

Chetan Vs. State

Chetan Vs. State

SooperKanoon Citation : sooperkanoon.com/60114

Court : Delhi

Decided On : Jul-16-2015

Judge : R. K. Gauba

Appellant : Chetan

Respondent : State

Advocate for Pet/Ap. : Mr. M.L. Yadav, Mr. Varun Goswami, Mr. Biswajit Kumar Patra

Judgement :

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

01. 07.2015 Pronounced on:

16. 07.2015 + CRL.A. 28/2000 CHETAN STATE + TASLEEM STATE + ASHOK STATE Appellant Through: Mr. M.L. Yadav, Adv. versus Respondent Through: Mr. Varun Goswami, APP for the State. CRL.A. 227/2000 Appellant Through: Mr. M.L. Yadav, Adv. versus Respondent Through: Mr. Varun Goswami, APP for the State. CRL.A. 533/2002 Appellant Through: Mr. Biswajit Kumar Patra, Adv. versus Respondent Through: Mr. Varun Goswami, APP for the State. CORAM: HON'BLE MR. JUSTICE SANJIV KHANNA HON'BLE MR. JUSTICE R.K. GAUBA R. K. GAUBA, J: % 1. The three appellants were held guilty, as charged, for the offence of gang rape punishable under Section 376(2)(g) of the Indian Penal Code (IPC) statedly committed against the

prosecutrix (PW-6) during 09:00 P.M. to 10:30 P.M. on 03.09.1997 in bus bearing registration No.DBP- 1735 on Outer Road, Mayur Vihar Phase-III, Near CRPF Camp within the jurisdiction of Police Station Kalyan Puri (the Police Station), by judgment dated 20.12.1999 of learned Addl. Sessions Judge, in Sessions case No.7/98, primarily on the basis of testimony of the first informant (prosecutrix). By order dated 20.12.1999, they were sentenced to imprisonment for life with fine of `10,000/- each, in default to further undergo rigorous imprisonment for two years each, the fine if realized to be paid to the victim (as compensation).

2. Through these appeals, the convicts challenge the judgment of the learned trial court pleading innocence and false implication arguing mainly that the word of PW-6 is not worthy of reliance and is not corroborated. The State, on the other hand, defends the impugned judgment urging the appeals to be dismissed.

3. It may be mentioned at this stage that in the narrative of the prosecution case, involvement of another person, Ram Kumar son of Jai Chand, resident of D-211, Munirka Village, Delhi had also come up. The said Ram Kumar, as indeed appellant Chetan (Criminal Appeal No.28/2000), accused No.3 (A-3) in the trial court record, could not be initially arrested. The investigation had been completed after arrest on 23.09.1997 of the other two viz. appellant Tasleem (Criminal Appeal No.227/2000) and Ashok (Criminal Appeal No.533/2002), accused No.1 (A1) and accused No.2 (A-2) respectively in the trial court record, and charge-sheet submitted in their respect on 22.01.1998. A-3 was arrested on 31.12.1997 whereupon the matter was further investigated and supplementary charge-sheet in his respect submitted on 20.01.1998. Ram Kumar, however, could not be arrested and after requisite processes had been issued, he was eventually declared a Proclaimed Offender (PO).

4. The prosecutrix (PW-6), a woman aged about 25 years on the relevant date, is a native of Nepal. The evidence on record reflects that she was married even when she was a minor. She hardly ever lived with her husband in Nepal, her husband having entered into a second marriage. She had shifted residence to Delhi in search of a job and came to be employed as a domestic servant in the house of a businessman in a locality of South Delhi.

5. During trial, and at the time of hearing on the appeals, submissions have been made that the prosecutrix had tried to conceal her marital status. Reference in this regard was made particularly to certain observations made by Dr. Sunita Vashisht (PW-5), Senior Resident of Gynecology Department, SDN Hospital, Shahdara (the hospital) in the context of medical examination conducted on 04.09.1997 against MLC (Ex.PW-2/A). Indeed, in the MLC, the name of the husband is not indicated. The description of the prosecutrix in the said document reflects name of the father. But then, it cannot be ignored that in her very first statement (Ex.PW-6/A) which formed the basis of endorsement (Ex.PW17/A) recorded by ASI Udaibir Singh (PW-17), the Investigating Officer (IO), leading to the registration of FIR (Ex.PW-3/A), the prosecutrix had disclosed not only the name of her father but also that of her husband.

6. The material on record reflects, and there is no rebuttal, that the appellant Chetan (A-3), resident of Mehrauli, was working for gain (tailor) in the local market of the area of Delhi where the prosecutrix was living. There is no reason to disbelieve the evidence of the prosecutrix also about Ram Kumar (PO) being in the business of cassettes in a shop adjacent to the shop of A-3 in the same market. A-3 in the course of his statement under Section 313 of the Criminal Procedure Code, 1973 (Cr.P.C.) admitted these facts to be correct.

7. Evidence to the effect that the prosecutrix was closely acquainted, and was on friendly terms, with A-3 and Ram Kumar (PO) is admitted by A-3 in his statement under Section 313 Cr.P.C. He went to the extent of taking the position that the prosecutrix used to come to his tailoring shop to get clothes stitched and had proposed that he should marry her to which he was not agreeable. During the course of cross-examination of the prosecutrix (PW-6), photographs Ex.PW-6/DA-1 to 8 were shown to her and she admitted that the said photographs had been exposed when she had visited a garden in the company of A-3 and Ram Kumar (PO). It may be mentioned here that in six of these eight photographs, the prosecutrix is shown to be posing for the photographs all alone. There is nothing in the other two photographs, also depicting the male companion, to lead to the inference of both being on any terms more than that of friends.

8. It is beyond the pale of any dispute that appellant Tasleem (A-1) and Ashok (A-2) were employed on the relevant date (03.09.1997) as driver and conductor (or helper) respectively by Avtar Singh (PW-4) in his bus bearing registration No.DBP-1735. The evidence shows that the bus was operating on stage-carriage route between Priya cinema and Noida with NCERT falling en-route. A-1 would live during those days in Trilokpuri and would park the bus at Sector - 34, Noida. The testimony of PW-4 Avtar Singh to this effect was not challenged and this part of the evidence came to be admitted as correct during their respective statements under Section 313 Cr.P.C. by A-1 and A-2.

9. It also must be noted at this stage that according to the version of the prosecutrix (PW-3), as appearing in the FIR, Chetan (A-3) and Ram Kumar (PO) had taken her into a bus, the driver and the conductor whereof were acquaintances and friends of the former two, all four eventually subjecting her to forcible sexual intercourse one after the other. It is clear from her said version (PW-6/A) that she herself did not know the said driver and conductor of the bus by name or otherwise.

10. It does appear that the prosecutrix had given the registration number of the bus to the IO in the said first statement as 1753. It is the case of the prosecution that the bus which was actually involved bears the registration No.DBP-1735. Clearly, the description given by the prosecutrix in the FIR was not correct and would not match the bus with which A-1 and A-2 are connected under the employ of PW-4. But this cannot be ground to absolve A-1 and A-2. According to the prosecution case, the discrepancy in the description had come to the fore by 23.09.1997, in the course of investigation which had since been taken over by S.I. Rakesh Kumar (PW-16), the second Investigating Officer (second IO), inasmuch as A-2 had been arrested at Ashram Chowk on the pointing out by PW-6 at a stage when he (A-2) was on duty in the bus bearing registration No.DBP-1735 (the bus), with some other person at the wheels.

11. According to the prosecution case, both A-3 and Ram Kumar (PO) whose names and addresses had been given by the prosecutrix in the FIR could not be immediately located and had made themselves unavailable. The prosecution

sought to prove the arrest of A-2 on 23.09.1997, after personal search (vide Ex.PW-6/F) by PW-16 in the presence of PW-17 and the prosecutrix through their respective testimony. According to the IO, it was A-2 who had disclosed the identity of A-1 and led to his arrest from his house in Trilokpuri which was effected after personal search (vide Ex.PW-16/B) again on 23.09.1997 in the presence of PW-17.

12. After his arrest, while in judicial custody granted by the Metropolitan Magistrate, during the course of investigation, A-1 had engaged services of an advocate. On 24.09.1997, the very next day after arrest, A-1 moved an application (Ex.P-X) through the said counsel before the Metropolitan Magistrate stating that he was not the driver of bus bearing number 1753 as mentioned by the prosecutrix and no precaution had been taken to fix his identity. By the said application, he requested for Test Identification Parade (TIP) to be arranged expressing his desire to participate in such exercise. The application eventually came to be marked for holding of TIP in respect of A-1 to Shri S.K. Sharma, Metropolitan Magistrate (PW-10). The proceedings conducted in this regard on 24.10.1997 in Central Jail, Tihar by PW-10 (vide Ex.PW-10/D) were proved by the judicial officer through his testimony which has remained unchallenged. These proceedings show that the prosecutrix, in the course of the said TIP (vide Ex.PW-10/E), positively identified A-1 as one of the assailants who had participated in the crime of gang rape against her. The prosecutrix PW-6 in the course of her testimony also deposed in this regard and no attempt was made to discredit her in this context during her crossexamination.

13. It is pertinent to note here that during his statement under Section 313 Cr.P.C., A-1 pleaded ignorance about the request for and conduct of his TIP and rather took the position that the prosecutrix had come to him being a friend of A-3, two or three days prior to the date of incident and had requested his intervention for getting her marriage with A-3 settled at which he had declined any role for himself for the reason it was their personal matter.

14. The defence explained to above effect by A-1 indeed confirms not only his friendship with A-3, as deposed by the prosecutrix but also the capability of the

prosecutrix to identify him. This puts pale the defence argument of there being no connection between A-3 (and PO Ram Kumar) on one hand and A-1 and A-2 on the other.

15. The sequence of events of the fateful evening/night (03.09.1997) as narrated by the prosecutrix in the FIR, briefly noted, were that since she wanted to leave for her native place in Nepal on 04.09.1997, she had requested A-3 and Ram Kumar (PO), who were here acquaintances and had accompanied them on the scooter driven by Ram Kumar (PO) at about 04:00 P.M. with A-3 sitting in the middle. The scooter had reached village Ghazipur area at about 07:00 P.M. when the bus, the registration number of which she recollected as 1753 later corrected as 1735, was found stationary with passengers alighting. She stated that A-3 had alighted from the scooter and had boarded the bus while she had continued as the pillion rider on the scooter driven by Ram Kumar (PO) which followed the bus. She stated that when the bus had reached near CRPF Camp, it was taken by the driver into a dark area when Ram Kumar (PO) asked her to accompany him into the bus as he wanted to meet his friends. She alleged that inside the bus, the said four persons, A-1, A-2, A-3 and Ram Kumar (PO) had consumed liquor and at the instance of the driver of the bus, she was also forcibly made to consume liquor by Ram Kumar (PO) and the driver. She stated that in the course of such indulgence in alcohol, the said four persons had become flirtatious and started teasing her and forcibly removed all her clothes disrobing her totally. She alleged that she was then subjected to forcible sexual intercourse after being made to lie on the bus seat, first by A-3, with the assistance of Ram Kumar (PO) (who was holding her hands) and then by Ram Kumar (PO) himself with similar assistance by A-3. She stated that she made an attempt to run out of the bus on finding opportunity but was again brought back into the bus by all the four persons giving her beatings. She alleged that thereafter the driver and conductor of the bus also forced her into sexual intercourse. According to her, she had lost consciousness and after regaining control, she had found the four persons indulging in liquor consumption and on opportunity coming her way, she jumped out of the bus, in nude state, to run and hide herself in a dark pit. She stated that after some time, the four assailants had left her behind, taking away the bus while she remained hidden in the pit overnight. She told the IO that someone had given her a sheet wrapping

which over herself she had been able to come out in the morning.

16. The first bit of information to the police came in the form of D.D. entry No.43-A, recorded at 04:30 A.M. on 04.09.1997, copy whereof was brought on record of the trial court as Mark - X. The D.D. entry was not formally proved but its gist about presence of a girl near CRPF Camp finds echo in the rukka Ex.PW-17/A and the deposition of PW-17 who was accompanied at that time by Constable Kashmir Singh PW-26 and Lady Constable Raj Kumari PW-14 (who had also been called for assistance in due course). PW-17 and PW-9 had found the prosecutrix in a pit near the aforementioned CRPF Camp without a stitch of clothes on her person, but wrapped in a sheet.

17. Questions were raised during trial, as indeed during hearing on the appeals as to what had happened to the clothes of the prosecutrix of which she is stated to have been forcibly relieved before the gang rape and at what stage and from what source she had had the benefit of a sheet for covering herself. We would revert to the question of clothes of the prosecutrix a little later. As regards the sheet, while the prosecutrix would claim that it was made available to her by the police, there is no confirmation in this regard coming forth from PW-9, PW-14 or PW-17. Going by the attendant facts, it is clear that the pit where the prosecutrix was found hiding is in close proximity to the CRPF Camp. Apparently, her presence in nude state would have come to notice in the early morning hours of someone who informed police telephonically leading to the D.D. entry 43-A. Before PW-17 accompanied by PW-9 arrived, substantial time had elapsed. Apparently, some good samaritan, possibly CRPF personnel (also similarly uniformed), would have arranged a sheet to help the prosecutrix cover herself.

18. It may be mentioned here that a lot of argument was raised about non-seizure of the sheet by the IO during investigation. In our view, this omission is of no consequence as the sheet was never used in the crime and its seizure would not have made any difference. The evidence shows that PW-14, the Lady Constable, who had been asked to join, had been instructed by the IO to bring along some of her own clothes. She had, accordingly, taken her own clothes from her house before reaching the spot and the same had been given to the prosecutrix for

immediate use before she was escorted by PW-14 to the hospital for medical examination.

19. The IO and the prosecutrix together proved the facts relating to recording of her statement (vide Ex.PW-6/A) on which endorsement was made vide Ex.PW-17/A which led to registration of the FIR Ex.PW-3/A by Head Constable Kuldeep Singh (PW-3) on the basis of rukka brought by PW-9 at 09:45 A.M.

20. When the prosecutrix PW-6 was brought to the hospital at 07:10 A.M. on 04.09.1997 under the escort of Lady Constable Raj Kumari (PW14), she was medically examined by Dr. T. Mishra (PW-2) and Dr. Sunita Vashisht (PW-5). The Medico Local Report (MLC) prepared by PW-2 has been proved by her as Ex.PW-2/A while PW-5 has proved her own notes Ex.PW-5/A on the same document. In the opinion of PW-2, who had examined the prosecutrix first before she was referred to PW-5, the general condition of prosecutrix was fair and she had no external injuries. This was confirmed by PW-5 in her notes though she particularly deposed, inter alia, about the hymen being ruptured and linear laceration of 2 cm present at 6 o'clock position on perineum indicative of force having been used in sexual intercourse with her.

21. PW-5 was subjected to cross-examination by the defence in an attempt to bring out that such laceration as noted by the medical officer could possibly be suffered during intercourse indulged in willingly with more than one person. Question of marital status of the prosecutrix also came to be raised in this context. It appears that PW-5 proceeded on the assumption that the prosecutrix was an unmarried girl, for the reason that the name of the husband is not indicated in the MLC. Given the nature of the form used for preparing the MLC (where there is no column for the name of the husband to be ascertained or recorded) and the state in which the prosecutrix would have been brought to the hospital for medical examination, in our view, it cannot be said that the prosecutrix would have concealed the factum of her marriage from the examining lady medical doctors. The prosecutrix had no reason to withhold such fact. Apparently, she had no desire to conceal her marital status since she had mentioned it on her own to the IO earlier when her statement Ex.PW-6/A had been recorded at the place where

she had been discovered.

22. In our opinion, nothing turns on the opinion of PW-5 except that the laceration of 2 cm present at 6 o'clock position on perineum is proved. What is important in the testimony of PW-5 is the observation that this laceration was indicative of use of force. This corroborates and affirms the prosecutrix's deposition and the charge of gang rape.

23. During medical examination of PW-6, vaginal smear/slide had been prepared. This was passed on by the medical officer to the IO through PW-14 and was subjected to formal seizure (vide Ex.PW-14/A). After their arrest, A-1 and A-2 had also been taken for their respective medical examinations. Dr. M.K. Mandal, Chief Medical Officer (PW-1), who examined both the said accused in the hospital, had prepared MLCs in respect of A-1 and A-2 vide Ex.PW-1/B and Ex.PW-1/A respectively. The MLCs confirm capability of both the said accused to indulge in sexual intercourse. There is no denial of the said fact by the said accused at any stage. The MLCs also show that the examining medical officer had collected blood samples of both A-1 and A-2 which were also passed on to the IO. It is pertinent to note here that the MLCs further disclose that both A-1 and A-2, when asked to do so by the examining medical officer, had refused to give the samples of their respective semen. The prosecution seeks to use this fact to press for an adverse inference.

24. It has been the case of the investigating police that at the time of arrest of A-2 from the bus at Ashram Chowk on 23.09.1997, the bus (DBP1735) was seized (vide Ex.PW-6/C) in the presence of the prosecutrix. As noted earlier, there had been a mis-description of the bus number in the FIR. The IO seized the number plate (Ex.P-3) of the bus in which A-1 and A-2 were engaged as crew vide separate proceedings drawn (Ex.PW-6/D). It has been the deposition of PW-17, PW-16 and Head Constable Jagbir Singh (PW-7) that after the seizure of the bus when its toolbox was checked, it was found to contain a polythene parcel which, on being opened, revealed its contents to include two articles of girls' clothing (Ex.P1 and Ex.P-2) which were identified by the prosecutrix (PW-6) to be the clothes which had been removed from her person inside the bus before the sexual

assault. The prosecutrix identified the said wearing apparels (Salwar Ex.P-1 and Kurta Ex.P-2) during her statement.

25. Given the sequence of events narrated by PW-6, it is possible that after the incident her clothes may have gone away with the bus inasmuch as she had been disrobed inside the bus. But then, PW-14, the Lady Constable, who had been called to the scene by the IO for assistance, in her cross-examination, testified that she had picked up the clothes of the prosecutrix from the spot which, in that event, would have been carried along by the IO as pieces of evidence. PW-14 confirms, at the same time, that the said clothes picked up by her from the spot, were not sealed in her presence.

26. Taking note of the above-noted part of deposition of PW-14 and observing that it was improbable for said accused to be moving around with such incriminating evidence, the learned trial court judge disbelieved the case of the police about the recovery of Ex.P-1 and Ex.P-2 from the toolbox of the bus on 23.09.1997. Since the view taken by the learned trial court on this issue is based on sound reasoning, we defer to it and would exclude from consideration the evidence to such extent, also for the reason that the said article of clothing did not provide any corroboration inasmuch as no biological samples connecting the appellants with the crime could be detected thereupon. The FSL report (PX) is of no consequence as the blood samples preserved during the medical examination of A-1 and A-2 were found to be putrefied and hence, leading to no definitive opinion.

27. It is the argument of the learned counsel for all the three appellants that learned trial judge fell into error by believing the word of PW-6. It is their submission that PW-6 is not worthy of reliance and her testimony ought not be acted upon in absence of independent corroboration. In an attempt to impeach her credibility, questions were raised about her character and it was argued that this witness has been giving contradictory versions at different stages. Reliance is placed on the judgment in the case reported as Rai Sandeep @ Deepu v. State of NCT of Delhi (2012) 8 SCC21 and the judgment of another Division Bench of this court in Criminal Appeal No.660/1999 Rohit Bansal v. State (decided on 29.05.1995) also a case of gang rape.

28. The defence particularly relies upon the following observations in Rai Sandeep @ Deepu (supra):

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 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 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.

29. It was pointed out that in Rohit Bansal (supra), the court had disbelieved the testimony of the prosecutrix for the reason it did not pass the muster of the test of high quality and caliber.

30. In above context, we would also like to bear in mind the law on the subject of appreciation of the evidence of a prosecutrix in the case of sexual assault, summarized by the Supreme Court in the case reported as Narender Kumar v. State (NCT of Delhi) 2012 (7) SCC171 in the following words:

It is a settled legal proposition that once the statement of prosecutrix inspires confidence and is accepted by the Court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix is a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be ground for throwing out an otherwise reliable prosecution case. A prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge. However, if the court finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or substantial, which may lend assurance to her testimony. (Vide: Vimal Suresh Kamble v. Chaluverapinake Apal S.P. and Anr.: AIR 2003 SC818 and Vishnu v. State of Maharashtra: AIR 2006 SC508.

31. The quoted observations of the Supreme Court are reiteration of what has been the consistent view of the Courts in India on the subject of evidentiary value of the testimony of prosecutrix, to understand the logic for which reference to the following observations (in para 7 of the judgment) in State of Punjab v. Gurmit Singh AIR 1996 SC1393 would suffice:

The testimony of victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon

the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion?. The Court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another persons lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.

32. It is the argument of the appellants that the prosecutrix has been a woman of easy virtue. In an attempt to persuade us to proceed on this assumption, it was pointed out on their behalf that the prosecutrix has admitted in her testimony that she was frequently going out with A-3 and Ram Kumar (PO) and even getting herself photographed in their company in public gardens. It was argued that no girl of such status and background would ordinarily agree to accompany a person with whom she had no relation for a drive out on a public road in the late evening hours. It was submitted that the prosecutrix had admitted that she had

accompanied her employer out of Delhi to places like Bombay where his wife lives or even abroad (Holland and Moscow) on his official or family trips. The prosecutrix was confronted in the course of her cross-examination with photograph Ex.DA-9 which admittedly depicts her employer sitting at his office desk without a shirt. The learned counsel for the appellants argued that the above-noted admissions and the photographs conjointly are suggestive of illicit relationship between the prosecutrix and her employer. The counsel further submitted that the prosecutrix had been insisting upon A-3 to marry her and had even sought the intervention of A-1 in this regard. It was argued that the defence to this effect taken by the appellant cannot be lightly brushed aside.

33. We find no substance in the above submissions. We rather find the innuendos respecting the character of the prosecutrix adding insult to the injury.

34. We accept the word of PW-6 that her employer used to treat her as his daughter. The photograph showing the elderly employer of PW-2 without a shirt at his office desk is of no relevance. It is not clarified how it was sourced. The prosecutrix cannot be made accountable for any explanation in its respect. She is not in the frame. Non-examination of the employer leads the defence nowhere. The employer would not be privy to any of the events which are subject matter of this case. The prosecutrix referred to the family of the employer also being part of the scene where she was working. It is wholly unfair to the prosecutrix to attempt draw from such circumstances any such connections as have been urged.

35. The prosecutrix, on her part, has given good explanation by deposing that she treated A-3 as a brother. No attempt was made to impeach her testimony to such effect. If she was living alone in Delhi, far away from her native place in Nepal and was treating A-3 and Ram Kumar (PO) as friends or brothers, insalubrious insinuations are unworthy and unacceptable. There is no evidence adduced by the appellants as to the alleged desire of the prosecutrix or her proposal to A-3 for marriage. Mere assertion by A-3 or A-1 cannot be given any credence.

36. The argument that the fact that prosecutrix willingly sat and moved on the scooter with A-3 and Ram Kumar (PO) is indicative of her consent needs only to be mentioned to be rejected. She may have as a friend consented for a joyride.

But, this cannot be stretched to allege consent for sexual intercourse with either A-3 or Ram Kumar (PO), or for that matter, any of their friends to her total strangers, individually or collectively. The facts speak and are glaring.

37. It was then argued that though prosecutrix claims to have been beaten up at several stages of the incident, the MLC is not supportive of her claim to such effect. We reject this argument for the reason that no weapon, blunt or otherwise, is stated to have been used in such physical assault. The beatings, thus, would have been restricted to fists or slap blows, or force used to overpower her. Such assault committed on her person till about 20:30 hours on the previous night may not have left any tell-tale signs for the medical officer to note or record at the stage of medical examination at 07:10 hours on 04.09.1997.

38. During the course of investigation, the prosecutrix was brought before PW-10 (Metropolitan Magistrate) for her statement under Section 164 Cr.P.C. PW-10 proved the proceedings in this regard vide Ex.PW10/A. Statement Ex.PW-6/B forms part of the said proceedings which was also affirmed by the prosecutrix in her deposition. The learned counsel for the appellants submitted that the said statement does not jell with the version of the prosecutrix either in the FIR (Ex.PW-6/A) or the testimony given in the court.

39. We find the above criticism on the basis of statement under Section 164 Cr.P.C. to be impressible. The proceedings recorded by PW-10 under Section 164 Cr.P.C. do appear to us rather cryptic. What has been recorded under Section 164 Cr.P.C. by the Magistrate is only a summarized version of the events constituting the incident. The said proceedings indeed are in the nature of previous statement of PW-6. In terms of Section 145 of the Evidence Act, the defence was entitled to cross-examine PW-6 with reference to such previous statement. But if it intended to contradict her on its touchstone, it was required to confront her by drawing her attention to such parts of the previous statement as were indicative of contradictions or discrepancies vis--vis the version in the court. No such attempt was made during cross-examination of PW-6 for impeaching her creditworthiness on the basis of Ex.PW-6/B. argument raised during appeal, thus, must be repelled. The It would be incorrect to urge that the statement under Section 164 Cr.P.C.

contradicts assertions and the charge of rape.

40. Learned counsel for the appellants also submitted that the investigation has been casual. They argued that the Investigating Officer has not shown in the site plan (Ex.PW-17/B) the location of the pit where the prosecutrix had been found hiding. It was argued that though CRPF Camp is located nearby, no official from the said Camp had been joined in the investigation. It was submitted that the seats of the bus were neither seized nor any corroborative evidence lifted therefrom. As per the argument of the defence, the omission of the IO to take the appellants, after arrest, for pointing out the place of occurrence, is a circumstance adverse to the case of prosecution.

41. We reject the above contentions. It is true that location of the pit in the site plan Ex.PW-17/A would have made the said document more graphic. But the area, as described, would have a number of pits. The fact that prosecutrix was discovered in hiding in a pit is borne out from other evidence on record. Absence of reference thereto in the site plan, thus, cannot discredit the word of the relevant witnesses on this score. It is nobody's case that a CRPF official had seen anything connected with the crime. Non-joining of CRPF personnel, thus, is inconsequential. The crime had occurred on 03.09.1997. The bus apparently had continued to be in use for public service thereafter till it was impounded on 23.09.1997. Apparently, no evidence would have come up even if its seats had been taken off and seized. We find the argument about the omission to take the arrested persons for pointing out the place of occurrence to be ignoring the basic provisions contained in Sections 25 to 27 of the Evidence Act. Such steps, even if taken during investigation by the IO, would be inadmissible.

42. We have gone through the testimony of the prosecutrix carefully. She narrated the sequence of events that had occurred and the role of each of the three appellants clearly and precisely. She may have mixed up, while narrating the incident at different stages of the legal process, the order in which the four persons subjected her to sexual assault. This, to our mind, cannot be a circumstance rendering her testimony doubtful. A woman, who suffered such sexual assault, particularly in a case of gang rape involving four perpetrators, is not expected to

narrate the incident parrot-like. Small imperfections or variations, as appearing, are natural. Absence of external injuries or failure to detect semen in the vaginal swab cannot render her word incredible. [Parminder @ Ladka Pola v. State of Delhi JT2014(2) SC306 Radhakrishna Nagesh v. State of A.P. JT2012(12) SC616 and, State of U.P. v. Chhoteylal JT2011(1) SC228 43. It is well-settled that ocular evidence of the prosecutrix would hold supremacy over medical evidence even if the latter rules out all possibilities of injuries taking place in the manner stated by the witness [Radhakrishna Nagesh (supra)]. As noticed earlier, in the case at hand, medical opinion confirms use of force against PW-6 at the time of sexual assault. The said observation of the medical officer, who examined her, provides corroboration to the word of the prosecutrix.

44. We find the evidence of the prosecution in general and that of PW-6 in particular inspiring confidence and worthy of reliance. The sole testimony of PW-6 is sufficient in the case at hand to lead to the conclusions and findings recorded by the learned trial court judge. We find no infirmity in the reasoning set out in the impugned judgment. Thus, the findings recorded by the learned Addl. Sessions Judge and the conviction of the three appellants are upheld.

45. It was submitted on behalf of the three appellants that they are now in middle age with families/children to support. It was submitted on behalf of A-1 that his wife has deserted him and his small children totally depend on him. The counsel also submitted that the appellants were enlarged on bail pending hearing on appeals and that they have not been involved in any criminal activity thereafter. The counsel, thus, urged for leniency in sentence.

46. The offence of gang rape is serious and grave crime. The manner in which the prosecutrix was trapped and subjected to sexual assault by the appellants and their fourth accomplice reflects gross depravity. In a case where an acquaintance exposes the victim to a situation that leads to she being subjected to rape or gang rape, as in the case at hand, there is also an added element of breach of trust. In such cases as reach the logical conclusion of the perpetrator(s) being found guilty after the judicial scrutiny, there can be no scope for leniency in the matter of punishment.

47. The penal code, through the provision contained in Section 376(2)(g), prescribes the punishment that could extend to imprisonment for life with fine. The said punishment has been awarded, and befittingly so in our opinion, by the learned trial judge in the case at hand. We find no reason to interfere.

48. The appeals are, thus, dismissed. The appellants are directed to surrender to custody forthwith to undergo the sentence awarded against each of them in the impugned judgment and order. The learned trial judge (successor judge) and the Station House Officer of Police Station Kalyan Puri are directed to take necessary steps to ensure due compliance. R.K.GAUBA (JUDGE) SANJIV KHANNA (JUDGE) JULY16 2015 ik

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