



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

% **Reserved on: August 17, 2023**

Pronounced on: October 18, 2023

+ **CRL.A.344/2003**

STATE

..... Appellant

Through: **Mr.Tarang Srivastava,** Additional
Public Prosecutor for State

Versus

DEVANAND& ORS.

.....Respondents

Through: **Ms.Seema Mishra,** Advocate

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT

SURESH KUMAR KAIT, J

1. Present appeal has been preferred against the judgment dated 05.02.1999 passed by the learned trial court in FIR No.89/96, registered at Police Station Rohini, New Delhi for the offence punishable under Section 376/34 IPC.

2. The case of the prosecution, as noted in the impugned judgment, is that on the night of 26.03.1997, a PCR call was received and the Police was informed that the prosecutrix, aged 45 years, had gone to House No.17, Jaina Apartment to give food to her brother Deva Anand, however, when she did not return, her son Kailash went to the said flat and found that his mother was lying in an unconscious condition. She was taken to the DDU

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Hospital, where she refused to make a statement, however, upon her return to her house, she alleged to have been raped by the accused persons. On her complaint, FIR in question was got registered; accused persons were arrested; investigation mobilized; chargesheet was filed; charge under Section 376/34 IPC was framed and the accused persons were put on trial.

3. In support of prosecution case, prosecution examined six witnesses. PW-1 Dr. Debas is doctor who had conducted medical examination of the accused; PW-2 is the prosecutrix; PW-3, Ct. Surender Kumar is Investigating Officer of this case; PW-4 Dhiraj is SOS daughter of prosecutrix; PW-5 SI Lata Sachdeva, on receipt of *rukka* had registered the FIR in question at CAW Cell, Ashok Vihar, New Delhi and PW-6 is the Clerk from DDU Hospital who was brought into the dock to prove the MLC of the prosecutrix.

4. After conclusion of evidence on behalf of prosecution, statement of accused person under Section 313 Cr.P.C was recorded, wherein they denied the charges framed against them and pleaded innocence. They categorically stated that the prosecutrix used to have illicit relations with different men and the accused persons have been framed by her in this case. However, they did not lead any evidence in their defence.

5. The learned trial court relying upon the testimony of the witnesses recorded and based on the material placed on record *inter alia* held as under:-

“The prosecutrix is a fully grown lady of about 45 years of age and in the natural course of events one would expect that she should be able to resist a sexual assault. She wants to court to believe that she was made to undress without any physical



assault to her tonamentors. Her statement that about half a bottle of liquor was thrust down her neck is incredible to believe. No doubt, direct evidence of rape is noever to be founded but the court must appreciate the evidence bearing in mind the human psychology and probable behaviour pattern of a person while assessing potency of the victim, namely, the prosecutrix and that of the other witness, namely, the PW Dhiraj. In my considered view the Charge of Rape is not proved against any of the accused and no the offence for that reason is proved against any of the accused. Both the accused are acquitted. They are in custody. They shall be set at liberty forthwith if no wanted in any other case. “

6. The challenge to the decision rendered by the learned trial court on behalf of the prosecution is that the prosecutrix PW-2 as well as her SOS daughter PW-4 Dhiraj have fully supported the case of the prosecution and the learned trial court has wrongly come to the conclusion that their statements were unbelievable. The stand of the prosecution is that the learned trial court has erred in holding that when accused Deva Anand started committing rape upon the prosecutrix, she lost consciousness which is highly improbable. Learned Additional Public Prosecutor for State submitted that the decision of the trial court is contrary to the material available on record and the contradictions pointed out in the testimony of the prosecutrix are minor, which are bound to happen and the same cannot be held to be fatal to the case of the prosecution. Hence, it is prayed that the impugned judgment deserves to be set aside.

7. To the contrary, learned counsel appearing on behalf of the respondents submitted learned counsel submitted that after adducing the CRL.A.344/2003



evidence brought on record, learned trial court has rightly acquitted both the accused persons of the offences charged with and hence, the impugned judgment calls for no interference by this Court.

8. The submissions advanced by learned counsel representing both the sides were heard at length.

9. The Hon'ble Supreme Court in **Bhagwan Singh v. State of M.P.**, (2002) 4 SCC 85 has observed that while disturbing the decision of acquittal rendered by the trial court, the High Court is duty bound to re-appreciate the evidence and has held as under:-

“7. We do not agree with the submissions of the learned counsel for the appellants that under Section 378 of the Code of Criminal Procedure the High Court could not disturb the finding of facts of the trial court even if it found that the view taken by the trial court was not proper. On the basis of the pronouncements of this Court, the settled position of law regarding the powers of the High Court in an appeal against an order of acquittal is that the court has full powers to review the evidence upon which an order of acquittal is based and generally it will not interfere with the order of acquittal because by passing an order of acquittal the presumption of innocence in favour of the accused is reinforced. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. Such is not a jurisdiction limitation on the appellate court but Judge-made guidelines for circumspection. The paramount consideration of the court is to ensure



that miscarriage of justice is avoided. A miscarriage of justice which may arise from the acquittal of the guilty is no less than from the conviction of an innocent. In a case where the trial court has taken a view ignoring the admissible evidence, a duty is cast upon the High Court to reappreciate the evidence in acquittal appeal for the purposes of ascertaining as to whether all or any of the accused has committed any offence or not. Probable view taken by the trial court which may not be disturbed in the appeal is such a view which is based upon legal and admissible evidence.”

10. With regard to scope of re-appreciation of evidence in cases of acquittal, the Hon’ble Supreme Court in **Ramanand Yadav Vs. Prabhu Nath Jha** (2003) 12 SCC 606, has held as under:-

“21. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence in a case where the accused has been acquitted, for the purpose of



ascertaining as to whether any of the accused committed any offence or not.”

11. Having regard to the afore-noted settled position of law, this court has scrutinized the testimony of the witnesses recorded before the learned trial court and other material placed on record.

12. **PW-2, prosecutrix** in her examination-in-chief stated before the trial court that accused Deva Anand had come to her house at about 8 PM to discuss about death of his mother and she accompanied him to Jaina Apartment where other accused Kamal Kishore was also present. The prosecutrix alleged that accused Deva Anand caught hold of her hair and both hands and other accused Kamal Kishor put liquor in her mouth and threatened her that they would call her SOS (Save Our Soul) daughter Dhiraj and they would do the same thing with her and other sisters. Accused Deva Anand took off her clothes and committed rape upon her and she became unconscious and regained only on next day when she saw her SOS daughter Dhiraj with Police in the hospital. She stated that her statement under Section 161 Cr.P.C. (Ex.PW2/A) was recorded at her home. However, during her cross-examination, the prosecutrix categorically stated that accused Kamal Kishore did not commit rape upon her and also that she did not know what had happened as she became unconscious thereafter. In fact the prosecutrix has given two contradictory explanations with regard to the role of accused persons. The prosecutrix upon being cross-examined by the learned Public Prosecutor stated that she had told the Police about the conduct of the Kishor Kumar and stated that he had misbehaved with her in a indecent manner and to that extent, she has stated that he committed rape upon her. In her statement recorded before the Police Ex.PW2/A, the



prosecutrix stated that both the accused persons had removed her clothes, whereas during cross examination, she stated that accused No.1 had removed her clothes and committed rape upon her. It is also pertinent to mention here that the prosecutrix during her examination deposed before the trial court that she had gone to Jaina Apartment along with Police and the site plan was prepared in her presence, however, during her cross-examination, she resiled from her statement and stated that she was so unwell that she did not at all move out of her place and she did not point out the place of occurrence to the Police. Upon being confronted by the learned Public Prosecutor with her supplementary statement Ex.PW2/B, prosecutrix stated that the house at Jaina Apartment belonged to accused No.1 and that is why the Police had prepared the site plan as place of crime.

13. Further PW-2 at the time of recording of her statement under Section 161 Cr.P.C. before the Police stated that she did not give any statement in the hospital as she was not fit to make statement. However, MLC of DDU Hospital categorically records her statement. Also the prosecutrix stated before the Police that when respondent no.1 began to rape her, she fell unconscious and gained consciousness in the hospital when she saw her SOS daughter with the Police standing there; whereas during her cross examination, the prosecutrix stated that her SOS daughter had taken her to the hospital with the help of the Police in a car.

14. **PW-4 Dhiraj, who is the SOS daughter of the prosecutrix**, stated that while she was at her home, accused Deva Nand came to her house and told her that prosecutrix was calling her at Jaina Apartment. However, she refused to go and rather sent her two brothers namely Kailash and Dhruv to follow Deva Anand. After some time, her brothers came back and told that



they had heard crying sounds of her mother and so she along with her two brothers and friends Deepika and Shweta went to Jaina Apartment; knocked the door which was opened by Kamal Kishore in intoxicated condition. She saw the prosecutrix lying on a bed in a naked condition and accused Deva Anand was also sitting beside her in a naked condition. She stated that prosecutrix was stinking badly from her mouth and she helped her to wear the clothes and took her to hospital. The statement of PW-4 does not match with the statement of PW-3 Constable Surender Kumar who is the Investigating Officer of this case. PW-4 in her statement stated that accused No.1 had come to her house at about 10.00/10.30 p.m. on 25.03.1996 after prosecutrix had left with him at around 8.30 pm and that she reached Jaina Apartment at 10.30/10.45 p.m. and called the Police at 11 pm. As per Police record, the PCR call was received on 26.03.1996 at about 12.47 midnight which shows that PW-4 did not make any Police call despite having seen the prosecutrix in naked position at the spot of the crime.

15. **PW-1 Dr. Debas** who had carried out the medical examination of two accused persons found them fit for sexual intercourse.

16. **PW-3, Constable Surender Kumar** is the official witness. He has categorically stated that the prosecutrix who had illicit relations with different men and the accused persons have been framed by her in this case. During his cross-examination by the learned Public Prosecutor, he stated that he did not remember whether door of the flat at Jaina Apartment was closed from outside or it was opened with the help of outsider. This witness also stated that nothing was recovered from the personal search of accused no.1. This witness also stated that from the place of occurrence, two underwears were taken into possession vide Ex. PW3/A, and when the CRL.A.344/2003



pulanda was opened before the Court, he said that one underwear belonged to prosecutrix but to whom the second underwear belonged, he did not know. However, when he was cross-examined by learned Additional Public Prosecutor for State, he stated that the underwear belonged to accused Devanand. PW-3 also stated that on the night of alleged incident, i.e. 25.03.1996, he arrested the accused persons from the spot, whereas, as per Police report, arrest has been shown as 26.03.1996. In the considered opinion of this Court, PW-3, despite being an official witness of the prosecution, has not supported the case of prosecution against the respondents-accused.

17. The settled position of law is that sole testimony of the prosecutrix is sufficient to convict the accused persons for the offence of rape, however, the testimony has to be reliable and trustworthy. To prove the guilt of the accused persons, testimony of the prosecutrix, if shaky, has to be corroborated with medical evidence as well as testimony of other witnesses and other evidence placed on record, above all, her own statements in respect of allegation of rape. The prosecutrix stated before the Police that when respondent no.1 began to rape her, she fell unconscious and gained consciousness in the hospital when she saw her SOS daughter with the Police standing there; whereas during her cross examination, the prosecutrix stated that her SOS daughter had taken her to the hospital with the help of the Police in a car. She also stated that accused Kamal Kishore did not commit rape upon her and also that she did not know what had happened when she was unconscious thereafter. In fact the prosecutrix has given two contradictory explanations with regard to the role of accused persons.



18. The MLC of the prosecutrix (EX. PW-6) recorded on 26.03.1996 at 04:30 AM notes that prosecutrix aged 45 years, was conscious and oriented; had *fourchette abrasions* size 3-4 mm with slight bleeding at the edges and her hymen is ragged. The learned trial court on this aspect has observed that the fresh abrasion present at *fourchette* has to be read in the light of statement of prosecutrix, as she had stated that when Devanand started committing rape, at that very moment she fell unconscious, which is highly improbable. Also, as per FSL Report dated 04.08.1997, semen could not be detected on exhibits. The prosecutrix version is that she fell unconscious and lost senses, so, she does not know what had happened and she gained consciousness only in the hospital and also, also the scientific evidence does not in any manner support her allegations of being raped. Thus, by making contradictory statements, the prosecutrix has failed to inspire confidence of this Court to substantiate the case of prosecution and also, the medical and scientific evidence placed on record as well as the testimony of PW-3 and PW-4, has demolished the case of prosecution. This Court cannot ignore that the motive behind implicating accused persons in the present case by the prosecutrix, which could be a property dispute between the parties. The accused has been acquitted of the offence of rape, which is a heinous crime and while challenging the acquittal, the prosecution has to prove its case beyond reasonable doubt based on the evidence which in the considered opinion of this Court the prosecution has utterly failed. In the absence of any cogent evidence or material on record, the judgment of learned trial court cannot be reversed. In our opinion, there is no error in the impugned judgment passed by the learned trial court and their acquittal is accordingly upheld.



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19. In the light of above, the present appeal is accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 18, 2023
ab/r