

Islam vs.state

Islam vs.state

SooperKanoon Citation : sooperkanoon.com/1218532

Court : Delhi

Decided On : Oct-08-2018

Appellant : Islam

Respondent : State

Advocate for Pet/Ap. : Mr. Hirein Sharma, Mr. Dhruv Gupta, Mr. Hirein Sharma, Mr. Biswajit Kumar Patra, Mr. Hirein Sharma

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

27. h September 2018 Decided on:

8. h October 2018 + CRL.A. 1029/2017 + + RAMESH @ PINDARI Through: Ms. Appellant Inderjeet Sidhu, Advocate STATE ISLAM STATE (DHCLSC). versus Through: Mr. Hirein Sharma, APP for State. Respondent CRL.A. 1122/2017 Appellant Through: Mr. Dhruv Gupta, Advocate (DHCLSC). versus Through: Mr. Hirein Sharma, APP for State. Respondent CRL.A. 14/2018 & CRL.M.B. 15/2018 BEERU STATE Appellant Through: Mr. Biswajit Kumar Patra, Advocate (DHCLSC). versus Through: Mr. Hirein Sharma, APP for State. Respondent CORAM: JUSTICE S. MURALIDHAR JUSTICE VINOD GOEL CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 1 of 26 Dr. S. Muralidhar, J.: JUDGMENT1 The present appeals are directed against the judgement dated 18th September 2017 passed by the learned Additional Sessions Judge, Special Fast

Track Court-2 (Central) (the trial Court) in SC No.27600/2016 arising out of FIR No.26/2015 convicting the three Appellants, viz. Beeru (A-1 who has preferred Crl.A. 14/2018), Islam (A-2 who has preferred Crl.A. 1122/2017), and Ramesh @ Pindari (A-3 who has preferred Crl.A. 1029/2017), for the offences under Section 3 IPC, Section 376D IPC, Section 376 (2) (I) IPC, and Section 5 IPC.

2. The appeals are also directed against the order on sentence dated 26th September 2017 whereby the Appellants were sentenced as under: a. For offence punishable under Section 376-D IPC, to rigorous imprisonment (RI) for life which shall mean imprisonment for the remainder of convicts natural life, in addition to payment of fine of Rs.15,000/- each, to be paid to the victim and in default whereof, to further undergo simple imprisonment (SI) for 1 year. b. For offence punishable under Section 3 IPC, to undergo imprisonment for 10 years, in addition to payment of fine of Rs.2,000/- each, in default whereof, to undergo SI for 1 year. c. For offence punishable under Section 376 (2) (I) IPC to undergo imprisonment for 7 years, in addition to payment of fine of Rs.2,000/- each, in default whereof, to undergo SI for 1 year. d. For offence punishable under Section 506 Part-I/34 IPC to undergo imprisonment for 2 years, in addition to payment of fine of Rs.2,000/- each, in default whereof, to undergo SI for 1 year.

3. The trial Court, noting that the three convicts were from economically weak backgrounds, did not direct them to pay compensation to the victim. It directed that a copy of its judgment be sent to the District Legal Services Authority to consider the payment of suitable compensation to PW-1 in terms of Section 357A (2) Cr PC. Call made to the PCR4 On 24th January 2015, Asif Ahmed (PW-4) was returning home by a bus on Route No.181. The bus was going to the Nizamuddin Railway Station. PW-4 alighted at Bhogal Bus Stand as he had to board another bus going towards his house in Okhla. While he was waiting for that bus at the Bhogal Bus Stand, at around 10:30-11 pm, he noticed a man dragging a blind lady on the road leading to the Nizamuddin Railway Station. He states that the lady was shouting bachao bachao and said, Yeh mujhe pakad ke le jaa raha hai.

According to PW-4, he along with public persons who had gathered at the spot helped the lady apprehend the man. That man was identified in Court by PW-4 to be A-1. He further stated that the victim too revealed her full name to them.

5. The PCR Form (Ex.PW-14/Q) records that a call was made to the police CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 3 of 26 at around 11:02 pm on 24th January 2015. The mobile number of the caller ending 9200 was that of PW-4. What was reported to the police is noted as Ek ladka ladki ko lekar ja raha hai. The noting on the PCR form at 11:29 pm reads: _____ naam ki ladki aged _____ years blind hai, Madhya Pradesh ki rehni wali hai, SHO moka par hai, ladki _____ jo train se Delhi aayi thi jise Dehradun jaana tha jo Bhogal stand par uske do teen aadmi thei jo uska mouth band karke jabardasti le jaane ki koshish kar rahe thei jo bhag gaye ha ek ladke Beeru aged 36 years ko shak mein pakda hai. Arrival of the police 6. The police official who first reached the spot was ASI Karan Singh (PW-8) attached to PS Hazrat Nizamuddin. His PCR van was positioned near Rajdoot Hotel at 11:08 pm when he received the above information. Along with Ct. Pawan Sehrawat (PW-16), PW-8 reached near the Bhogal Bus Stand where public persons were found gathered. One person, viz. PW-4, met him there and informed PW-8 that he was the person who had given information to the PCR. The boy who was taking away the girl had been overpowered and his name was disclosed as A-1.

7. Meanwhile, SI Mahender Kumar (PW-5) and the SHO came to the spot. One Lady Ct. Rekha was also called there and PW-1 was entrusted to her. A-1 was handed over to the IO, viz. PW-5. For some reason, PW-8 did not record the statement of PW-4 at the spot. Medical examination of PW-1 8. It is not clear what happened immediately thereafter because the next relevant document, i.e. the Medico Legal certificate (MLC) of PW-1 CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 4 of 26 (Ex.PW-9/A) shows that she was brought to the All India Institute of Medical Sciences (AIIMS) at 2:13 am on 25th January 2015, nearly three hours after she was entrusted to the Lady Ct. Rekha. This delay in sending her for a medical examination is not explained.

9. The MLC noted that PW-1 was examined by Dr. Prashasti Srivastava (PW-9). The MLC further noted: According to the victim, she was taken by 3 male, who took her to some unknown place and sexually assaulted her on 24/1/15 - There is also H/O physical assault. 10. As regards the menstrual cycle, it was noted that the last cycle was three months ago. This indicated that, as on date, PW-1 was pregnant for at least three months. The other observations on the MLC were as under: - no signs of injury - Sphincter intact - Hymen old tear 11. The right thumb impression (RTI) of PW-1 was taken below the endorsement which read: I am willing for medical examination & sample collection. PW-9 also took the following samples from PW-1 at the time of medical examination for the purposes of checking whether any of the said samples had any sperm on them: 1. Vaginal swab 2. Vulval swab 3. Anal swab 4. Oral swab 5. Vaginal smear 6. Hair combing 7. Hair strands 8. Nail scrapping & clipping CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 5 of 26 9. Undergarments Counsellors report 12. What happened with PW-1 after the medical examination till her counselling at around 9:30 am on 25th January 2015 is also not very clear. A counselling report (Ex.PW-14/A) was prepared by the woman counsellor (not examined) at 10:30 am wherein, in the column entitled Need for medical assistance, it has been noted that PW-1 was in need of psychiatric assistance. The names of the accused were already given. It was noted that the accused were not known to the victim.

13. The statement given by PW-1 to the counsellor was recorded in Hindi. PW-1 stated that she was visually challenged; that in order to give the Class XII examinations, she was going to a blind school located at Gangaji Road in Dehradun; that she had come by the Mahakaushal Express at the Nizamuddin Railway Station on 24th January 2015; that she was trying to find out about which train might take her onwards to Dehradun when three persons came to her and offered her food; that those three persons then took her to a secluded place and raped her; and that they raped her again after taking her to the bus stand. She further stated that when she raised an alarm, public persons came there and the police was called. The statement of PW-1 to the police 14. PW-1 gave a statement to the police under Section 161 Cr PC (Ex.PW-5/C) on 25th January 2015 at PS Hazrat Nizamuddin. It is pertinent to note that the recording of the statement purportedly commenced at 9:30 am and was concluded at 9:35 am, i.e. the

recording of the statement of CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 6 of 26 the victim lasted approximately five minutes. In her statement, the victim informed the police that both her parents had died and that she was totally blind. She further stated that she was studying in Class XII in a blind school in Dehradun. She further claimed that she had gone to her village in Madhya Pradesh to spend some time at home and thereafter, on 23rd January 2015 she set out alone to return to Dehradun by boarding the Mahakaushal Express. She stated that she arrived in Delhi at the Nizamuddin Railway Station on 24th January 2015 and was making enquiries as to which train would take her to Dehradun when three men came to her and told her that they would take her for a meal.

15. PW-1 claimed that on that pretext, they took her to a secluded spot and removed her salwar. She then claimed that one of them said that A-2 should rape her first and when she protested, A-2 asked A-1 to shut her mouth. She further stated that A-1 asked A-3 to hold both her hands. PW-1 claimed that thereafter they, one after the other, did galat kaam with her and also threatened to kill her when she started shouting. According to her, they were going to take her to the train heading to Dehradun when she heard the sound of traffic. PW-1 stated that she screamed again and someone from the crowd asked her for her name. With his help, one of the three persons was caught. Thereafter, the police was called. Investigation and arrests 16. The rukka identified PW-4 as the caller and also noted his mobile number. The investigation was entrusted to Inspector Indu Rani (PW-14) who was given a copy of the FIR and rukka as well as the report of the counsellor. PW-14 interrogated A-1 and recorded his disclosure statement CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 7 of 26 (Ex.PW-14/B). Pursuant to said disclosure, according to PW-14, A-1 had also pointed out the place of the incident, vide pointing out memo (Ex.PW-14/C) bearing my signature at point A. A-1 was then arrested under (Ex.PW-14/D) which again bore her signature at point A. PW-14 stated that PW-1 had also identified A-1 at that time. A personal search was undertaken of A-1 and the personal search memo prepared (Ex.PW-14/E).

17. At this stage, it should be noted that the arrest memo of A-1 (Ex.PW-14/D) shows the time of arrest to be 1 pm on 25th January 2015. In other words, although A-1 was supposedly apprehended at the spot at around 11:30 pm, his

arrest is shown to have been made more than 12 hours later at 1 pm on the following day at the PS itself. No reasonable explanation is provided by the prosecution for this delay except to say that there was some confusion regarding jurisdiction of the PSs.

18. This, of course, is not very convincing since the PCR van which reached the spot was from PS Hazrat Nizamuddin and the arrest memo was also prepared by police officials attached to the same PS. There are only two attesting witnesses to the arrest memo, Ct. Amardeep (not examined) and PW-1. The pointing out memo (Ex.PW-14/C) also bears the attestation of the same two persons but, unfortunately, there is no site plan to indicate where the place of occurrence was. It only shows that this was near the Barapullah nala without indicating the exact place and its relative distance from the railway station.

19. According to PW-14, after obtaining his police remand, A-1 was interrogated for about two days but the co-accused could not be traced out. Crl. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 8 of 26 PW-14, therefore, obtained three further days of police remand and during this period A-1 pointed out A-2 and A-3. The arrest of A-2, as per the arrest memo (Ex.PW-6/C), was made at 9:35 pm on 27th January 2015 at the Neela Gumbad. The arrest memo pertinent to A-3 also shows the time of arrest as 9:30 pm on the same date and at the same place. Apart from PW-1, two other police officers are shown to have attested the two arrest memos. Their disclosure statements were also recorded and they too are stated to have pointed out to the place of the incident which again was the very same spot which was already pointed out two days earlier by A-1. Medical examination of the Appellants 20. The MLC of A-1 (Ex.PW-11/A) shows that he was taken for medical examination to Vardhman Mahavir Medical College and Safdarjung Hospital at 12:25 pm on 27th January 2015. Once again, no satisfactory explanation is forthcoming as to why A-1, who was apprehended at 11:30 pm on 24th January 2015, was taken for medical examination only at 12:25 pm on 27th January 2015, roughly three days later.

21. After being examined by Dr. Ayush Malhotra (PW-11) at 12:25 pm, A-1 was then examined by Dr. Mukesh Bansal (PW-12) at 2:10 pm who, in his report

(Ex.PW-12/A) noted the marks of identification on the body of A-1 and opined that there was nothing to suggest that A-1 was not capable of performing sexual intercourse. There was no smegma present at corona glandis. There was no sign of any local injury or venereal disease. It was further noted that no specimen was collected at that stage as the blood sample of A-1 had already been collected at the casualty ward. CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 9 of 26 22. As for A-2 and A-3, they were both taken to the aforementioned same hospital on 28th January 2015 and their MLCs were prepared at 11:25 am and 11:27 am respectively. Thereafter, A-2 was examined by PW-12 at 1 pm on the same date and it was opined in the report (Ex.PW-14/H) that there was nothing to suggest that A-2 was not capable of performing sexual intercourse. The remaining observations in the report are also similar to that made in the aforementioned report pertinent to A-1.

23. PW-12 collected the blood on gauze and the underwear along with langot of A-2. A-3 was examined by the same doctor (PW-12) at 1:30 pm and the observations made in the report (Ex.PW-14/I) are almost identical to that made qua A-2. The only specimen collected was blood on gauze. The statement of PW-1 before the MM24 PW-14 arranged to have the statement of PW-1 recorded before the learned Metropolitan Magistrate (MM) (Ex.PW-3/A) on 27th January 2015. This statement is more or less consistent with the hereinbefore discussed statement made by her to the police at the first instance. She speaks of each of the accused referring to each other by name and thereafter, taking it in turns to repeatedly rape her. What was added here was that after they took PW-1 to the bus stand, she quickly wore her clothes.

25. The age determination of the PW-1 could not be undertaken as she was pregnant. PW-1 delivered a baby subsequently and thereafter, her age was determined as between 20-22 years. Forensic report 26. The charge sheet was filed on 24th February 2015. However, at that stage CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 10 of 26 the FSL report dated 29th June 2015(Ex.PW-14/P) had not been received from the Biology Division, FSL. That report stated that blood was detected on exhibits 10, 11, and 13 (blood samples on gauze of the three Appellants). It is further stated that no blood was to be detected on exhibits 9

(undergarment of PW-1), 12a (langot of A-2), and 12b (undergarment of A-2). Further, semen could not be detected on the vaginal swab, vulval swab, anal swab, vaginal smear, pubic hair, undergarment of PW-1 or the langot and undergarment of A-2.

27. As regards exhibit 8, the report notes that it was one plain paper described as nail scraping & clipping kept unexamined as no biological evidence was found on it. As far as the DNA examination is concerned, it was noted as under: Since semen could not be detected on exhibit '1' (vagenal swab), '2' (vulval swab), '3' (anal swab), '4' (oral swab), '5' (vagenal smear), '7' (hair), '9' (cloth piece), '12a' (langot of accused Islam) & 12b (knickers of accused Islam) therefore DNA examination was not conducted. Whether PW-1 a reliable witness 28. Charges were framed by the trial Court against the Appellants in the manner indicated hereinbefore on 10th September 2015. The three accused pleaded not guilty and claimed trial. In all, 16 witnesses were examined by the prosecution. The trial commenced within 10 days of the framing of charges on 19th September 2015 with PW-1 being examined first. Her entire examination-in-chief on that date reads as under: I am blind since the age of 1 years. I became blind after suffering from chicken pox. My parents have already expired. I do not have any siblings. I have studied till class XI in a blind CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 11 of 26 school in District Banda. On 24.01.2015 I came to Delhi by train and got down at a railway station, whose name I do not recollect now. Three persons met me at the railway station and stated to me that they will give me food. I accompanied them believing them to be true. They took me towards bushes near the railway station. They torn my clothes and all three of them raped me one by one. When I tried to object and raise noise, they caught hold of my hands and legs and pressed my mouth. They were addressing each other by the names of Beeru, Islam and Pindari. They also gave me beatings and I started bleeding from my lips. They had taken me towards bushes at about 4.30 PM and continued to rape me till about 2 AM. Court Question: How can you tell the time of the incident?. Ans. 'Mujhe time pata chal jata hai.' Court Question: Can you tell what is the time right now?. Ans. It is about 10 AM. Court Observation: It is 10.30 AM by the court clock. After committing rape, all the three assailants took me somewhere and I could hear the sound of buses and horns in that area. Then I cried for help. I

caught hold of accused Beeru while other two managed to escape. Public persons also gathered there and I narrated the incident to them. Someone called the police. Police took me to the PS and took me to hospital. Police made enquiries from me and recorded my statement on which I put my thumb impressions. My statement was also recorded before Ld. MM and I also put my thumb impression on that statement. CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 12 of 26 I had identified accused Islam and Pindari in the police station by hearing their voice on 27.01.2015 when police arrested them. When I was got medically examined by the police after this incident, it was revealed that I was pregnant. I had also been raped by someone in my village about 03 months before I came to Delhi. I do not know who was that person, who raped me in my village. 29. At that stage, further examination-in-chief was deferred as the APP sought time to go through the record. It continued on 5th November 2015, on which date, PW-1 deposed in the following manner: I had earlier identified the accused persons after hearing their voice. I can still identify the accused persons, if I am made to hear their voice. At this stage, all the accused persons are asked if they are willing to speak something so that their voice can be heard by the witness I for the purpose of their identification. They state by their separate statements that they have no objection if they are made to speak something so that their voice can be heard by the witness. At this stage, accused Islam is asked to read something from a Hindi newspaper, however, he states that he is illiterate. He has spoken something about himself by giving brief introduction except his name and parentage. On hearing his voice for about 1-2 minutes, the witness states that he is one of the persons, who had committed rape upon her. However, she states that the name of this person is Beeru. At this stage, accused Beeru is asked to read something from a Hindi newspaper, however, he states that he is illiterate. He has spoken something about himself by giving brief introduction except his name and parentage. On hearing his voice for about CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 13 of 26 1-2 minutes, the witness states that he is one of the persons, who had committed rape upon her. However, she states that the name of this person is Pindari. At this stage, accused Ramesh @ Pindari is asked to read something from a Hindi newspaper. He has read the newspaper about 2-3 minutes. On hearing his voice for about 2-3 minutes, the witness states that he is

not the same person who had been apprehended at the spot. She however, states that he is one of the persons, who had committed rape upon her and states that the name of this person is Islam. I cannot tell the contents of conversation held between accused Islam and Pindari at PS. I had also appended my thumb impression on the documents prepared by the police qua arrest of accused Islam and Pindari. I had also appended my thumb impression on the documents prepared by the police qua arrest of accused Beeru. I was also given counselling by the Counsellor at the PS. I had also narrated the incident to the said Counsellor and also to the doctor who medically examined me. I had also disclosed the names of the assailants to the public persons, gathered at the spot after hearing my shouting. During the course of investigation, I had also given my statement to the Ld.Magistrate at Tis Hazari Court. I had also appended my thumb impression on the said statement. 30. PW-1 was cross-examined on 7th December 2015. She stated that she had met the accused on the platform of the railway station after getting down from the train. She could not tell the name of the railway station or platform number. PW-1 stated that she came to Delhi from Atara, District Banda, Uttar Pradesh and that she wanted to go to some blind school. According to her, I was not in complete senses on that day, hence I had told the police that I came from Dehradun. I came to Delhi by Maha Kaushal Express. I travelled in General Class and I did not have any reservation. I CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 14 of 26 was carrying my clothes in a poly bag. I had Rs.40/- with me.

31. As regards the accused, PW-1 stated in her cross-examination:Accused persons did not serve me food on that day. Firstly, accused persons take me along with them by holding my hands but when I refused, they insisted me to accompany them for food and took me with them by lifting me in their lap. I raised alarm at the Railway Station as well as in the bushes. I cannot say if any policeman was present at the Railway Station at that time. No police official met me at the Railway Station. I cannot tell how much time it took to reach the bushes from Railway Station. When I was being carried by the accused persons, I tried to escape from them. [Vol. But they did not leave me].. Accused persons snatched my polythene containing my clothes in the bushes. [Vol. They had also torn my wearing clothes and put on the clothes on me which I was carrying in my polythene bag after committing the offence].. The said torn clothes were lying in the bushes. The

money which I was carrying was also in the said polythene bag. I was carrying one set of clothes in the said polythene bag. I had also stated the said fact to the police. I could hear the sound of vehicles near the Railway Track. 32. When confronted with her previous statement made to the police at the first instance, PW-1 admitted that she had not stated to the police that she could identify the persons involved by their voices. Significantly, she stated that at the time when I identified the accused persons at PS by their voice, two police officials were also present and talking and I could hear their voices.

33. According to PW-1, after the rape, the Appellants carried her in their laps but when she raised an alarm and caught one of the offenders, she was not on their laps. She claims to have immediately narrated the incident to CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 15 of 26 the public persons gathered at the spot. PW-1 further deposed that her statement was recorded by the police after they took her to the PS. She went on to state that the police did not accompany me to the place of incident during investigation. The train reached the Delhi Railway Station at about 4.00 pm.

34. There are two things to be noted here. First is that in her examination-in-chief, PW-1 claimed that the Appellants had taken me towards bushes at about 4.30 PM and continued to rape me till about 2 AM. This is not consistent with the evidence on the record which shows that PW-1 was met by police officials near the Bhogal Bus Stand at 11:30 pm on 24th January 2015. This discrepancy weakens PW-1's assertion that she could tell the time of day even without looking at a watch.

35. Secondly, in light of PW-1's claim that she arrived on Mahakaushal Express at 4 pm and was then taken to the bushes situated near the Nizamuddin Railway Station at 4:30 pm, no attempt has been made to draw up a site plan which would assist the trial Court in determining the exact location of said bushes. Even the pointing out memo purportedly prepared at the instance of A-1 indicating the spot where the alleged gang rape was committed merely mentions a spot near the Barapullah nala with no scaled site plan made available.

36. The net result of these lapses is that it is not clear whether it would be feasible for a person to be taken, either by foot or by carrying them, from the railway station

to the bushes where the incident is supposed to have occurred within half an hour. It is also not clear whether the victim could CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 16 of 26 have been raped till 2 am at that precise spot. As per her version deposed to in the trial Court, the accused had her in their custody for nearly 10 hours which is inconsistent with the other evidence on the record.

37. It appears that a number of claims made by the victim (PW-1) have not been verified by PW-14. In her cross-examination, PW-14 states that although she sought the CCTV footage at Nizamuddin Railway Station for the relevant time, the camera covering the area where the incident is supposed to have taken place was found to be not working. According to PW-14, she had recorded the statement of a constable of the Railway Police Force (RPF) for non-functioning of the CCTV camera but no such RPF constable was examined. According to PW-14, no public person found present at H. Nizamuddin Railway Station revealing the incident.

38. Clearly, PW-14 did not consider it necessary to go to the village from where PW-1 is supposed to have boarded the train all by herself on 23rd January 2015 or to check the exact time at which the Mahakaushal Express arrived at Nizamuddin Railway Station on 24th January 2015.

39. Learned counsel for the Appellants has pointed out how, despite taking PW-1 to Dehradun on 3-4 occasions, the police was unable to locate the blind school which PW-1 was trying to reach. In other words, there is no evidence at all that PW-1 was studying in Class XII at any blind school in Dehradun or that she was going to appear in the Class XII examination as claimed by her in the statements to the police and before the learned MM.

40. PW-1 also makes a significant addition in her deposition pertaining to CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 17 of 26 the clothes worn by her. It will be recalled that she did not mention about her clothes being torn but only her salwar being removed by the accused, both in her initial statement to the police and in her statement under Section 164 Cr PC. What she has added in her statement under Section 164 Cr PC is that, after being brought to the bus stand, she quickly wore her clothes. It is only in her examination-in-chief in the Court that for the first time she spoke about her clothes being torn before three Appellants

raped her. In her cross-examination, PW-1 stated that she was carrying another set of clothes in a plastic bag. This again was disclosed for the first time in the trial Court. She further claimed that they had torn her wearing clothes and put on the clothes on me which I was carrying in my polythene bag after committing the offence and that the said torn clothes were lying in the bushes. No attempt was made by PW-14 to locate the torn clothes of PW-1. Even during her medical examination, all her clothes were not seized. As was seen earlier, only her undergarment was seized. This too contained neither blood nor semen.

41. Therefore, the statement made by PW-1 that she left her village all by herself on 23rd January 2015 and that she was studying in Class XII at a blind school in Dehradun and was going there to write an examination have not been corroborated by any evidence. These were verifiable facts and the prosecution has been unable to explain why no investigation was carried out on these aspects.

42. The central part of the deposition of PW-1 is about her being gang raped by the three Appellants one after the other. It will be recalled that according to her, the gang rape took place between 4:30 pm on 24th January 2015 and CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 18 of 26 2 am on 25th January 2015. Even if one were to take into account a margin of error and assume that incident happened between 5 and 11 pm on 24th January 2015, it should be noted that PW-1 was entrusted to Lady Ct. Rekha at 11:30 pm but was only medically examined almost three hours later at 2:13 am on 25th January 2015. No external injuries, including scratches, were found. Only the left side of her lip was swollen. It will also be recalled that the white paper purportedly carrying the nail clippings was found to contain no biological material which could be examined. Therefore, there is nothing to indicate that PW-1 struggled with her assailants. The hymen tear was an old one. The medical examination revealed that she was already three months pregnant at the time of the incident. There was no semen detected on any of the samples collected from her person. Likewise, there was nothing in the medical or forensic evidence that could connect any of the three accused with the crime.

43. It has already been noticed that no explanation has been offered by PW-14 for the delay in conducting the medical examination of A-1 by more than two days after his apprehension by the police. This kind of a lapse is inexplicable and perhaps inexcusable. With there being no site plans despite the pointing out memos by the Appellants, it is difficult to appreciate where precisely the incident took place.

44. The identification of the accused by PW-1 is another aspect which the trial Court seems to have overlooked. It is noticed that in her earlier statement to the police that was recorded at 9:30 am the next morning, PW-1 somehow gave the names of all the three Appellants as according to her, she knew their names because each of them was calling the other by his name. CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 19 of 26 She maintained this even in her statement under Section 164 Cr PC. Yet, as already noticed, in her cross-examination, PW-1 disclosed that she had identified the Appellants at the PS by their voice and that two police officials were also present and talking and she could hear their voices as well. Yet when she was asked to identify the Appellants in the Court through their voices, she mistook one for the other. Her identification of three Appellants was therefore doubtful.

45. This Court would at this stage like to refer to the legal position regarding prosecutrix evidence in cases involving rape. It has been explained by the Supreme Court in several decisions that if the statement of a victim is otherwise truthful and reliable, the mere fact that her statement may not be corroborated by the medical or forensic evidence does not, by itself, discredit her version. In other words, as long as the victim puts across a believable and reliable version, the Court can still proceed to convict. However, the Court has to be extremely careful when it undertakes this exercise.

46. The Supreme Court, in *Krishan Kumar Malik v. State of Haryana* (2011) 7 SCC130 observed as under: 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. CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 20 of 26 47. In Rai Sandeep v. State of NCT of Delhi (2012) 8 SCC21 the Supreme Court reiterated: 15. 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 strenuous it may be and under no circumstances 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 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 CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 21 of 26 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. PW-4 not a reliable witness 48. This Court finds that the evidence of PW-4 is also not convincing. Although the prosecution has been able to prove that the call to the PCR was made from his mobile phone, it is pertinent to note that the PCR form itself identifies the caller as one Vinod Seth, ASF Infrastructure Pvt. Ltd., who has not been examined. As for the information given to the PCR, what the police was told was that a man was taking away a woman. Even after the police reached there and spoke to the victim, they were told that three men were trying to forcibly take away the woman.

49. In Court, when he was examined, PW-4 stated for the first time that when he asked the victim at the Bhogal Bus Stand, she told him that A-1 along with two three persons had been committing rape upon her. She did not name the other associates of accused Beeru. This was an improvement made by PW-4 and over his previous statement to the police as is evident in his reply as under in his cross-examination: I had stated to the police that Prosecutrix also told us that the accused Beeru along with 2-3 persons had been committing rape upon her. (Confronted with statement Ex.PW-4/DA, where it is not so recorded.) 50. This was a significant improvement which, for some reason, was overlooked by the trial Court. It made PW-4 an unreliable witness. It is another matter that despite knowing his mobile number and despite having met him at the spot and noting this fact in the rukka, the police did not CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 22 of 26 record his statement until 12th February 2015, nearly 20 days after the incident. Yet again, this delay has not been explained.

51. It also appears that PW-4 did not initially know the name of A-1. In his cross-examination, he conceded that I came to know the name of the accused from the police officials. In other words, although PW-4 claimed to have been present at the spot when A-1 was apprehended and that PW-1 had disclosed the name of A-1, in his cross-examination, he conceded that he did not know the name of A-1 till the police official told him. This makes the identification of A-1 by PW-4 in Court very doubtful. This Court is, therefore, unable to be assured that PW-4 is speaking the complete truth. Statements under Section 313 Cr PC52 The Courts attention was

drawn to the replies given by the three Appellants in their respective statements under Section 313 Cr PC. Interestingly, A-1 does not dispute that he was at the Bhogal bus stand. Questions No.1, 7, 8, 33 and 34 and the answers thereto are significant in this regard and read as under: Q.1 It is in evidence against you that on 24.01.2015 PW5 SI Mahender Kumar pursuant to a call vide DD No.37A, Ex.PW5/A along with Ct. Rekha reached Bhogal Bus stand, where the first informant, PW4 Sh. Asif Ahmed, prosecutrix PW1 and you accused Beeru were found present; PW5 SI Mahender Kumar sent you in the custody of one Constable to PS Nizamuddin. What you have to say?. Ans. It is correct that I was apprehended from a little ahead of bus stand Bhogal. Q.7 It is in evidence against you that PW14 Insp. Indu Rani Crl. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 23 of 26 interrogated and arrested you vide arrest memo Ex.PW14/D in the presence of PW6 Ct. Rajender Singh; your personal search was also conducted vide personal search memo Ex.PW14/E; PW14 Insp. Indu Rani disclosure statement, Ex.PW14/B and pursuant thereof you pointed out the place of incident vide pointing out memo, Ex.PW 14/C. What you have to say?. Ans. It is a matter of record. recorded also your Q.8 It is in evidence against you that PW14 Insp. Indu Rani obtained your five days police custody remand; pursuant to your disclosure statement Ex.PW14/B you pointed out your co- accused Islam and Ramesh @ Pindari and got them arrested in the presence of PW6 Ct. Rajender Singh vide arrest memos Ex.PW6/C and Ex.PW6/A respectively; their personal search was also conducted vide personal search memos Ex.PW6/F and Ex.PW6/E respectively. What you have to say?. Ans. It is incorrect. Q.33 It is in evidence against you that at about 10:30 pm - 11:00 pm on that day while PW4 Sh. Asif Ahmed was waiting for Okhla bound bus at the said bus stand, he saw you accused Beeru dragging the prosecutrix PW1, a blind lady on the road leading to Nizamuddin Railway Station; prosecutrix PW1 was shouting "bachao bachao. yeh mujhe pakad ke le jaa rahan hai". What you have to say?. Ans. It is incorrect. Q.34 It is in evidence against you that after hearing the said shouting public persons gathered at the spot; PW4 Sh. Asif Ahmed with the help of public persons apprehended you accused Beeru. What you have to say?. Ans. I was only sitting there. I was not apprehended by any public Crl. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 24 of 26 person. 53. Thus, there was no convincing evidence that A-

1 was trying to take away PW-1 and was caught in that process. In what circumstances he was trying to take her away is also not very clear. As far as A-2 and A-3 are concerned, they do not appear to have been present. Each of them has claimed to have been falsely implicated.

54. There is no evidence to show that the three Appellants even knew each other. A-2 is a resident of a village in U.P whereas A-1 and A-3 are from Madhya Pradesh but again from different villages. How the three of them got together at the Hazrat Nizamuddin railway station and decided to jointly commit this offence has not been sought to be explained by the prosecution. This is another lapse in the investigation. Errors of the trial Court 55. The conclusion in the impugned judgment of the trial Court about the version of PW-1 being consistent, coherent, creditworthy and intrinsically reliable overlooks the inconsistencies and improvements in her statements at various stages as has been discussed hereinbefore. The further conclusion of the trial Court that there is no contradiction in the said version of the prosecutrix on any material aspects of the case in her different statements, is not supported by the record.

56. The trial Court accepted the evidence of PW-4 as an independent public person without noticing the material improvement made by him in his deposition in the Court regarding what was disclosed to him by PW-1 in the very first instance. The trial Court has after noting that the version of PW-1 CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 25 of 26 was not corroborated by either the medical or the forensic evidence observed that the absence of such evidence does not exonerate accused persons. The question was whether such evidence corroborated the evidence of PW-1 which in the present case it did not. Conclusion 57. For the aforementioned reasons, the Court finds it unsafe to hold the Appellants guilty of any of the offences with which they have been charged on the basis of the prosecution evidence. Consequently, the impugned judgement of the trial Court convicting the Appellants for the offences with which they were charged and the consequent order on sentence are hereby set aside. The Appellants are acquitted of the offences with which they have been charged.

58. The Appellants shall be set at liberty forthwith, unless wanted in any other case. They will fulfil the requirements of Section 437A Cr PC to the satisfaction of the trial Court immediately. The trial Court record be returned forthwith along with a certified copy of this judgment. The appeals are allowed and the applications are disposed of in the above terms. S. MURALIDHAR, J.

VINOD GOEL, J.

OCTOBER08 2018 mw CrI. A. Nos. 1029, 1122 of 2017 & 14 of 2018 Page 26 of 26

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com