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

% ***Date of decision: 1st May, 2024***

+ CRL.L.P. 406/2022 & CRL. M.A. 16701/2022

STATE OF NCT OF DELHI

..... Petitioner

Through: Mr. Tarang Srivastava, APP for State
versus

SUNDER & ORS.

..... Respondent

Through: Mr. Abhimanyu Garg, Amicus Curiae
and Mr. Vivek Sura, Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MR. JUSTICE MANOJ JAIN

J U D G M E N T (oral)

1. State has taken exception to judgment dated 05.12.2020 passed by the learned Trial Court whereby all the three accused, respondents herein, have been acquitted of all the charges.
2. The present appeal has been filed under Section 378(1) Cr.P.C. and, therefore, it needs to be seen whether the State has been able to make out any case, necessitating grant of leave to appeal.
3. Investigation took off on 17.03.2012 when complainant (mother of victim 'M') came at P.S. Ambedkar Nagar and informed that her daughter 'M' was missing. She informed the police that on 15.03.2012 at about 2:00 p.m., her daughter had left the house but did not return. She, on her own, tried to find her out but there was no clue. She apprehended that someone



had enticed her away.

4. FIR was registered for commission of offence under Section 363 IPC.
5. Fact remains that, on 19.03.2012, complainant herself produced 'M' at Police Station.
6. 'M' was immediately sent to hospital for medical examination.
7. It will be worthwhile to mention here that when she was taken to AIIMS for her first medical examination, she, merely, claimed that there was some quarrel between her and her mother and, therefore, she had run away and stayed with her one friend 'Pinki' and thereafter she was brought back home on 19.03.2012 by police. She also revealed to the attending doctor that there was no sexual assault upon her and she refused to undergo any internal examination.
8. Surprisingly, same day she was again brought to same hospital for another medical examination at around 4:20 p.m. and then she changed her version and told the attending doctor that though she had left her home on account of confrontation with her mother, she was followed by one person namely, Sunder, a pick pocketer who administered her drink laced with some substance which made her drowsy and then said Sunder raped her. The attending doctor also recorded in the MLC that her such statement was in contradiction to her earlier version, given same day.
9. Be that as it may, her statement under Section 161 Cr.P.C. was recorded and she was also produced before the concerned magisterial court on 20.03.2012 for recording of her statement under Section 164 Cr.P.C. In such statements, she named all three respondents as rapists.



10. As per the case of the prosecution, since in her subsequent statements she had given the names of all the three respondents and had categorically claimed that she had been kidnapped by them and had been sexually assaulted by them, all the respondents were arrested and charge-sheeted.

11. They were charged under Sections 363/34, 376(2)(g) and Section 377 IPC to which they pleaded not guilty and claimed trial.

12. Prosecution was directed to adduce evidence and examined 20 witnesses.

13. All the three respondents, in their respective statements made under Section 313 Cr.P.C., claimed that they had been falsely implicated. Three witnesses were also examined, in defence.

14. Learned Trial Court, after analysis of the evidence led by the prosecution and defence, came to the conclusion that the prosecution had miserably failed to bring home the guilt of the accused persons. Taking note of the various contradictions appearing on record, learned Trial Court held that the story of the victim did not inspire any confidence on account of numerous inconsistencies. It was observed that her testimony was shaky and riddled with severe doubts and, therefore, was not a believable one.

15. Such order is under challenge.

16. Learned APP for the State has taken us through the digital copy of the Trial Court record (TCR).

17. We have carefully gone through the TCR and also perused the statements which had been given by the victim, during different stages of the case. We have also taken note of the observations appearing in MLC as well



as her testimony during the trial and we have no hesitation in holding that the testimony of the victim, in fact, does not inspire any confidence or trust as she has come up with contrasting and incompatible versions.

18. 'M' had gone missing on 15.03.2012 but it has not been explained by the prosecution as to why the complaint was not lodged immediately and why mother of 'M' waited for two days. 'M' was hardly 13 years of age when she had allegedly gone missing and in such a situation, any parent would immediately rush to the police but in the present case, there is no explanation, much less a plausible one, which may elucidate the delay in any manner.

19. It is also not clear whether 'M' was produced before police by her mother or whether the police had traced her out.

20. As noted above, the victim was immediately taken to hospital for medical examination. If her first MLC is to be believed, she was not sexually assaulted by anyone and she had gone to her friend Pinki. There is no enlightenment from prosecution as to why she was brought to AIIMS again, for yet another medical examination. There is also no explanation from her as to why she switched her version and told the attending doctor, at the time of second examination, that she had been sexually assaulted by one Sunder.

21. Things did not stop here.

22. When she was produced before the concerned magisterial court for recording of her statement under Section 164 Cr.P.C. and was asked by the learned Magistrate to apprise as to what had happened to her, she told the learned Magistrate that since she was asked to reveal the truth she would



reveal the truth only and that till that time, all the statements which she had made were false by claiming “*Madam, aapne kaha hain sach bolo to mai ab sach bolungi, abhi tak maine jitney bayaan diye hai vo sab jhoote hai.*”

23. This shows that she is in habit of telling lies.

24. As per her second MLC, she had been raped by one person but in her statement made under section 164 Cr.P.C., she named three persons who raped her and whom she never met before 18.03.2012.

25. Thus, she does not seem to be a credible witness as she, as per her own whims and fancies, switched the version. Moreover, as noted, before the learned Magistrate, she, herself, admitted that all her earlier versions were false and untrue.

26. When she entered the witness box during the trial, she gave another twist to the tale. She deposed that she had met the accused persons on 15.03.2012 itself.

27. This is in direct contrast with her statement which she had made under Section 164 Cr.P.C. in which she had, in no uncertain terms, deposed that she had not met the accused persons before 18.03.2012.

28. Obviously, there are material contradictions and improvements in her statement and she was duly confronted with all such contradictions and could not offer any explanation about such contradictions.

29. In her testimony, she also went to the extent of claiming that she had no friend with the name of Pinki. There was no occasion or reason for the doctor to have recorded such name of his own.

30. It is thus very much obvious that she has come up with contradictory



and conflicting versions, which makes the entire story of the prosecution untrustworthy.

31. If any such material witness who is victim of sexual assault makes wholly inconsistent statements at different stages of the criminal proceedings, it creates a doubt in the mind of the Court and the testimony of such witness cannot be relied upon, unless the contradictions are satisfactorily explained. The contradictions as noted by the learned Trial Court are very material and go to the root of the matter and, therefore, indeed, it becomes very difficult to rely on her.

32. We are, of course, conscious of the fact that the sole testimony of victim of sexual assault can be sufficient for returning finding of guilt but then, the testimony of any such witness should be of sterling quality. We may refer to *Nirmal Premkumar and Anr. V. State Rep. By Inspector of Police*¹ wherein it is observed that conviction can be recorded on the sole evidence of a victim of crime; however, it must undergo a strict scrutiny through the well- settled legal principles as established by Apex Court in a catena of decisions. Said case also pertained to sexual assault and the appellants had challenged their conviction while highlighting the fact that there were many contradictions in the testimony of the victim in that case. Such conviction was set aside while observing as under: -

“13. *This Court was tasked to adjudicate a matter involving gang rape allegations under section 376(2)(g), I.P.C in Rai Sandeep v. State (NCT of Delhi). The Court found totally conflicting versions of the prosecutrix, from what was stated in the complaint and what was deposed before Court, resulting*

¹ 2024 SCC OnLine SC 260.



in material inconsistencies. Reversing the conviction and holding that the prosecutrix cannot be held to be a 'sterling witness', the Court opined as under:

"22. In our considered opinion, the 'sterling witness' should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such (2020) 10 SCC 573 (2012) 8 SCC 21 similar tests to be applied, can it be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

14. In *Krishan Kumar Malik vs. State of Haryana*, this Court laid down that although the victim's solitary evidence in matters related to sexual offences is generally deemed sufficient to hold an accused guilty, the conviction cannot be



sustained if the prosecutrix's testimony is found unreliable and insufficient due to identified flaws and lacunae. It was held thus:

“31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of the prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, which have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the appellant guilty of the said offences.

32. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (Cr.P.C) FIR and deposition in court. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. The record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the appellant.” (2011) 7 SCC 130

15. What flows from the aforesaid decisions is that in cases where witnesses are neither wholly reliable nor wholly unreliable, the Court should strive to find out the true genesis of the incident. The Court can rely on the victim as a “sterling witness” without further corroboration, but the quality and credibility must be exceptionally high. The statement of the prosecutrix ought to be consistent from the beginning to the end (minor inconsistencies excepted), from the initial statement to the oral testimony, without creating any doubt qua the prosecution’s case. While a victim's testimony is usually enough for sexual offence cases, an unreliable or insufficient account from the prosecutrix, marked by identified flaws and gaps, could make it difficult for a conviction to be recorded.”

33. As regards, the case in hand, we have no hesitation in holding that her statement does not inspire confidence and, therefore, the learned Trial Court was fully justified in giving benefit of doubt to all the accused persons.



34. We are, thus, persuaded to hold that the Trial Court appreciated and analysed the evidence in right perspective.

35. There is nothing on record which may compel us to take a different view.

36. Moreover, order of acquittal is not, generally, interfered with when view taken by the Trial Court is found to be reasonable and plausible one and when such view cannot be, even otherwise, reversed merely because a different view was possible.

37. In view of our foregoing discussion, we do not find it to be a fit case where State is entitled to leave to appeal.

38. Resultantly, the leave is declined.

39. The petition stands dismissed.

SURESH KUMAR KAIT
(JUDGE)

MANOJ JAIN
(JUDGE)

MAY 1, 2024/ns