

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

RESERVED ON : 9th MARCH, 2015

DECIDED ON : 29th MAY, 2015

+ **CRL.A.No.369/2014**

GAURAV MAGGO Appellant

Through : Ms.Richa Kapoor, Advocate.

versus

THE STATE OF NCT, DELHI Respondent

Through : Mr.Navin K.Jha, APP.

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

S.P.GARG, J.

1. Challenge in this appeal is to a judgment dated 22.02.2014 of learned Addl. Sessions Judge, Delhi in Sessions Case No. 09/13 arising out of FIR No. 111/12 PS Timarpur by which the appellant Gaurav Maggo was convicted for committing offence under Section 376 IPC. By an order dated 25.02.2014, he was sentenced to undergo RI for seven years with fine ₹ 5,000/-.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that from 14.10.2011 to 25.05.2012, the appellant committed rape upon 'X' (assumed name) on the pretext of marrying her and also criminally intimidated her. Written complaint (Ex.PW-1/A) lodged by 'X' on 25.05.2012 formed the basis of First Information Report registered on 26.05.2012. 'X' was medically examined; she recorded her statement under Section 164 Cr.P.C. Statements of the witnesses conversant with the facts were recorded. Exhibits were sent to Forensic Science Laboratory for examination. After completion of investigation, a charge-sheet was filed against the appellant for commission of offences under Sections 376/506(II) IPC. The prosecution examined eight witnesses to substantiate its case. In 313 statement, the appellant denied his involvement in the crime and pleaded false implication. DW-1 (Rita @ Pinki) appeared in defence. The Trial resulted in conviction as aforesaid. It is pertinent to note that appellant's acquittal under Section 506(II) IPC remained unchallenged by the State. Being aggrieved and dissatisfied, the appellant has filed the instant appeal.

3. I have heard the learned counsel for the parties and have examined the file. Appellant's conviction is primarily based upon the testimonies of 'X' and her sisters - PW-5 (Annu) & PW-6 (Usha). The

said evidence, however, was not considered sufficient to record conviction under Section 506 (II) IPC. Admitted position is that the appellant aged around 23 years, an unmarried boy, was acquainted with 'X' and her family members much prior to the incident. He had visiting terms to X's house. He used to render assistance to 'X' and her family. X's husband was suffering from jaundice and the appellant used to take him to hospital in his taxi. X's husband expired on 14.10.2011 after prolonged illness leaving behind 'X' and three children. It is alleged that after his demise, the appellant started frequently visiting 'X' and developed intimacy with her children. In her Court statement, 'X' disclosed that in December, 2011 when she, her children, elder sister with her elder daughter had gone to Mathura in the appellant's taxi, he put 'sindoor' on her 'maang' in a temple. They went to Agra from Mathura and returned to Delhi next day. On inquiry by her sister as to why he had put 'sindoor' in her 'maang', the accused expressed desire to marry her (X). PW-1 further stated that thereafter accused started visiting her occasionally. He promised to talk to his parents about their marriage. On 02.01.2012 taking advantage of absence of her mother-in-law who had gone to Punjab, the accused established physical relations with her. He assured that he would inform his parents about their marriage at a suitable time. The accused thereafter

forcibly established physical relations with her several times without her consent in her house on the assurance to talk with his parents about their relation. In April, 2012 when he started keeping distance and avoided her telephone calls, she met him at Smile Dental Clinic at Nehru Vihar. The accused threatened to kill her and her children if she disclosed about their relations to anyone. When she contacted accused's parents they also criminally intimidated her. PW-5 (Annu), X's sister though has corroborated her version, but her knowledge is based upon the information given to her by her other sister – Usha who had accompanied 'X' to Mathura. PW-6 (Usha), X's other sister also deposed that the accused had filled X's 'maang' with 'sindoor' in her presence in a temple at Mathura. When she enquired about it, the accused expressed his willingness to accept 'X' and her children.

4. Admitted position is that in December, 2011, 'X' and her family members including sister Usha had gone to Mathura in the accused's taxi driven by him. There is, however, no cogent and clinching evidence on record to prove if on any specific date or time, the appellant put 'sindoor' on X's 'maang'. 'X' did not reveal the name of the temple where 'sindoor' was allegedly put in her 'maang'. In the cross-examination, 'X' informed that as she used to remain depressed, due to

her husband's death, her sister took her to Mathura to visit Guruji. However, no detailed particulars have been given whether 'X' and her family members had visited Guruji and at which place. No individual from the said place has been examined. It is also not clear if 'X' had objected to the alleged filling of 'sindoor' in her 'maang'. In the cross-examination, she claimed that she had objected to the filling of 'sindoor' in her 'maang' and had attempted to remove it with her hand. She, however, did not lodge complaint against the appellant about it. She continued to accompany the appellant along with her other family members to Agra and photographed together. It is unbelievable that the accused, a young boy of 23 / 24 years, would dare to fill 'sindoor' in X's 'maang' aged about 32 years, mother of three children, against her wishes in the presence of her family members. In her complaint (Ex.PW-1/A), 'X' did not reveal if the appellant had filled her 'maang' with 'sindoor' at Mathura. Initially, 'X' claimed to be in possession of audio and video recording and her examination was deferred on 18.02.2013 to enable her to produce it. However, on 12.04.2013 on re-appearance, she could not produce any audio and video CD alleging that its contents were corrupted. 'X' relied upon certain photographs Ex.PW-1/P1 to Ex.PW-1/P7 to buttress her claim. I have examined the photographs Ex.PW-1/P1 to

Ex.PW-/P3. Apparently these were taken at Agra during the trip in December, 2011. There is nothing objectionable in these photographs. It is not unusual for a family friend to be photographed along with other family members. These photographs do not depict any 'sindoor' in X's 'maang'. Photographs (Ex.PW-1/P4 to Ex.PW-1/P7) obviously were not taken at Mathura or Agra along with Ex.PW-1/P1 to Ex.PW-1/P3. These photographs are in different context; the appellant and 'X' are in different clothes. Again, there is nothing much objectionable in these photographs to infer that the appellant and 'X' were closely intimidated to each other. It is unclear as to when, at which place and in what context, these photos were taken, and if so, by whom. No negatives of these photographs have been brought on record. Merely because X's 'maang' is filled with 'sindoor' in one or two photographs, it cannot be inferred with certainty that it was done by the appellant at Mathura as alleged. These photographs do not depict appellant filling X's 'maang'. Besides this, filling of 'maang' with a 'sindoor' ipso facto does not create any relationship akin to promise to marry.

5. 'X' has not divulged with certainty and clarity if physical relations with the appellant were consensual on his promise to marry or it were against her wishes forcibly. This relationship continued for sufficient

duration and at no stage, she raised alarm / hue and cry or lodged report with the police against alleged forcible sex. Even after the initial incident on 02.01.2012, she continued to have sexual relations with him on several occasions without demur and at no stage 'X' lodged report about his behaviour and conduct. Only in April, 2012 when the appellant started avoiding her and stopped attending her telephone calls, she approached him to enquire about his changed attitude. When she did not get positive response, she lodged the complaint after a considerable unexplained delay on 25.05.2012 with the police. In her medical examination vide MLC Ex.PW-2/A, no visible injuries were found on her body. DNA Fingerprinting report (Ex.PW-8/E) did not implicate the appellant. Vital discrepancies have emerged in the statement (Ex.PW-1/A) lodged at first instance and the one recorded under Section 164 Cr.PC. (Ex.PW-1/B).

6. Indisputably, the appellant and his family lived in the same vicinity. At no stage, 'X' or her sisters approached the family members of the appellant for marriage. It is unclear as to why 'X' concealed the factum of filling of 'sindoor' by the appellant in her 'maang' from his family members and did not make it public. Where was the compulsion for her to establish physical relations first without ensuring that the appellant and his family members were willing to perform marriage with

her? She was mature enough to fully understand as to what was happening between the two. There is nothing in her evidence to demonstrate that she was incapable of understanding the nature and implications of the act which she consented to. Her consent for physical relations (if any) was an act of conscious reason. If a fully grown up lady consents to the act of sexual intercourse on a promise to marry and continues to indulge in such activity for long, it is an act of promiscuity on her part and not an act induced by misconception of fact. At no stage, 'X' approached the appellant's family members to apprise them his intention to marry her.

7. 'X' is not believed to allow the appellant to have physical relations without first ensuring authenticity of the alleged promise to marriage particularly when she had lost her husband about three months before. She had three grown-up children. There was least possibility a young boy aged 22 years to marry 'X' having three grownup children. In complaint (Ex.PW-1/A), 'X' omitted to disclose if the accused had established physical relations with her 'forcibly'. No independent public witness was associated at any stage of the investigation. X's sisters - PW-5 (Annu) & PW-6 (Usha) are interested witnesses.

8. Settled legal position is that conviction can be based upon the sole testimony of the prosecutrix provided it is reliable and is of sterling quality.

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

“Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1.

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

“It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The

accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.”

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

“In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well

as, the sequence of it. Such a version should have correlation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

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

15 SCC 566, the Supreme Court held :-

'It is true that in a case of rape the evidence of the Prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter.'

13. X's testimony tested on the above settled principles, is wholly unreliable due to inherent infirmities therein. In the instant case, no cogent and clinching evidence has been brought to prove valid marriage between the two in Mathura on any particular date at a specific place. The appellant's conduct in the episode is, however, unfair / unreasonable. He knowingly that 'X' was a widow having three grown-up children, indulged in consensual sex with her. Observations of Hon'ble Supreme Court in similar circumstances in 'Vinod Kumar vs. State of Kerala', 2014 (5) SCC 678 are worth-noting :

“The Appellant is not an innocent man inasmuch as he had willy-nilly entered into a relationship with the prosecutrix, in violation of his matrimonial vows and his paternal duties and responsibilities. If he has suffered incarceration for an offence for which he is not culpable, he should realize that retribution in another form has duly visited him. It can only be hoped that his wife Chitrlekha will find in herself the fortitude to forgive so that their family may be united again and may rediscover happiness, as avowedly the prosecutrix has found.”

14. The prosecution has miserably failed to establish that physical relations with the prosecutrix were on the false promise to marry. The appeal filed by the appellant is accordingly allowed. Conviction and

sentence of the appellant are set aside. The appellant shall be released forthwith if not required to be detained in any other criminal case.

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

(S.P.GARG)
JUDGE

MAY 29, 2015 / tr