanied the appellant to various places. In the circumstances, we find extreme difficulty in relying upon the version of the victim alone to bring home the charge against the appellant. We are inclined to give benefit of doubt to the appellant.

“10. We, therefore, set aside the order of conviction and sentence passed against the appellant. The present appeal is thus allowed and the appellant is acquitted of the charge levelled against him. The appellant who was released on bail, is discharged of his bail bonds.”

31. In the case of ***Hirianna Shetty v. the State of Mysore*** 1971 SCC Online Kar 267, the Hon’ble Supreme Court has held that non-examination of the Investigating Officer is a serious infirmity resulting in prejudice to the accused. The relevant paragraph has been reproduced as under:

“10. It is clear from the above decisions that the examination of the Investigating Officer is necessary in order to bring on record the contradictions in the Statement of witnesses and that such a right is a valuable right of the accused. Further, it is clear that non-examination of the

Investigating Officer is a serious infirmity in the prosecution case in so far as it deprived the accused of the opportunity to show to the Court that witnesses were not reliable witnesses by proving contradictions in the earlier statement. Thus, in my opinion, the non-examination of the Investigating Officer in the case is a serious infirmity resulting in prejudice to the accused and therefore, the conviction and sentence passed against him are liable to be set aside.”

32. In the case of ***Dharmendra v. The State of Maharashtra, Criminal Appeal No. 170 of 2017***, the Hon’ble High Court of Judicature at Bombay, Nagpur Bench vide Judgment dated 8th January 2018, had discussed whether the tearing of hymen will amount to sexual assault on the victim, to which the Hon’ble Court had stated as under:

“14. No doubt, the medical report suggests that hymen of the victim was torn and that sexual assault had occurred. The victim was aged seven years. PW 8 Dr. Jaya states that it cannot be stated whether the injuries were painful or not at the time of examining the victim. She states that there may be other reasons for hymen tearing and tearing of hymen is possible if a child is involved in the sports activities. She states that tearing of hymen is possible if a girl child is living in unhygienic condition and there is itching to her private part and if she scratches it by her own finger. She states in response to the query that the minor girl of seven years is capable of sexual intercourse. In view of this, it is not possible to confirm the finding of the Sessions Court that there was a sexual assault on the victim.

15. In view of above, we are of the view that the oral evidence of the witnesses relied upon by the Sessions Court is untrustworthy and not of credence to hold that the offence

against the accused is established. Neither the oral evidence and the medical examination report by PW 8 Dr. Jaya nor the report of the Chemical Analyzer can be relied upon to hold that the accused committed sexual assault on the minor child. The evidence on record is short of connecting the accused with the crime alleged and the possibility of falsely implicating the accused cannot be ruled out. It is, therefore, not possible for us to sustain the findings recorded by the Sessions Court holding the appellant-accused guilty of the offences charged and he is required to be acquitted for want of reliable evidence of committing an act of rape on the minor child, being in relation as niece.”

33. In the case of ***Sadashiv Ramrao Hadbe v. State of Maharashtra, (2006) 10 SCC 92***, the Hon’ble Supreme Court has held that in the cases where there are serious doubts regarding the sexual intercourse, the benefit of doubt has been provided upon the accused. The Hon’ble Supreme court after analysing the facts of the case, held as under:

“....10. In the present case there were so many persons in the clinic and it is highly improbable that the appellant would have made a sexual assault on the patient who came for examination when large number of persons were present in the near vicinity. It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able-bodied person of 20 years of age with ordinary physique. The absence of injuries on the body improbabilise the prosecution version.

13. The Sessions Court as well as the High Court had not taken into consideration the absence of spermatozoa in the

vaginal swab of the prosecutrix. It may also be noticed in the FI statement. In this case the prosecutrix had not given the full description of the incident allegedly taken place but when she was examined in court she had improved her version.

14. On a consideration of the entire evidence in this case, we are of the view that there is a serious doubt regarding the sexual intercourse allegedly committed by the appellant on the prosecutrix. The appellant is entitled to the benefit of those doubts and we are of the view that the High Court and the Sessions Court erred in finding the appellant guilty. We set aside the conviction and sentence of the appellant.... ”

34. The Courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of the witnesses which are not of a substantial character.

35. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively, each ingredient of the offence it seeks to establish and such onus never shifts. It is not the duty of the defense to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defense.

36. It is settled law that unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial

presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt.

37. The Hon'ble Supreme Court in ***Tukaram v. State of Maharashtra (1979) 2 SCC 143*** has held as under: -

“16. Secondly, it has to be borne in mind that the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and that such onus never shifts. It was, therefore, incumbent on it to make out that all the ingredients of Section 375 of the Penal Code, 1860 were present in the case of the sexual intercourse....”

38. In ***Uday v. State of Karnataka (2003) 4 SCC 46*** the Hon'ble Supreme Court has held as under:-

“21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception

of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.”

39. The Hon’ble Supreme Court settled the law that the prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defense. There must be proper legal evidence and material on record to convict the accused. The conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of the prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix's case becomes liable to be rejected.

40. The instant case is required to be decided in the light of the aforesaid settled legal propositions. This Court is of the view that the given facts and circumstances make it crystal clear that if the evidence of the prosecutrix is read and considered in totality of the circumstances along with other evidence on record, in which the offence is alleged to have been committed, her deposition does not inspire confidence. The prosecution has not disclosed the true genesis of the crime. In such a fact situation, the appellant becomes entitled to the benefit of doubt.

CONCLUSION

41. In view of the above, the present appeal succeeded and is allowed.

42. The impugned judgment dated 18th July, 2006 and order on sentence dated 20th July 2006 passed by the learned Additional Sessions Judge, New Delhi, wherein the Appellant/Accused was convicted for the offence punishable under Section 376 of the Indian Penal Code, 1860 is set aside. The Appellant/Accused is on bail. His bail bonds stands discharged.

43. Before parting from the case, I would like to record my appreciation for Mr. Anuj Kapoor, learned counsel appearing on behalf of Delhi High Court legal Services Committee (DHCLSC) for rendering commendable assistance to the Court.

44. Pending application, if any, also stands disposed of.

45. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

December 23, 2021

Pallavi

नित्यमेव जयते