

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 30.09.2020

+ **CRL. A. 141/2019, CRL.M. (BAIL) 7652/2020 & CRL. M.A. 2982/2019**

AJAY KUMAR

.....Appellant

Versus

STATE (NCT OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Manish Pratap Singh, Advocate.

For the Respondent : Mr Amit Gupta, APP for State.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The appellant impugns a judgment dated 18.10.2018, whereby he was convicted for an offence punishable under Sections 376 and 506 of the Indian Penal Code, 1860 (IPC). He also impugns the order on sentence dated 27.10.2018, whereby he was sentenced (i) to ten years of rigorous imprisonment for committing an offence punishable under Section 376 of the IPC along with a fine of ₹20,000 and in default of payment of fine to undergo simple imprisonment for a further period of six months; and (ii) to four years of rigorous imprisonment for committing an offence under Section 506 of the IPC along with a fine of ₹10,000 and in default of payment of fine to undergo imprisonment for a

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further period of three months. Both sentences were directed to run concurrently.

2. The appellant was prosecuted pursuant to registration of FIR No. 168/15 under Sections 376/506 of the IPC, with PS Ranhola. The said FIR was registered on 09.03.2015 at the instance of a married woman aged about thirty years (hereafter referred to as 'the prosecutrix'). The prosecutrix alleged stated that the accused had forcibly established physical relations with her on several occasions between 17.02.2013 to 07.03.2015. She stated that on 17.02.2013, the accused while playing with her children had entered her house. At that time, she was taking a bath in the bathroom. She was under the impression that no one was present in the house, but when she came out from the bathroom, she found the accused (appellant) was present there. He had recorded a video of her taking a bath on his mobile phone. She stated that the accused forcibly established physical relation with her and threatened her that he would upload the video on the internet. She alleged that the accused also threatened to kill her children and her husband, if she disclosed this incident to anybody. She further alleged that on the occasion of '*Bhai Dooj*', the accused along with his father and brothers had quarreled with her husband and thereafter her husband and reported the same to PS Ranhola. The accused also threatened her not to narrate the incidents to anyone, otherwise he would kill her children and husband and upload her obscene photographs on the net.

3. Further, she alleged that the accused would enter her house and forcibly establish physical relations with her and also make a video film

of the same on the sly (*chupke se*). She alleged that the accused possessed a hand gun (*tamancha*) and used to scare her with the same. She alleged that on 07.03.2015, at about 07:00 pm when her husband was away to his village, the accused tried to establish physical relations with her, in the presence of her three children. However, she resisted and during a scuffle her suit was torn. On 08.03.2015, she was again abused by the accused. She stated that she telephoned her husband and informed him about the incident. According to the prosecutrix, he stated that keeping quiet would not serve any purpose (*chup rehane se baat nahi banegi*) and they should take help of the law.

4. The prosecutrix was medically examined at about 10:10 pm on 08.03.2015. The MLC (Ex.PW1/B) indicates that the prosecutrix had no injuries.

5. Thereafter, on 09.03.2015, the petitioner was counseled by a Counselor from the NGO through DCW. The Counseling Report (Ex.PW1/C) indicates that the prosecutrix had informed the Counselor that the appellant lived along with his family in the neighborhood and he would often visit her house. She stated that they had established physical relations on several occasions in the absence of her husband. She stated that they would also exchange messages on their phones. He would come to her house and insist on establishing physical relations with her. She stated that on her refusing to do so, he would get annoyed and would start abusing her. She stated that her children would watch TV in one room while they would establish physical relations in another room. She stated that this was also the reason for fights between her and her

husband. She stated that the appellant did not like the prosecutrix to maintain relations with her husband. The Counseling Report (Ex PW1/C) also indicates that the Counselor had asked her as to why she did not inform her husband or call 100 when the appellant had established physical relations with her for the first time. However, the prosecutrix did not respond to the said question and remained silent. The Report indicated that she now wanted to get rid of the relationship with the accused (*Ajay se peecha chudana chahti*) and, therefore, she had insisted on instituting proceedings against him.

6. The statement of prosecutrix was recorded under Section 164 Cr.PC on 10.03.2015. In her statement, she stated that on one day in the year 2013, she was having a bath at her house. Her children were very young and, therefore, she had closed the main gate but had not closed the door of her bathroom. She stated that she did not know on what pretext the appellant had got the main gate opened. He, subsequently, told her that he had made a video. She claimed that she asked him to delete the same. However, he threatened that he would put the video on the net, if she did not follow what he said (*baat nahi maani*). She stated that on the threat of the said video being made public, the appellant had established physical relations with her. She alleged that he would hurl abuses at her. He would compel her to phone him and would keep an eye on her. She stated that he would not allow her to do anything and had ruined her life. She alleged that he would forcibly enter her house, tear her clothes and also beat her (*maar peet karta hai*). She stated that she was fed up with the same and had filed a complaint with the police.

7. The accused was arrested on 11.03.2015. Thereafter, charges under Sections 376/506/511/354 of the IPC were framed against the accused. The accused pleaded not guilty and the matter was set down to trial.

8. The prosecution examined ten witnesses. After evaluating the evidence led in the case, the Trial Court found the appellant guilty of offences under Sections 376 and 506 of the IPC, and accordingly convicted him.

9. The appellant contends that the impugned judgment and order on sentence be set aside, *inter alia*, on the grounds that the testimony of the prosecutrix is in variance with her earlier statements and therefore cannot be relied. The appellant contends that the forensic evidence also does not support the case of the prosecution.

Evidence

10. The prosecution's case largely rests on the testimony of the prosecutrix. She was examined as PW1. She testified that she was residing in a rented accommodation in area of Vikas Nagar. She stated that in the year 2012, the accused constructed a house opposite her house and after construction the family of the accused started visiting each other. She testified that on 17.02.2013, her children were watching TV when she was taking a bath. She stated that, at that time her children opened the door for the accused. And, when she came out of the bathroom, she saw the accused standing outside the bathroom. He told her that she looked very nice having a bath and complemented her in the

manner she takes her bath. On inquiring as to how he was aware of the same, he revealed that he had made a video recording of her taking a bath. He told her that she has to do whatever he says and in case she refuses he would upload the video on the internet. He then forcibly established physical relation with her. She stated that on several occasions the accused had forcibly established physical relations with her in the absence of her husband. She stated that when she told the accused that she would vacate the rented accommodation, he threatened her with a country made pistol. The accused also threatened the children of the victim that he would kill them if they ever complained to her husband. She deposed that on 10.05.2014, her husband was threatened by the accused and he had made a complaint to the police. She deposed that on the occasion of *Bhai Dooj* in 2014, the accused had beaten her husband. She also deposed that the accused was also joined by her brothers, father, sisters and cousins in doing so. The matter was reported to the police. She stated that on 07.03.2015, her husband had gone to his village and she was present in the house with her children and the accused came to the house at 7:00 p.m. on that day. He beat her, tore her clothes and forcibly established physical relations with her. On 08.03.2015, when she was alone at home, the accused started abusing her from his house. She deposed that about 5:00 - 5:30 p.m., she narrated all the incidents to her husband. Her husband took her to PS Ranhola at about 7:00 pm where she gave a written complaint to the police.

11. In her cross-examination, she deposed that on 17.2.2013 her children were not playing outside with the accused and that they were

watching TV and had opened the door for the accused. She also deposed that she was using the mobile no. 9818687162 in February 2013. She further deposed that she was compelled by the accused to call and message him. She stated that at most times the accused had her phone in his possession. In her cross-examination, she also stated that her husband wrote the complaint and she only signed on it.

12. The husband of the prosecutrix was examined as PW2. He testified that in the year 2015, the accused (appellant herein) was constructing a house on a vacant plot in front of their rented residence. He testified that on 17.02.2013, his wife was bathing in the bathroom, while his three children were present in the house and were watching TV. He stated that the children had opened the door for the accused and his wife was unaware of the same. The appellant had taken a video recording of her while she was taking a bath. When his wife came outside from the bathroom, the accused told his wife about the video recording and asked her to act as per his wishes otherwise he would upload the video on the internet. Thereafter, the accused forcibly established physical relations with his wife. He also stated that initially these facts were not informed to him and the incidents were narrated to him by his wife on 08.03.2015. He deposed that on 10.05.2014, at 8:30 am, his wife informed him that accused was abusing her and had also threatened to kill her. He further deposed that at about 8:45 am, the accused called him and threatened to kill him and after 1 -1 ½ hours, the accused also came to his house. Thereafter, he made a complaint to SHO PS Ranhola. He also stated that on 25.10.2014, the accused, his father and his two brothers had entered in

his house and quarreled with him. He made another complaint to PS Ranhola in this regard. That on 07.03.2015, he had gone to his native village and he came back on 08.03.2015. He deposed that on 08.03.2015, he received a call from his wife around 5:30 pm and was informed that the accused is abusing and threatening to kill her. He reached home around 6:30 and it was then when his wife narrated the entire incident of 17.02.2013 in detail.

13. In his cross-examination, PW-2 identified his own mobile number as well as the mobile number of the accused. He testified that he had prior knowledge that the accused used to harass and beat his wife. He denied the suggestion that prior to 8.03.2015, he was aware that the accused had established physical relations with his wife. He stated that his son (who was also examined as PW3) had told him that the accused used to come to his house. He also stated that neither the landlord nor any neighbour ever complained to him regarding hearing the cries of his wife.

14. The minor son of the prosecutrix aged about eleven years was examined as PW3. He stated that the accused used to enter their house without anyone's permission. He also deposed that the accused used to beat his mother and his two sisters. He stated that the accused used to carry the mobile phone of his mother. The accused had abused him and his mother and also threatened to kill his family. In his cross-examination, he deposed that on a few occasions he told his father about the incidents but he did not recollect the exact dates.

15. ASI Chander Hass testified that at about 12:20 am on 09.03.2015, he was on duty at the police station. He had received the *rukka* from the WSI Savita and had got the FIR registered. ASI Suraj Bhan was examined as PW5 and ASI Vijender Sindhu (MHCM) was examined as PW6. PW5 testified that he had collected the exhibits along with the FSL Form from MHCM and had deposited the same with FSL, Rohini vide RC No. 44/21/15 and the case property was not tampered with while it was in his possession. PW6 testified that on 09.03.2015, W/SI Savita had deposited two sealed *pullandas* and one sample seal with the initials of SGMH (Ex.PW6/A). And, on 11.03.2015, W/SI Savita had deposited one sealed *pullanda* and a sample seal with the initials of SGMH (Ex.PW6/B).

16. It is also relevant to refer to the testimony of Dr. Neha Saluja, Senior Resident, SGM Hospital. She was examined as PW10. She testified that she was deputed by the hospital on behalf of Dr. Hemlata, however she can identify the handwriting and signature of Dr. Hemlata. In her cross-examination she stated that hymen tear as reported in the MLC (Ex. PW1/B) may have occurred at the time of sexual interaction between the husband and wife or at the time of delivery of a child since the victim is already a mother of three children.

17. Sh. D.N. Singh, who was the owner of the premises, rented by the prosecutrix and her family, was examined as PW8. He testified that one day, he saw the husband of the prosecutrix quarrelling with the accused. The husband of the prosecutrix informed him that the accused was having illicit relations with his wife. In his cross-examination he stated

that he had never received any complaint from the prosecutrix regarding the accused forcibly trying to make physical relation with her. He also stated that he never heard the prosecutrix cry or scream as long as she and her family were residing in his premises as tenants.

18. The statement of the appellant was recorded under Section 313 of the Cr.PC and he denied the allegations made against him.

Reasoning

19. Apart from the testimony of the prosecutrix and PW3, there is little evidence that supports the allegations made against the appellant. The testimony of the husband of the prosecutrix (PW2) regarding the incidents is apparently based on the information received from the prosecutrix. According to him, he had no knowledge of any of the incidents prior to 08.03.2015 (the date of the FIR). The testimony of PW8 (the landlord and neighbor of the prosecutrix) does not further the case of the prosecution; on the contrary it dents it as according to his testimony the husband of the prosecutrix was aware of the illicit relations between the prosecutrix and the appellant. The MLC of the prosecutrix does not support the case of the prosecution. The FSL report also does not support the allegation that she was sexually assaulted on 07.03.2015.

20. Thus, as observed earlier, the prosecution's case is largely founded on the testimony of the prosecutrix. To some extent, her testimony is also supported by the statement made by her minor son (who was examined as PW3). He had stated that the appellant used to come to their house on several occasions without taking any permission and used

to beat his mother and his sisters. He also stated that he questioned the appellant as to why he comes to their house and beats his mother her. He alleged that on being questioned the appellant used to abuse him and threaten to kill them. However, he also did not state that the prosecutrix was sexually assaulted by the appellant. He did not confirm the allegation that the appellant wanted to forcibly establish physical relations with the prosecutrix on 07.03.2015 in the presence of him and his siblings, as alleged by the prosecutrix. Further he did not state that he had seen his mother (the prosecutrix) pleading with the appellant not to establish physical relations with her, as alleged by her.

21. Having stated the above, it is also well settled that an accused can be convicted solely on the testimony of a witness. This is subject to such testimony meeting the standards of proof that is required for convicting an accused: establishing that the accused had committed the crime beyond any reasonable doubt.

22. In *Raju and Ors. v. State of Madhya Pradesh: (2008) 15 SCC 133*, the Supreme Court had observed as under:

“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, 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.

12. Reference has been made in Gurmit Singh case [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.”

23. It cannot be disputed that the evidence led by the prosecutrix alleging an offence of rape has to be given due weightage. It is also necessary to consider that any such complaint is bound to cause immense distress and humiliation to the prosecutrix. Thus, it must be presumed that such a complaint is true unless there are circumstances, which raise doubts regarding the same.

24. In *State of Rajasthan v. Babu Meena: (2013) 4 SCC 206*, the Supreme Court had explained that the oral testimony of a witness can be classified into three categories: (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. The Court had explained that an accused can be convicted on the basis of a wholly reliable testimony of a solitary witness. However, testimony that is neither wholly reliable nor wholly unreliable would require corroboration. The relevant extract of the said decision is set out below:

“8. We do not have the slightest hesitation in accepting the broad submission of Mr. Jain that the conviction can be based on the sole testimony of the prosecutrix, if found to be worthy of credence and reliable and for that no corroboration is required. It has often been said that oral testimony can be classified into three categories, namely (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. In case of wholly reliable testimony of a single witness, the conviction can be founded without corroboration. This principle applies with greater vigour in case the nature of offence is such that it is committed in seclusion. In case prosecution is based on wholly unreliable testimony of a single witness, the court has no option than to acquit the accused.”

25. In the facts of the present case, the testimony of the prosecutrix is not corroborated by any evidence except to a limited extent by the statement made by her minor son. However, as stated hereinbefore, even her minor son does not testify that the appellant had forcibly established physical relations with the prosecutrix. He had stated that he used to beat

the prosecutrix as well as his sisters. He did not confirm the allegations that the appellant wanted to forcibly establish physical relations with the prosecutrix on 07.03.2015 in their presence or that he had seen his mother (the prosecutrix) pleading with the appellant not to establish physical relations with her, as alleged by her. This Court is of the view that the statement of PW3 has a limited evidentiary value. PW3 had also stated that he had informed about the incidents to his father. Therefore, it is not possible to believe that the husband of the prosecutrix would not take immediate steps, if he had found that the appellant used to barge into their house and beat his children and his wife.

26. It is apparent from the above that PW3 had made his statement only in order to try and support the case of the prosecution. Thus, the only material evidence, on the basis of which the appellant has been convicted, is the testimony of the prosecutrix.

27. As stated earlier, it cannot be disputed that the appellant's conviction is liable to be sustained if the quality of the testimony of the prosecutrix is unimpeachable and wholly reliable. It is thus necessary to evaluate whether her testimony meets this standard.

28. In *Rai Sandeep @ Deepu v. State of NCT of Delhi: (2012) 8 SCC 21*, the Supreme Court had explained the qualities of a sterling witness in the following words:

“22To 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...”

29. It is, thus, essential to scrutinize the statements made by the prosecutrix at different stages and her testimony to ascertain whether her testimony qualifies as that of a sterling witness.

30. The statements and the testimony of the prosecutrix can be examined in the context of her allegation relating to the incident of 17.02.2013; her allegations relating to the period between 17.02.2013 and 07.03.2015; and her allegations regarding the events on 07.03.2015 and 08.03.2015.

Allegations Regarding Incident of 17.02.2013

31. In her initial statement made on 08.03.2015, on the basis of which the FIR was filed, the prosecutrix stated that on 17.02.2013 at about 2:00 p.m. when she was alone in the house as her husband was away at work, the accused had while playing with the children entered her house. At that time she was taking a bath in the bathroom. In her statement recorded under Section 164 Cr.PC, she stated that one day in 2013, she

had locked the main door and had gone to the bathroom for taking a bath but she did not close the door as her children were young. She did not know how the accused had managed to get the main gate opened (*pata nahi kaise tabhi Ajay ne bahaane se main gate khulwa liya*).

32. In her examination-in-chief, she stated that on 17.02.2013, her children were watching TV when she was taking a bath. The accused got the entrance door opened from her children. In her cross-examination, she confirmed that her children were not playing outside with the accused, but were inside watching TV and had opened the door for the accused.

33. It is apparent from the above that there is material variation between her initial statement and her testimony as to whether her children were playing with the accused at the material time or were inside the house watching TV.

34. In her initial statement, the prosecutrix had stated that she was under the impression that no one was outside when she was having a bath and when she came out of the bathroom, she saw the accused with the phone in his hand. He told her that he had already recorded a video of her when she was taking a bath. He threatened that she would now have to do whatever he says otherwise he would upload her video on the internet. She claimed that he forcibly established physical relations with her. In her statement recorded under Section 164 Cr.PC, she stated that the accused had told her that he had made a video of her taking a bath and threatened that he would upload the same on the internet if she does not

do what he demands. She alleges that he forcibly established physical relations with her thereafter. In her examination-in-chief, the prosecutrix testified that the accused had taken advantage of the door of the bathroom being opened and had prepared an obscene video. She testified that when she came out of the bathroom, she saw the accused standing outside the bathroom and on seeing her he stated that “*bahut ache lagte ho, bahut achhi tarike se nahaate ho*”. She then inquired from him as to how he knew the manner in which she takes a bath and it is then he informed her that he had seen her taking a bath and had also prepared a video. She testified that he threatened her that he would upload the video on the net if she did not follow what he said. She stated that she pleaded with him not to do anything as her husband was an Advocate in the Supreme Court, but he persisted. She alleged that he forced himself on her and established physical relations with her against her consent.

35. It is apparent from the above that the prosecutrix had made significant improvement in her testimony. The prosecutrix had not narrated any conversation regarding the appellant complementing her on the way she takes a bath either in her initial statement recorded on 08.03.2015 or in her statement recorded under Section 164 Cr.PC,

Period between 17.02.2013 to 07.03.2015

36. In her initial statement, the prosecutrix had stated that the accused had threatened her that he would kill her husband and children. She claimed that the accused used to beat her in front of her children and her children intimidated by the accused never told anyone about the incident.

In her statement recorded under Section 164 Cr.PC, she stated that the accused abused and stalked her. She alleged that the accused used to call her a “*chamaaran*” and threatened her that he would destroy her life and that she cannot do anything to him (“*tum mera kuch nahi kar sakti*”). In her examination-in-chief, the prosecutrix testified that she pleaded before the appellant not to establish physical relations with her, but the accused would nevertheless forcibly establish physical relations with her. She stated that when she informed the accused that she would be vacate the rented accommodation, the accused threatened her with a country made pistol (Tamancha) and did not allow her to vacate the premises.

37. She stated that he used to call her a “*chamaaran*” and forcibly establish physical relations with her by threatening her and her children by showing a country made pistol (*tamancha*) that he would kill them if, they would say anything to her husband and he stated that “nobody has the courage to do anything against me, your husband is a pimp”.

38. It is apparent from the above that the prosecutrix made significant improvement over her statements, in her testimony. In her initial statement she had stated that she could not narrate the incidents to her husband because the accused has a *tamancha* with which he used to scare her. The prosecutrix had not made any allegation that the accused had forcibly raped her by threatening her with a country made pistol. In her testimony, she alleged that he would not allow her to vacate her rented premises by threatening her with a *tamancha*. The prosecutrix had not made any such allegation of the accused using a country made weapon to

threaten her or scare her in her statement recorded under Section 164 Cr.PC.

39. In her initial statement, the prosecutrix recorded that on *bhai dooj*, the accused along with his father and brothers quarreled with her husband and a report was filed in the Police Station (Mark B). In her examination-in-chief, the prosecutrix deposed that on *Bhai Dooj* in 2014, the accused had beaten her husband. She stated that the accused was also accompanied by her brothers, father, sisters and cousins. She also deposed about another incident of 10.05.2014, wherein the accused had threatened her husband and a complaint was made in the Police Station (Mark A).

40. As is evident from the above, there is a significant improvement in the testimony of the prosecutrix. The prosecutrix had not narrated about any incident that occurred between her husband and the accused on *bhai dooj* in her statement recorded under Section 164 Cr.PC. The prosecutrix had also not narrated about the incident of 10.05.2014 either in her initial statement recorded on 08.03.2015 or in her statement recorded under Section 164 Cr.PC.

41. There is a material variation in the initial statement of the prosecutrix and in her examination-in-chief qua, the incident of 2014. While in her complaint she claimed that the accused was accompanied by his father and brothers, however, in her examination-in-chief she deposed that the accused was joined by her brothers, father, sisters and cousins.

42. In her initial statement, the prosecutrix had stated that she was forced to call up the accused, otherwise he threatened to beat her up. No such allegation was made by her in her testimony. In her cross-examination, the prosecutrix deposed that at most times, the accused had her phone in his possession. She admitted that she used to call the accused by using her mobile phone with the number 9818687162 which she was using at the material time. However she stated that she was compelled to call and send messages to the accused from her mobile number.

43. It is apparent that there is a significant improvement in the testimony of the prosecutrix. The prosecutrix had not narrated any incident regarding the accused taking over possession of her mobile phone in her initial statement recorded on 08.03.2015 or in her statement recorded under Section 164 Cr.PC.

Incident of 07.03.2015 and 08.03.2015

44. In her initial statement, the prosecutrix had stated that on 07.03.2015, her husband had gone to his village for some work. She stated that at 7pm on that day, the accused forcibly tried to establish physical relations with her, in front of her three children. She stated that she resisted and during the scuffle, her suit was torn but somehow she managed to save herself. In her examination-in-chief, she testified that on 07.03.2015, when her husband had gone to his village, at 7pm, the accused entered her house, beat her up, tore her clothes and forcibly established physical relations with her, in front of her children.

45. The inconsistency in her allegation as made by her regarding the alleged incident of 07.03.2015 is material. Whilst in her initial statement she stated that she managed to save herself; in the testimony she alleged that the accused had raped her.

46. In her initial statement she claimed that on 08.03.2015, when her husband went to work and she was alone at home, the accused abused her and told her that she cannot leave him otherwise, he would show her photographs and videos to everyone. She stated that she then narrated all incidents of abuse over phone to her husband. In her examination-in-chief, the prosecutrix deposed that on 08.03.2015, at about 1:00pm, she was alone at home and the accused started abusing her from his house. She deposed that due to the conduct of the accused, she contemplated suicide as all limits were crossed by the accused due to his constant abuse and threats. She further deposed that on 08.03.2015, when her husband returned home, she then narrated all incidents of abuse to her husband at about 5:00-5:30 pm.

47. As is apparent from the above, there is a material variation between her initial statement and her testimony as to time and the manner in which she had narrated the incidents of abuse to her husband. Additionally, neither the incident of 07.03.2020 nor the incident of 08.03.2020, was stated in her the statement of the prosecutrix as recorded under Section 164 Cr.PC.

48. In view of the above and other reasons as discussed hereafter, this court is unable to accept that her statement ought to be accepted as wholly reliable.

Evaluation of other evidence

49. The prosecutrix was medically examined at about 10.10 p.m on 08.03.2015. The MLC (Ex PW1/B) establishes that the prosecutrix had not suffered any injury. The Labia Majora and Labia Minora were reportedly healthy. The cervix and vagina were also reportedly healthy and there was no vulva injury or bleeding. This does not support the allegation that the appellant had forcefully established physical relations with the prosecutrix despite the petitioner actively resisting the same. She had also claimed that there was a scuffle between them and her clothes were torn but she had not suffered any bruises or scratches in the process.

50. Various medical samples of the prosecutrix were collected by the concerned doctors on 08.03.2015 including vaginal swab, vaginal smear, nail clippings, hair etc. It is important to note that the MLC (Ex Pw1/B) of the prosecutrix records that she had neither taken a bath nor changed her clothes since the assault allegedly made by the accused at about 7.00 p.m. on the previous day. The clothes worn by the prosecutrix were seized and sent for forensic analysis.

51. The FSL report (Ex PW10/D) indicates that human semen was found on the *salwar* worn by the prosecutrix and its DNA was analysed. The FSL report states that the “*DNA profile generated from the source of exhibit ‘3’ (blood stained gauze of the accused) is not accounted for in*

the mixed DNA profile generated from the source exhibit '2b' (salwar of the victim)''. Thus, while it is apparent that prosecutrix had engaged in sexual intercourse prior to her medical examination resulting in traces of human semen on her *salwar*, the said human semen was not that of the accused. Thus, the FSL report does not support the allegations made by the prosecutrix. It is also important to note that at the time of her medical examination, the prosecutrix did not disclose that she had sexual intercourse with any other person after 07.03.2015 but the presence of semen on her *salwar* indicates to the contrary.

52. It is relevant to note that the FIR in question was lodged on 08.03.2015. However, no allegation was made by the prosecutrix in the initial statement that the appellant had established physical relations with her proximate to the date of lodging of the FIR. She had narrated an incident of 17.02.2013, that is, more than two years prior to the date of registration of the FIR. However, apart from the said incident, no other specific incident prior to 7.03.2015 was narrated by the prosecutrix. She alleged that the appellant had attempted to established physical relations with her on 07.03.2015 at about 07:00 pm but she did not allege that he had, in fact, done so. On the contrary, her allegation was that the appellant had tried to establish physical relations with her in front of her children but she resisted. This resulted in a scuffle and somehow, she managed to save herself.

53. Undeniably, there is a significant delay in filing of the FIR considering that the prosecutrix claims to have been raped for the first time on 17.02.2013. This is a material fact and is necessary to take this

into account while evaluating the evidence of the prosecutrix. Her explanation for the delay is that she was under constant threat by the appellant that he would upload her obscene video on the net. However, it is in evidence that her husband had made a complaint on 10.05.2014 inter alia alleging that the appellant used to make obscene calls to the prosecutrix. Clearly at this stage, nothing prevented the prosecutrix to make other allegations. The explanation that she had refrained from making a complaint under the fear of threats from the appellant appears insubstantial considering that a complaint was made against him, albeit, limited to alleging receipt of obscene calls.

54. She had also alleged that he had forcibly established physical relations with her on several occasions and had also managed to make a video clip of the same on the sly. However, the prosecutrix did not explain as to how the petitioner could manage to make such a film while forcibly raping her.

55. Although the appellant's phone was seized, there is no scientific evidence to establish that any obscene video was made. According to the disclosure statement allegedly made by the appellant, the video was recorded on an SD Card which had been thrown away. The question whether analysis of the device would still yield evidence of any such video is a contentious one. Be that as it may, the fact is that there is no concrete evidence to establish that any such video was made apart from the statement of the prosecutrix to the aforesaid effect.

56. In the present case, it is brought in evidence that two other complaints had been made by the husband of the prosecutrix. Thus, there does appear that the relationship between the husband of the prosecutrix and the appellant were strained. It is also brought in evidence that the initial FIR had been written by the husband of the prosecutrix and signed by her. In addition, there is evidence on record to establish that the prosecutrix and the appellant were in regular touch with each-other.

57. It is also important to note that the testimony of the landlord of the premises occupied by the prosecutrix and her family, was examined as PW8. He had testified that he had seen the husband of the prosecutrix and the appellant quarrelling. The husband of prosecutrix had informed him that the appellant and prosecutrix had illicit relations. Thus, there was animosity between the husband of the prosecutrix and the appellant.

58. PW8's testimony does not support the case of the prosecution. The prosecutrix and her family used to reside on the ground floor and PW8 resided on the floor above. Thus he was the immediate neighbor of the prosecutrix and he had not heard the prosecutrix screaming or crying during the period she and her family were residing there. He also did not testify that he had heard the appellant hurling abuses at the prosecutrix. Surely, if the appellant had hurled abuses at the prosecutrix from his house –which was across the premises occupied by her – as alleged, PW8 and the neighbours would have heard the same. But PW8 did not hear any such commotion and none of the other neighbours were examined to prove the same.

59. The prosecutrix had alleged that the appellant had a *tamancha* and had threatened her with it and did not allow her to vacate the rented premises and shift from the locality. However no such allegation was made in her statement under section 161 Cr. PC or under section 164 Cr. PC. She had further testified that the appellant used to “have physical relations with me [her] forcibly by threatening her and her children by showing the country made pistol”; but no such statement was made by PW3. Further, no such *tamacha* has been recovered.

60. It is contended on behalf of the appellant that the prosecutrix and the appellant were in a relationship. The appellant had been avoiding her and the prosecutrix could not bear the same and therefore had made the allegations out of spite. The messages exchanged between the appellant and the prosecutrix also indicate the prosecutrix was close to the appellant and had been pursuing a relationship with him. But the said messages cannot be looked into as the appellant has not brought the same in evidence.

61. However, the call records for the period 01.02.2015 to 10.03.2015 have been brought in evidence (Ex PW10/DA) and the same indicate that the prosecutrix was in regular touch with the appellant. She had testified that she was using the mobile number 9818687162 and Ex PW10/DA indicates that the appellant was using mobile number 9910650942. The call records indicate that the prosecutrix had sent multiple messages to the appellant. On 01.02.2015 she had sent over thirty messages to the appellant. Approximately similar number of messages were sent by the prosecutrix on all other days as well. The prosecutrix had sent a number

of messages to the appellant on 07.03.2015 and 08.03.2015 as well. The same was sought to be explained by stating that the phone of the prosecutrix would be taken away by the appellant. However, it is difficult to accept that the appellant would send multiple messages to himself every day from the phone of the prosecutrix over a considerable period of time. In addition, it was also pointed out by the learned counsel for the appellant that the call records indicate that the prosecutrix had made calls and sent messages to her husband as well. This clearly established that the prosecutrix was in possession of her phone. Although the prosecutrix had made a statement in her cross examination that she was compelled to make such calls, this Court is of the view that there are sufficient reasons, as indicated above, to not accept this testimony of the prosecutrix. It is material to note that this is also in variance to her allegation that the appellant used to take away her phone.

62. The IO (who was examined as PW10) did not – as admitted by her – analyse the Call records and did not investigate the messages sent by the prosecutrix. Investigation into the said messages would have lent clarity to the relationship between the prosecutrix and also assisted in determining whether the allegations made by the prosecutrix were true.

63. The appellant has filed an application before this court to bring the messages on record. Copies of the transcript of the some of the messages placed on record do indicate that the same would provide substantial strength to the appellant's defence. However, this court does not consider it necessary to entertain the said application since it is apparent that the

prosecution has not met the standard of proof to sustain the appellant's conviction.

64. The husband of the prosecutrix is a practicing Advocate. Thus, he is fully aware of the remedies available in law. If the appellant had, in fact, made it a practice to barge into the house of the prosecutrix and beat her children, the children would have in the normal course complained to their father. It is difficult for this Court to accept that he would not have taken the necessary steps after being informed that the appellant had barged into his house and beaten his children and his wife in his absence.

conclusion

65. In view of the above, this court is unable to accept that the prosecution has established its case beyond reasonable doubt. Accordingly, the appellant's conviction for the committing the offences for which he is charged is unsustainable. The appellant is acquitted of those charges.

66. The appeal is, accordingly, allowed. The impugned judgment dated 18.10.2018 is set aside. The impugned order on sentence dated 27.10.2018 is also set aside. The appellant will be released forthwith if not in custody in any other case.

67. All pending applications are also disposed of.

VIBHU BAKHRU, J

SEPTEMBER 30, 2020/RK