

2024:PHHC:136594-DB



**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

Date of Decision:-18.10.2024

CRA-AD-170-2023(O&M)

X.

.....Appellant.

Vs.

State of Haryana & Anr.

.....Respondents.

**CORAM:- HON'BLE MR. JUSTICE SUDHIR SINGH
HON'BLE MR. JUSTICE JASJIT SINGH BEDI**

Present:- Mr. Satish Chaudhary, Advocate for the Appellant.

Mr. Sharan Sethi, Additional AG Haryana.

JASJIT SINGH BEDI, J.

The present appeal has been filed against the judgment of acquittal dated 29.08.2022 passed by the Additional Sessions Judge (Fast Track Court), Faridabad.

2. As per record, the FIR came to be registered on 08.04.2018. The judgement of acquittal was recorded on 29.08.2022. The appeal was filed in 2023 and has come up for hearing today after nearly 06 years of the registration of the FIR.

3. Briefly stated, the case of the prosecution is that on 08.04.2018 the complainant/prosecutrix had got her statement recorded with the police in the presence of Ms. Renu Tyagi, Legal Aid Counsel, wherein she had alleged that she was a resident of House No. C-117, Trikha Colony. She was

a qualified MBA. On 05.12.2017 she received a call on her phone no. 01294192900 from phone nos. 9720146614 and 9456690106 and the caller abused and uttered obscene words to her. He threatened her by stating that in case she solemnized marriage with some one else then he would break such a marriage and make the life of her entire family miserable. She used to receive such calls after an interval of 2-3 days and the caller used to harass her by abusing and uttering obscene words. She further disclosed that said phone numbers belonged to her maternal Aunt's son namely Amit, whom she had known since long. Amit son of Kamal Singh, resident of Udainangla, District Etta (U.P.) was posted as a cook in 28th Battalion, Antagarh (Chattisgarh). Her marriage was fixed on 18.02.2018 and that day, her husband Pankaj, received a call from Amit, who tried to break her marriage, by sending obscene messages to her husband and had called him 2-3 time on his mobile numbers 9990353554 and 8368613602. Amit made repeated calls to her husband from his phone nos. 7297843942, 9720146614 and 9456690106 and he had been even causing undue harassment by calling her at phone no. 8851986232 and was threatening that in case she disclosed this fact to anyone then he would kill her.

As the contents of the aforesaid complaint revealed commission of offences punishable under Sections 354-D and 506 IPC, the FIR in question was registered and the investigation began.

Thereafter, the prosecutrix got her supplementary statement recorded with the investigating officer on 09.06.2018, wherein she alleged that on 08.08.2017, accused Amit, had come to their house. At that time, she was alone and he stealthily added some intoxicant in her tea, which was prepared by her at his instance and after consuming the same, she got unconscious. On regaining consciousness, she found herself naked and the

accused was also lying naked over her and told her that he had prepared a video of getting intimate with her. On her resistance, he threatened her and again committed rape upon her. She also alleged that as and when the accused came on leave, he by issuing threats to make her obscene video viral, kept on committing rape on her. She disclosed that the accused had come on leave on 05.10.2017 to 08.10.2017. Earlier she had not narrated these facts as the dignity of her family was at stake. However, these acts of the accused got escalated, as on the date of her marriage i.e. 18.02.2018, he even made calls to her husband and spoke in a derogatory manner about her, so as to break her marriage.

Accordingly by taking it into account the supplementary statement, Sections 328, 376 and 201 IPC were incorporated in the FIR.

4. Further investigation was carried out, the place of occurrence was inspected and statements of witnesses were also recorded. Accused Amit Kumar was arrested on 03.11.2018 and later on, he was admitted to concession of regular bail. After completion of investigation, report under Section 173 Cr.P.C. was submitted in the court of Ld. Illaqa Magistrate against the accused - Amit Kumar for having committed offences punishable under sections 328, 354-D, 376, 201 and 506 IPC.

5. On commitment and after hearing both the parties and on the basis of report under Section 173 Cr.P.C. and accompanying documents, the accused—Amit Kumar was charge sheeted under Sections 328, 354-D, 376(2)(n), 201 and 506 IPC by the Court of Id. Addl. Sessions Judge, Faridabad vide order dated 14.02.2019. He pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution examined 22 witnesses and produced documents i.e. statement of prosecutrix dated

08.04.2018 recorded before legal aid counsel - Ex.PA; statement of prosecutrix dated 09.04.2018 u/s 164 Cr.P.C. Ex.PB; certificate of Id. Magistrate Ex.PB/1; statement of prosecutrix dated 09.06.2018 recorded before the police Ex.PC; statement of prosecutrix dated 10.06.2018 u/s 164 Cr.P.C. recorded before the Magistrate Ex.PD; certificate of the Magistrate Ex.PD/1; recovery memo of one audio CD - Ex.PE; scaled site plan Ex.PF; recovery memo of three CDs Ex.PG; certificate u/s 65-B of Indian Evidence Act Ex.PH; demarcation memo Ex.PK; disclosure statement Ex.PJ; customer application form of mobile no. 9456690106 Ex.PL; Aadhaar card of accused Ex.PM; call details Ex.PN; certificate u/s 65-B of Indian Evidence Act Ex.PO; Airtel prepaid enrollment form Ex.PP; Aadhaar card of Mamta Devi - Ex.PQ; call details - Ex.PR; site address - Ex.PS; notice u/s 91 of Cr.P.C. Ex.PT; certificate u/s 65-B of Indian Evidence Act Ex.PU; FIR Ex.PV; application for getting statement of prosecutrix recorded u/s 164 Cr.P.C. - Ex.PW; MLRs of accused Ex.PAA & Ex. PAB; application for conducting medical examination of prosecutrix Ex.PAC; MLR of prosecutrix Ex.PAD; notice u/s 81 of Cr.P.C. Ex.PAE; supply of certified copy of CDR, CAF and certificate u/s 65-B of Indian Evidence Act-Ex.PAF; certificate u/s 65-B of Indian Evidence Act - Ex.PAG; call details record Ex.PAH; customer application form of phone no. 97201466614 of Sunita Devi - Ex.PAJ; rough site plan-Ex.PAK/PW22; application for conducting medical examination of accused Ex.PAL/PW22; application for taking voice sample of accused Ex.PAN/PW22; specimen sample of accused Ex.PAN/PW22; FSL report-Ex.PK; and CD-Ex.MO4/PW22. Thereafter, the public prosecutor for the State closed the prosecution evidence.

7. A brief resume of the evidence adduced by the prosecution is as under:-

PW1 - Prosecutrix reiterated the contents of her statements, which were made by her before the police on dated 08.04.2018 and 09.06.2018 as well her statements which were got recorded by her under section 164 Cr.P.C. She further proved the factum of handing over a CD to the investigating officer and also proved its recovery memo on record.

PW2 - SI Anoj Kumar, Draftsman deposed that on 03.07.2018 he visited the spot and on the direction and demarcation of ASI Neelam, he prepared the scaled site plan, which he proved on record.

PW3 & PW4 - Ms. Sakshi Saini & Sh. Pardeep Singh, Id. Judicial Magistrates Ist Class, Faridabad deposed about having recorded the statements of prosecutrix u/s 164 Cr.P.C. on 09.04.2018 and 10.06.2018 respectively and issued certificates and passed orders in this regard, which they proved on record.

PW5 & Ex.PW6-Ms. Renu Tyagi & Ms. Uma Chauhan, legal aid counsels deposed that on 08.04.2018 and 09.06.2018, on being called by the police, they reached the police station, where Investigating officers recorded the statements of prosecutrix in their presence and they proved their endorsements on record.

PW7-Shyam Singh, Photographer deposed that on 27.11.2018 ASI Neelam handed over a DVD to him and he prepared three DVDs/CDs from it and handed over the same to ASI Neelam. He also stated having furnished a certificate u/s 65-B of Indian Evidence Act in support of said CDs.

PW8-HC Shakuntla deposed that on 31.05.2018 the prosecutrix had produced a CD and the same was taken into police possession vide recovery memo, which she proved on record.

PW9 Const. Sarita got the prosecutrix medico-legally examined from B.K.Hospital, Faridabad and produced its copy before the Investigating Officer.

PW10 Const. Yashpal deposed that on 03.11.2018 the accused was interrogated in his presence by the ASI Neelam and he suffered disclosure statement and demarcated the place of occurrence, which he proved on record as he had witnessed and attested the same.

PW11 Sanjay Kumar, JTO (Sales) BSNL, Haryana brought the summoned record of mobile No. 9456690106 for the period w.e.f. 22.01.2019 to 18.03.2018 and proved the customer application form, Adhar card of accused and call details on record. He deposed that certificate u/s 65-B of Indian Evidence Act was issued by Dinesh Kumar Aggarwal, Nodal Officer, Faridabad, which he proved on record.

PW12 Surender Kumar, Nodal Officer, Bharti Airtel Ltd. proved the attested copies of customer application form, issued in the name of Mamta, Adhar card, CDR and tower locations on record. He deposed that he also issued a certificate u/s 65-B of Indian Evidence Act, which he proved on record.

PW13 ASI Geeta deposed that on 08.04.2018 the prosecutrix along with her sister came in the Police Station and thereafter, she called Ms. Renu Tyagi, legal aid counsel and recorded the statement of prosecutrix, upon which she recorded the FIR, which she proved on record. She further stated that on 09.04.2018 she produced the prosecutrix before Id. Magistrate for recording her statement u/s 164 Cr.P.C. and thereafter, the case file was handed over to MHC for further investigation.

PW14-Lady Const. Samta delivered the special report to the Id. Illaqa Magistrate and senior police officers without any delay.

PW15 Dr. Vijay, Medical Officer, Civil Hospital, Ballabgarh deposed that on 03.11.2018, the accused- Amit was produced before him by the police for his medico-legal examination and he conducted his medico-legal examination. He proved the MLR of accused on record. He deposed that sampling was not done. However, he opined that there was nothing to suggest that the person examined was not capable of performing sexual intercourse.

PW16 & PW19 Reena (sister of prosecutrix) & Arjun (father of prosecutrix) corroborated the initial version of the prosecutrix (PW1).

PW17 Inspector Savita Rani, Incharge Women Cell, Palwal deposed about having prepared the report u/s 173 Cr.P.C. after completion of the investigation.

PW18-Lady ASI Usha deposed that on 22.05.2018, further investigation of this case was assigned to her, whereby she got issued warrants of arrest of the accused and on 25.05.2018 she applied for call details of the mobile phones of the accused and husband of the prosecutrix. She further deposed about having taken into possession the CD, which was produced by the prosecutrix and proved its recovery memo on the record. She also proved the statement of the prosecutrix, which was recorded by her in the presence of Ms. Uma Chauhan, legal aid counsel.

PW20 Dr. Bishanwati, Medical officer, Civil Hospital, Faridabad conducted the medico-legal examination with history of sexual assault of the prosecutrix and proved her MLR on record. She stated that in her opinion, possibility of sexual intercourse could not be ruled out.

PW21-Saurabh Aggarwal, Nodal Officer, Vodafone Idea Ltd. brought the summoned record and on seeing the call record of mobile No. 9720146614 for the period w.e.f. 27.12.2017 to 18.03.2018, he deposed that the said record was issued by their office on police request. He proved the forwarding letter, certificate u/s 65-B of Indian Evidence Act; call detail report and customer application form on record. He identified the signatures of Rajesh Kumar, Nodal Officer as he was working with him.

PW22 ASI Neelam, who had taken over the investigation of this case on 09.06.2018, gave a detailed account of the investigation which was conducted by her thereby proving all the formal steps which were taken by her during the course of her investigation and also proved the relevant documents on record.

8. The accused was examined under section 313 of Cr.P.C., wherein all the incriminating circumstances were put to him. He denied the entire prosecution allegations, pleaded innocence and claimed false implication. No oral evidence in defence was led by the accused. However, he produced documents i.e. statement of Arjun Singh dated 09.06.2018 u/s 161 Cr.P.C. Ex.DA; statement of account of accused- Ex.DB; certificate of

registration of marriage of accused - Ex.DD; and FIR No. 254 dated 21.07.2018 U/Ss 406, 504 and 506 of IPC, P.S. Sirhachi, District Etta (U.P.) -Ex.DC, in his defence.

9. Based on the evidence led as described above the accused was acquitted by the court of Additional Sessions Judge (Fast Track Court), Faridabad vide judgment dated 29.08.2022.

10. It is the aforementioned judgment which is under challenge in the appeal.

11. The Counsel for the appellant (prosecutrix) contends that the testimony of PW-1 was clear and cogent and had been disbelieved without any basis whatsoever. The medical evidence was totally in consonance with the ocular account. Minor contradictions in the statements of the prosecution witnesses have been given undue importance. In fact the offences stood established beyond any reasonable doubt. He, therefore, contends that the impugned judgment was liable to be set aside and the respondent no.2-accused was liable to be convicted for the offences in question.

12. The learned counsel for the State while supporting the case of the appellant/complainant contends that the impugned judgment was not based on proper appreciation of the evidence on record and, therefore, the judgment of acquittal was liable to be set aside.

13. We have heard the counsels and gone through the record.

14. The prosecutrix had initially got her statement recorded on 08.04.2018-Ex.PA before the police with the allegations that accused Amit, who was the son of her real maternal Aunt, had been harassing her by abusing her telephonically and since he wanted to marry her, he tried his level best to get cancelled her marriage fixed with Pankaj for 18.02.2018.

Accordingly, on the basis of aforesaid facts an FIR Ex.PV under Sections 354-D, and 506 IPC was registered and the law was set into motion. Thereafter, the statement of the prosecutrix was recorded under Section 164 Cr.P.C. (Ex.PB) on 09.04.2019, wherein she reiterated her version. However, on 09.06.2018, the prosecutrix made a supplementary statement - Ex.PC to the police, alleging therein that accused-Amit on 08.08.2017 after administering some intoxicant laced in tea, committed rape upon her and kept on exploiting her sexually under the threat of circulating an alleged video containing their intimate moments, on the internet. Accordingly, the investigating officer on the basis of the said supplementary statement clubbed with another statement dated 10.06.2018 recorded under Section 164 Cr.P.C. Ex.PD, incorporated sections 328, 376 and 201 IPC in the FIR.

15. The admitted facts, which emerge are that the accused is the son of the real maternal Aunt of the prosecutrix (PW1), who had initially levelled allegations against the accused on 08.04.2018 that he had been repeatedly making abusive and vulgar telephonic calls to her and used to issue threats that in case she solemnized marriage with anybody else, then he would break such a marriage and would not allow her family members live peacefully. The marriage of the prosecutrix was fixed for 18.02.2018 and on that day, the accused had allegedly made a telephonic call to her prospective husband namely, Pankaj and sent vulgar messages on his phone numbers ie. 9990353554 and 8368613602. However, after the lapse of about two months, the prosecutrix got her supplementary statement recorded with the investigating officer, levelling allegations against the accused that on 08.08.2017 at the time when she was alone in the house, the accused had administered some intoxicant in tea and when she got unconscious, committed rape upon her and thereafter, the accused, who is working as a

Cook with 28th Battalion, SSB, Antagarh, came on leave from 05.10.2017 to 08.10.2017 and again repeatedly committed rape upon her during the said period. The aforesaid version has been reiterated by the prosecutrix while appearing in the Court as PW1. The question which arises for consideration is whether the prosecution version can be believed so as to convict the acquitted accused.

16. The statements of material witnesses i.e. prosecutrix PW-1 and that of her sister – PW-16 and father - PW19 are required to be examined minutely. A careful scrutiny of the testimony of these witnesses and that of the investigating officer (PW22) reveals that the case of the prosecution suffers from various material discrepancies/contradictions, which may be noticed as under:

(i) It is evident from the supplementary statement- Ex.PC of the prosecutrix that the accused had allegedly committed upon her initially on 08.08.2017 and thereafter accused again committed rape upon her from 05.10.2017 to 08.10.2017, when he had come on leave and stayed at their home. However, the prosecutrix disclosed this incident only on 09.06.2018 before the legal aid counsel vide her aforesaid supplementary statement and the FIR came to be registered on 08.04.2018 did not contain this allegation. Therefore, there is, an inordinate delay of about 08 months in lodging the present FIR and the allegation of rape came 02 months thereafter.

(ii) The prosecution has placed reliance upon the testimony of sister (PW16) and father (PW19) of the prosecutrix in order to seek corroboration of the statement of the prosecutrix (PW1), as she had narrated the incident to them which is evident from the statement of PW19 (Ex.DA) recorded by investigating officer u/s 161 Cr.P.C. In

Dhal Singh Dewangan v. State of Chhattisgarh (SC): 2016(4)

R.C.R.(Criminal) 467, the Hon'ble Apex Court has held that the general rule of evidence is that hearsay evidence is not admissible. However, Section 6 of the Evidence Act embodies a principle, usually known as the rule of res gestae in English Law, as an exception to the hearsay rule. It has been further held that the rationale behind this Section was the spontaneity and immediacy of the statement is question which rules out any time for concoction and that for a statement to be admissible under Section 6, it must be contemporaneous with the acts which constitute the offence or at least immediately thereafter i.e. the statements must be almost contemporaneous and there must not be an interval between the criminal act and the recording or making of the statement in question. Apparently, the statements of PW-16 and PW19 do not satisfy the law of res gestae. Infact, an appraisal of the evidence of PW16 reveals that she merely stated that on 05.12.2017 her sister (prosecturix) had disclosed to her that the accused has been sending obscene messages to her. On the other hand, PW19 (father of prosecutrix) did not state in clear terms that his daughter had even disclosed to him that the accused had committed rape upon her. He merely stated that on 09.06.2018 his daughter had disclosed that the accused had been sending obscene messages to her, though there is reference of the fact that accused had committed rape upon his daughter in his statement Ex.DA. However, for the reasons best know to him, he did not state anything on oath in this regard in the court. But, even assuming that she did make such a disclosure, the spontaneity and continuity was lost as statements cannot be said to

have been made so shortly after the incident so as to form part of the transaction. In the circumstances, the testimonies of PW16 and PW19 are liable to be rejected.

(iii) There is no medical evidence that there was any kind of penetrative assault on the prosecutrix. Her wearing apparel was never sent for examination nor any vaginal swabs of the prosecutrix were taken, as the incident was quite old and in any event no report of there being any semen on the wearing apparel of the prosecutrix was proved by forensic evidence.

(iv) Further, it is evident that from Memo - Ex. PE that the prosecutrix (PWI) deposed that during investigation she had handed over an Audio CD (mark-A) to the police of abusive language used by the accused. The said CD allegedly contained audio recordings of conversations which had allegedly taken place between the accused and her husband-Pankaj, wherein the accused - Amit had used abusive and vulgar language qua the prosecutrix. PW22 - ASI Neelam deposed that on 27.11.2018, she got prepared three copies of the CD and DVD, which were handed over by the prosecutrix to her and she had obtained certificate under section 65-B of Indian Evidence Act regarding preparation of CDs from Shyam photographer, which were taken into police possession vide memo Ex. PG. P.W.22 also stated that on 15.01.2019, the accused was taken to FSL Madhuban, where samples of the accused were taken and the CDs were handed over by her at FSL Madhuban. The transcript of the conversation issued by FSL Madhuban is Ex.PAN/PW22, but a perusal thereof reveals that the accused did not use any abusive/vulgar language qua the prosecutrix. The

investigating officer (PW22) during her the cross examination stated that the voice sample of the accused for comparison purposes was taken on 15.01.2019 at Madhuban and that the said sample was of the same text, which was in the CD and not a different text. In **Nilesh Dinkar Paradkar v. State of Maharashtra (SC): 2011(3) R.C.R.(Criminal) 533**, the Hon'ble Apex Court while dealing with the issue whether voice identification evidence was substantive evidence and whether the court could base conviction purely on evidence of voice identification, held that accurate voice identification was much more difficult than visual identification and it was prone to such extensive and sophisticated tampering, doctoring and editing that the reality could be completely replaced by fiction. In the instant case voice identification was conducted without taking any precautions, as no attempt was made to mix the voice of accused with some other unidentified voices. No mobile phone or a sim/memory card was ever seized which was the original source of the said recording.

v) The prosecutrix vide her statement dated 08.04.2018 - Ex.PA had initially levelled allegations only of use of abusive language by the accused and threat to get her marriage already fixed with Pankaj cancelled. However, after a lapse of about 2 months i.e. 09.06.2018, she while improving her earlier version, projected a totally different story that the accused had infact repeatedly committed rape upon her. Therefore, apparently, the prosecutrix (PWI) made different statements at different point of times. The Hon'ble Apex Court in **State of Rajasthan v. Bhawani, (SC): 2003(3) R.C.R.(Criminal) 875**, held that a witness who makes

different statements at different times has no regard for truth. His evidence has to be read and considered as a whole with a view to find out whether any weight should be attached to the same. The Court should be slow to act on the testimony of such a witness and normally, it should look for corroboration to his evidence. However, a perusal of the entire evidence led by the prosecution reveals that neither the sister (PW16) and father of prosecutrix (PW19) have supported the version of prosecutrix nor the medical evidence renders any support to her case.

(vi) It is also evident from the contents of the complaint - Ex.PA that the accused had been making repeated calls on her mobile number 8851986232 from phone numbers 9720146614, 7297843942 and 9720140617 and had also made vulgar calls to her husband namely Pankaj on his mobile numbers 9990353554 and 8368613602. However, the prosecution failed to prove that the said mobile numbers belonged to the accused.

(vii) The prosecutrix (PW1) deposed that on 18.02.2018 her marriage was fixed and the accused made a call to her husband and impeached her character on account of which her husband refused to marry her. PW1 further deposed that after a request being made by her family members, the phera ceremony started but during that time also the accused was sending messages to her husband namely Pankaj. PW1 further deposed that when she reached her matrimonial house, the accused did not stop and kept on pursuing his bad deeds and was doing her character assassination. Therefore, the husband of the prosecutrix was a most material witness from whose testimony the prosecution could have sought corroboration,

but for the reasons best know to the prosecution, the husband of the prosecutrix was not even cited as a witness.

(viii) It is evident from the cross examination of all the material witnesses ie. PW1, PW16 and PW19 that the accused has set up a categoric defence that infact, the father of the prosecutrix had agreed to jointly buy one plot worth Rs. 10 lakh along with accused and for that purpose, he had transferred a sum of Rs. 3.50 lakh on 08.05.2016 in the account of the sister of prosecutrix (PW16) and another sum of Rs. account of 1.5 lakh in three installments in the account of the prosecutrix, but despite that no such plot was purchased nor was the said amount returned to him. The factum of having received a sum of Rs. 3.5 lakh has been admitted by PW16. However, she in her cross examination, stated that infact, she had loaned a sum of Rs. 3.10 lakh to the accused between the years 2014 to 2016 or 2017 and that her father was aware of such transactions. However, the father while appearing as PW19, did not utter a single word that her daughter had loaned a sum to the accused. On the contrary he stated that on different occasions, he transferred various sums in the account of the father of accused. Further, the accused had lodged an FIR No. 254 dated 21.07.2018 U/Ss 406, 504 and 506 of IPC, P.S. Sirhachi, District Etta (U.P.) Ex.DC, against the prosecutrix, her sister and father, in respect of the aforesaid money transaction.

The aforesaid discrepancies/contradictions create a doubt in the prosecution case and there can be no general and universal rule that a women cannot level false allegations or will not put her character at stake. The facts and circumstances of each case are to be

examined carefully. In the instant case, the testimony of the prosecutrix, shows several discrepancies, contradictions and therefore, her evidence cannot be said to be of unimpeachable character.

17. It is reiterated here that the testimony of the prosecutrix is inconsistent and in contradiction with her earlier version. The F.I.R. was got registered by the prosecutrix on 08.04.2018 against the accused under section 354D and 506 IPC, whereas the allegations leveled by the prosecutrix in her supplementary statement dated 09.06.2018 (Ex.PC) as well as her statement recorded u/s 164 Cr.P.C. on 10.06.2018 are a stark improvement from her initial version. As has already been discussed, in the initial statement - Ex.PA, the allegations of rape were not levelled. A Division Bench of this Court in ***State of Haryana vs Sukhbir: 2017(4) PLR 234*** held in para 9 as under:-

“ 9. The trial Court had recorded that the allegations levelled by the prosecutrix in her complaint Ex. P1 as well as her statement, Ex.P8 recorded after a period of about eight days of the alleged occurrence under Section 164 of the Code before the Magistrate, are altogether different. She had not levelled the allegations of rape in her first version before the police. The allegations of rape are serious and grave and the prosecutrix usually level such allegations against the accused at the first instance and not after a gap of eight days. As per the application, Ex.P1. moved by the prosecutrix, the civil disputes are also pending between the parties regarding property.....”

In ***Kiran Vs. State of Haryana & Anr. CRM-A-1260-MA-2018*** decided on **23.04.2019** this Court held as under:-

“ Learned court below had taken into consideration the fact that statement of the prosecutrix was recorded on 24.06.2016 which is exhibited as Ex. P1 and had also recorded the statement under Section 164 of the Cr.P.C. exhibited as Ex. P2 but in those two versions, there was no allegation of rape but after the arrest of respondent No. 2 on 01.07.2016, she changed her version on 02.07.2016 (Ex. P-4) to the effect that respondent No. 2 had committed rape on her 5-6 times in her house but the same was not disclosed by her out of fear.

We have heard learned counsel for the applicant and after perusing the available record, are of the considered opinion that there is no error committed by the trial Court in passing the order of acquittal in favour of respondent No. 2 because the first version of the prosecutrix after the alleged incident on 23.06.2016 was recorded on 24.06.2016 in which she did not utter a word about the past conduct of the respondent No. 2 of having raped her. In her statement recorded under Section 164 of the Cr. P.C. before the JMIC where there was no pressure upon her, the statement remained the same i.e. only regarding outraging the modesty by pulling her inside the room for the purpose of committing some kind of sexual offence. Therefore, it is apparent that the prosecutrix had an axe to grind because it has come on record that her brother was to pay `30,000/- to the respondent No. 2 and in order to deny to repay the said amount, which was taken as loan respondent No. 2 was tried to be involved in more heinous offence.”

18. PW-15-Dr. Vijay, Medical Officer, Civil Hospital, Ballabgarh, medico legally examined the accused on 03.11.2018 vide MLR Ex.PAA (Manual) and he also proved the computerized MLR as Ex.PAB. He gave his opinion that there was no evidence to suggest that the accused was not capable of performing sexual intercourse. On the other hand, Dr. Bishanwati (PW20), stated that on 09.06.2018 she was posted Medical Officer, Civil Hospital, Faridabad and on that day, on the basis of an application Ex.PAC, moved by the police, she conducted medico legal examination of prosecutrix and prepared report Ex.PAD. She opined therein that the possibility of sexual intercourse could not be ruled out. It is evident from the medico-legal report of the prosecutrix -Ex.PAD that no mark of external injury was seen by the doctor and since she had changed her clothes of the incident, as such, her clothing, outer as well as inner were not taken for its analysis nor were the vaginal swabs taken as the incident was quite old. Except this, no other medical evidence is available on record. Infact, it is an admitted fact that prosecutrix was a married lady and her marriage was solemnized on 18.02.2018, whereas the father of the prosecutrix (PW19) stated in his cross examination that marriage of prosecutrix was performed on 27.11.2017. Be that as it may, in the absence of any evidence to the contrary, it has to be presumed that prosecutrix (PW1) was sexually active with her husband. In

these circumstances, the opinion given by doctor that possibility of a sexual intercourse cannot be ruled out, does not further the case of the prosecution.

19. Regarding the allegations that at the time of initially committing rape, the accused had administered an intoxicant to the prosecutrix by mixing it in her tea, it is relevant to note that there is no evidence as to what kind of intoxicant was allegedly administered as no sample of such tea was ever lifted on account of the fact that matter was reported to the police after a delay of about 10 months. Further, it is a categorical case of the prosecution that the accused on 08.08.2017, at the time of developing physical relations with the prosecutrix when she was unconscious, had made a video, but again no recovery of any such video was effected by the investigating officer. In order to justify its non recovery, the prosecution relied upon the fact that the accused in his disclosure statement - Ex. PJ stated that he had destroyed the said phone after coming to know about the registration of present case. The prosecutrix-PW1 in her cross examination stated that she did not know whether the police recovered her naked photographs or video from the accused during investigation.

20. Thus, in the light of these facts, the prosecution cannot be said to have proved the commission of offences punishable under sections 328, 354D, 376(2), 201 and 506 IPC.

21. As to how an appeal against a judgment of acquittal is to be dealt with, the Hon'ble Supreme Court in ***Kallu @ Masih & Ors. Vs. State of Madhya Pradesh 2006(1) RCR (Criminal) 427*** has held as under:-

“ 8. While deciding an appeal against acquittal, the power of the Appellate Court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an appellate court, where the judgment of the trial court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the trial court merely because a different view is possible.

The appellate court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further if it decides to interfere, it should assign reasons for differing with the decision of the trial court.”

22. In view of the aforementioned discussion and keeping in view the law laid down in ***Kallu @ Masih & Ors. Case (supra)***, we find no reason to interfere with the well reasoned judgment of acquittal passed by the Additional Sessions Judge (Fast Track Court), Faridabad. Therefore, the criminal appeal filed by the complainant challenging the acquittal stands dismissed.

(JASJIT SINGH BEDI)
JUDGE

(SUDHIR SINGH)
JUDGE

October 18, 2024
Vinay

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether reportable</i>	<i>Yes/No</i>