

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

**RESERVED ON : 6<sup>th</sup> APRIL, 2015**

**DECIDED ON : 30<sup>th</sup> JUNE, 2015**

**+ CRL.A.1392/2013**

**SHIBU** ..... Appellant

Through : Mr.K.Singhal, Advocate.

**VERSUS**

**STATE NCT OF DELHI** ..... Respondent

Through : Ms.Kusum Dhalla, APP.

**CORAM:**

**HON'BLE MR. JUSTICE S.P.GARG**

**S.P.GARG, J.**

1. The appellant – Shibu challenges the legality and correctness of a judgment dated 03.01.2013 of learned Addl. Sessions Judge in Sessions Case No. 18/12 arising out of FIR No.412/11 PS Mukherjee Nagar whereby he was convicted under Sections 376/506 IPC. By an order dated 04.01.2013, he was sentenced to undergo RI for seven years with fine ₹ 5,000/- under Section 376 IPC and RI for two years under Section 506 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 05.12.2011 in front of Sewa Bharti Dispensary, Mukherjee Nagar, Delhi, the appellant and his associates – Hawaii Singh,

Sukhbir Singh @ Bhura and Manoj @ Bona kidnapped the prosecutrix 'X' (assumed name) aged around sixteen and a half years out of lawful guardianship of her parents. Thereafter, they all took her in an auto / D.Van to a jungle at Nehru Vihar and committed gang-rape upon her; she was also criminally intimidated by them. Police machinery came into motion when 'X' lodged complaint (Ex.PW-7/A) on 06.12.2011. The Investigating Officer lodged First Information Report making endorsement (Ex.PW-16/A) over it. 'X' was taken for medical examination; she recorded her statement under Section 164 Cr.P.C. Exhibits were sent for examination to Forensic Science Laboratory. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was submitted against Shibu (the appellant) alone for commission of offences under Sections 363/376/506 IPC. Hawai Singh, Sukhbir Singh @ Bhura and Manoj @ Bona were summoned by the Trial Court to face trial by an order dated 18.05.2012 exercising powers under Section 319 Cr.P.C. On their appearance, they were also charged for the offences under Sections 363/366/376 (2)(g)/506 IPC. The accused persons pleaded not guilty to the charges and claimed trial. The prosecution examined sixteen witnesses to substantiate its case. In 313 Cr.P.C. statements, the accused persons

denied their involvement in the crime and pleaded false implication. After considering the rival contentions of the parties and appreciating the evidence on record, the Trial Court, by the impugned judgment, convicted the appellant – Shibu alone to be the perpetrator of the crime and acquitted Hawai Singh, Sukhbir Singh @ Bhura and Manoj @ Bona of the charges. It is relevant to note that the State did not challenge their acquittal. Being aggrieved and dissatisfied, the appellant – Shibu has preferred the instant appeal.

3. I have heard the learned counsel for the parties and have examined the file minutely. Admitted position is that ‘X’ and the appellant were acquainted with each other before the incident. The appellant lived in her neighbourhood and is her ‘chacha’ in relation. He is a married man having two children. The prosecutrix was major on the day of incident. School records describing her date of birth 08.07.1996 was collected during investigation. However, the prosecution did not examine any witness from any authorities to prove her date of birth. As per ossification test report (Ex.PX6), age of the prosecutrix was ascertained in between 20 – 22 years. The Trial Court was of the opinion that ‘X’ was major on the day of incident.

4. Appellant's conviction is primarily based upon the sole testimony of the prosecutrix 'X'. This statement, however, was considered deficient to record conviction against accused - Hawai Singh, Sukhbir Singh @ Bhura and Manoj @ Bona who were implicated in definite terms by the prosecutrix in her Court statement. Apparently, the Trial Court did not believe the prosecutrix regarding involvement of appellant's alleged associates in the crime. On the same set of evidence, the Trial Court acquitted three of the accused while convicting the appellant. Why the same benefit could not have been bestowed to the appellant has not been dealt with especially in the impugned judgment.

5. 'X' has made inconsistent statements at different stages of the investigation. In her statement (Ex.PW-7/A) recorded on 06.12.2011, she implicated and named only the appellant to have sexually assaulted her on 05.12.2011. She disclosed to the police that the appellant, a married man, who lived in her neighbourhood was known to her. On 05.12.2011 at around 03.00 p.m. when she was going to perform her job and reached near a park in front of Sewa Bharti Dispensary, Mukherjee Nagar, Delhi, Shibu came there on his tempo and asked her to go for outing. When she disclosed that she was to go for her work, he again offered to take her out and leave her after a short while. On that, she sat on the front seat of the

tempo. Thereafter, the accused drove the tempo towards an isolated spot; brought her to the rear portion of the tempo; forcibly pushed her inside it and sexually assaulted her there. She was threatened not to disclose the incident. The accused left her at Mukherjee Nagar 'Bandh'. On return to her house, she did not inform her family members about the occurrence due to fear. She disclosed the incident next day to her sister who in turn informed her brother. Thereafter, in an altercation with her family members, she sustained head injuries. Apparently, 'X' in her first version to the police had levelled allegations of commission of rape only against the appellant – Shibu. There were no accusations of forcible kidnapping or beating.

6. In her 164 Cr.P.C. statement recorded on 09.12.2011, 'X' making vital improvements stated that when she declined to go for outing, the accused forcibly pushed her inside the auto and took her towards Nehru Vihar jungle. She attempted to flee the spot but was pushed forcibly inside the rear portion of the tempo and was sexually assaulted. Thereafter, she was deserted on the road. Again, she did not implicate anyone else except Shibu for the crime. There were no allegations that she was given beatings by the appellant or that he criminally intimidated her and extended any threat. Nothing is there in her statement to infer if she

had put any resistance at the time of commission of offence or had sustained any visible injuries. She omitted to mention as to how she sustained injuries on her head.

7. In her Court statement as PW-13 recorded on 08.05.2012, she deposed that on 05.12.2011 when she left her house at around 03.00 p.m. for her work and reached Sewa Bharti Dispensary, one auto / D.Van driven by its owner Hawai came from behind. Three boys sitting in the said auto forcibly pulled her in the auto and shifted her to its backside portion. The vehicle was taken towards Nehru Vihar area in a jungle. Describing their roles, she deposed that Bona caught hold of her hands; Bhura caught hold of her legs and Shibu committed rape upon her. Bhura and Hawai also attempted to rape her but due to her resistance, she could save herself. Thereafter, they all left her in the jungle. After coming out, she met her brother near 'pulia' and he brought her home. The culprits had threatened her not to disclose anyone about the incident or else they would kill her brothers. When cross-examined by Addl. Public Prosecutor, after seeking Court's permission, she stated that appellant's associates were named as the Investigating Officer had advised her not to do so. In the cross-examination, she was confronted with her statement (Ex.PW-7/A) where certain facts deposed in her examination-in-chief did not find

mention. She volunteered to add that she had given all the facts to the Investigating Officer but she insisted her to concentrate only on the person who had actually committed the offence. She admitted to have sustained head injury and was taken to a private doctor Mahesh in the gali where she was treated and her wound was stitched. She explained that her brother had pushed her out of frustration and her head hit the wall, as a result of which she sustained injuries. She denied the suggestion that she herself was interested to marry Shibu.

In her Court statement recorded on 16.08.2012, she deposed that on the date of occurrence when she reached near Sewa Bharti Dispensary, the accused – Shibu came in an auto / tempo / D.Van; called her from behind and offered her to go for outings but she declined. On that, he caught hold of her hands; closed her mouth and threw her in the tempo being driven by its owner Hawaii. She further deposed that after rape, she was left in a jungle. For a long time, she roamed there. In the late evening, when she came out of the jungle, her brother met her near the main road and took her to her home. On the next day, she disclosed the incident to her sister who had already got a hint of it because somebody in the neighbourhood i.e. Hari Om had seen her roaming in the jungle.

Admittedly, she preferred to go to Nari Niketan after recording her

statement under Section 164 Cr.P.C. and remained there for 16 -17 days. She claimed herself to be 15 years old.

8.           Analysing the versions given by the prosecutrix 'X' at different stages of the investigation / Trial reveal that she is inconsistent throughout. In the initial version, she did not attribute role in the crime to anyone except Shibu. Subsequently, she involved three others and assigned definite role to them at the time of commission of the crime. It is unclear as to what had prompted or forced 'X' to rope in the three associates of the appellant at a later stage. It is mystery as to why she did not name them in the FIR. This omission speaks volume against her and her credibility stands shaken. She also gave conflicting statements whether Shibu had forcibly kidnapped / abducted her at first instance or she had accompanied him of her own accepting his proposal to go for outing. None of the alleged culprits was armed with any weapon to cause real apprehension in X's mind not to raise alarm at the time of alleged forcible kidnapping or soon after she came on the main road. It is unbelievable that due to alleged threat 'X' victim of gang-rape would not disclose the incident to her brother who happened to meet her soon after the occurrence. She had no visible injuries on her body that time. She conveniently went along with her brother to her house. She was beaten in



the house resulting injuries on her head. The Investigating Officer did not collect any medical record from Dr.Mahesh to ascertain as to how and under what circumstances, she was brought there. The Investigating Officer did not find out as to who had caused injuries to 'X' after coming to know of the occurrence. It appears that X's family members considering 'X' responsible for the incident thrashed her. Obviously, 'X' preferred to go to Nari Niketan for 15 / 16 days after recording 164 Cr.P.C. statement. Apparently, 'X' was a consenting party throughout.

9. On 06.12.2011, PW-11 (Dr.Santosh) examined 'X' vide MLC (Ex.PW-11/A) and found 3 cm. lacerated wound on parito-parietal region. 'X' declined to undergo internal medical examination. PW-14 (Dr.Seema) deposed that on external examination, external genitalia was normal, no marks of scratch or trauma around it and the hymen was torn. Obviously, 'X' did not suffer any external or internal injuries at the time of alleged sexual assault. PW-14 (Dr.Seema) opined that generally in rape cases there are marks, scratches or trauma around the genitalia of the prosecutrix if there is resistance.

10. X's statement has not been corroborated by any other evidence, oral or documentary. Statement of her brother – PW-9 (Rakesh) is in conflict with X's version. In his Court statement on 08.05.2012, he

disclosed that on 06.12.2011 after coming to know about the incident from her sister, he made a call at 100 to the police. In the cross-examination, he revealed that after coming to know about the incident of rape upon his sister from 'somebody' in the area, when he confronted 'X', she disclosed him the details. He admitted that his sister 'X' herself did not disclose the incident to him. He further revealed that 'X' had returned to the house on the day of occurrence at 06.00 p.m. in his absence. He volunteered to add that he had received a call from 'someone' informing that his sister had been left at village Dhaka and he should bring her from there. On that, he went and brought her sister back from village Dhaka to home. He further stated that when his sister 'X' met him on 05.12.2011 at village Dhaka, she did not tell him about the incident. He volunteered to disclose that she had informed to have lost her way from the market. She had no signs of injuries on her body. When PW-9 reappeared on 16.08.2012, after refreshing his memory, he deposed that her friend's sister-in-law had made a call to him to pick 'X' from village Dhaka without disclosing as to what had happened to her. In the cross-examination, he elaborated that after receiving the telephone call in between 07.00 to 08.00 p.m. from Bhura's sister-in-law, he brought 'X' to the house at 08.30 to 08.45 p.m. He further admitted that 'X' did not

disclose anything about Bhura, Hawai or Bona. He volunteered to add that she had only implicated Shibu and he came to know about the involvement of three others after her statement in the Court on the previous date of hearing i.e. 08.05.2012. PW-9 (Rakesh) was conspicuously silent as to how and in what manner, 'X' sustained head injuries when he had not noticed any such visible injuries on her body when met her for the first time. Instead of apprising him about the brutal sexual attack, 'X' misled him stating that she had lost the way. Sushma, X's elder sister appeared as PW-10 and disclosed that 'X' left the house at about 01.00 p.m. for going to work in the kothies but did not return throughout the day. When she came back crying at about 09.00 p.m. and she enquired from her about it, 'X' did not tell anything and went to sleep. Next day, on her persuasion 'X' disclosed that she was beaten and sexually assaulted by Shibu. In response to a Court question "what did she mean by 'Galat Kaam'?", the witness introduced an entirely new version and disclosed that her sister had informed her that there were four persons and they all had played definite role in committing rape upon 'X'. Since she had resiled from her previous statement, learned Addl. Public Prosecutor declared her 'hostile' and cross-examined her. In the cross-examination, she was confronted with her statement (Ex.PW-10/PX)

recorded under Section 161 Cr.P.C. where certain facts deposed in her examination-in-chief did not find mention. In the cross-examination by accused, she denied to have recorded statement before the police. She did not allege if 'X' had sustained any injuries and was brought at home by her brother – Rakesh. When PW-10 (Sushma) again appeared on 16.08.2012, she changed her version and stated that 'X' had left the house at about 12.00 - 01.00 p.m. and returned only at about 06.00 - 07.00 p.m. On her persuasion on the next day, 'X' disclosed her that when she was returning from the kothies, Shibu met her on the way and offered to take her for outing. Thereafter, Shibu made a telephone call to 'somebody' and a D.Van came in which there were three more boys. It was being driven by Hawai. The van was taken to an isolated spot. She had noticed bruise marks on her cheeks.

11. All the three relevant witnesses PW-9, PW-10 and PW-13 have given conflicting and divergent versions about the entire incident. It is highly unsafe to base conviction on the wavering testimony of the prosecutrix. The improvements found in the evidence of the prosecutrix being material, render her testimony unreliable. Entire allegations of the prosecution are built on an unacceptable plinth and regard having been to

the evidence brought on record which is completely sketchy, conviction could not have been recorded.

12. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the instant case, the unexplained delay in FIR, the non-examination of material witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. It shows several lacunae. There are various serious contradictions in her statement and actions, from which it can safely be concluded that she was certainly not telling the truth.

13. In *Abbas Ahmed Choudhury v. State of Assam* (2010) 12 SCC 115, observing that a case of sexual assault has to be proved beyond reasonable doubt as any other case and that there is no presumption that a prosecutrix would always tell the entire story truthfully, the Hon'ble Supreme Court held:-

*“Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond*

*reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1.*

14. In another case *Raju v. State of Madhya Pradesh* (2008) 15 SCC 133, the Supreme Court stated that the testimony of a victim of rape has to be tested as if she is an injured witness but cannot be presumed to be a gospel truth.

*“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, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but 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.”*

15. In *Rai Sandeep @ Deepu vs. State of NCT of Delhi*, (2012) 8 SCC 21, the Supreme Court commented about the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused. It held :-

*“In our considered opinion, the 'sterling witness' should be of a very high quality and caliber 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 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 correlation with each and everyone 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 similar such tests to be applied, it can 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.”*

16. In *Tameezuddin @ Tammu v. State (NCT of Delhi)*, (2009)

15 SCC 566, the Supreme Court held :-

*'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.'*

17. In the light of above discussion, I am of the considered view that the prosecution has failed to establish its case against the appellant beyond reasonable doubt. The appellant deserves benefit of doubt. The appeal is allowed; conviction and sentence awarded by the Trial Court are set aside. The appellant shall be released forthwith if not required to be detained in any other criminal case.

18. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for compliance.

**(S.P.GARG)**  
**JUDGE**

**JUNE 30, 2015 / tr**