Punnu vs State (Govt. Of Nct) Delhi on 19 February, 2018

Author: S. Muralidhar

Bench: S.Muralidhar, I.S.Mehta

$~R-83 & 84
* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.A. 1429/2013
PUNNU ..... Appellant
Through: Mr. Aditya Vikram, DHCLSC and
Mr. Avinash, Advocate.
versus
STATE (GOVT. OF NCT) DELHI ..... Respondent
Through: Ms. Kusum Dhalla, APP for State
with Insp. Rajendra Meena, Police
Training School Dwarka.
+ CRL.A. 586/2006
SAROJ ..... Appellant
Through: Ms. Inderjeet Sidhu, Advocate.
versus

THE STATE OF NCT DELHI ..... Respondent
Through: Ms. Kusum Dhalla, APP for State
with Insp. Rajendra Meena, Police
Training School Dwarka.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

ORDER

% 19.02.2018

Dr. S. Muralidhar, J.:
Introduction

1. Crl. A.586/2006 by Appellant Saroj is directed against the judgment dated 17th February, 2006 passed by the learned Additional Sessions Judge (ASJ), New Delhi in Sessions Case No.163/2004 arising out of FIR No. 11/2003 registered at Police Station (PS) Delhi Cantonment, convicting her for the offence under Section 109 IPC read with 376 (2) (g) IPC and Section 5 (1)

(c) of the Immoral Traffic Prevention Act, 1956 (ITPA) as well as the order on sentence dated 22nd February, 2006 whereby for the offence under Section 109 read with Section 376 (2) (g) IPC she was sentenced to rigorous imprisonment (RI) for life with a fine of Rs.1,000/- and in default of payment, to undergo RI for two months and for the offence under Section 5 (1) (c) of the ITPA she was sentenced to RI for seven years with a fine of Rs.500/- and in default to undergo RI for one month.

2. The companion appeal i.e. Crl.A. 1429/2013 is by Punnu, the husband of Saroj and is directed against judgment dated 10th September, 2013 passed by the learned ASJ, Dwarka Courts in Sessions Case No.77/2013 arising out of the same FIR No.11/2003 registered at PS, Delhi Cantonment, convicting him for the offences under Sections 120 B IPC, Section 344 IPC, Section 376 IPC, Section 376 (2) (g) IPC, Section 506 IPC and Section 5(1) (c) of ITPA. It is also directed against the order on sentence dated 17 th September, 2013 whereby for the offences mentioned above, he was sentenced as under:

> "(1) To rigorous imprisonment for a period of 10 years along with fine of Rs.10,000/- for the offence punishable u/s. 120 IPC.

He shall suffer further imprisonment for a period of 6 months in case of default of payment of fine.

(2) To rigorous imprisonment for a period of 3 years along with fine of Rs.10,000/- for the offence punishable u/s.344 IPC. He shall suffer further imprisonment for a period of 6 months in case of default of payment of fine.

(3) To rigorous imprisonment for a period of 10 years along with fine of Rs.10,000/- for the offence punishable u/s. 376 IPC. He shall suffer further imprisonment for a period of 6 months in case of default in payment of fine.

(4) To life imprisonment along with fine o Rs.10,000/- for the offence punishable u/s.376(2)(g) IPC. He shall suffer further imprisonment for a period of 6 months in case of default in payment of fine.

(5) To rigorous imprisonment for a period of 2 years along with fine of Rs.10,000/- for the offence punishable u/s. 506 IPC.

(6) To rigorous imprisonment for a period of 14 years along with fine of Rs.25,000/- for the offence punishable u/s. 5(1)(c) of Immoral Traffic (Prevention) Act, 1956."

3. While in the case of Saroj the sentences were directed to run concurrently, in the case of Punnu the sentence as in (1) above was directed to run first and after its completion sentences at (2), (3) and (5) were directed to run concurrently. After the completion of those three sentences, sentences at (4) and (6) were directed to run consecutively.

4. At the outset it requires to be mentioned that although charges were initially framed against both the Appellants by the order dated 19th January, 2004 of the learned ASJ, at that stage only Saroj (Accused No.1:A-1) was available and Punnu (A-2) was declared a Proclaimed Offender (PO). Therefore, A-1 alone faced trial which ended in her conviction by the impugned judgment dated 17th February, 2006 of the trial Court followed by the order on sentence dated 22nd February, 2006.

5. As it transpired, A-2 surfaced many years later and was arrested on 29th April, 2010. A supplementary charge sheet was filed against him on 5th May, 2010 and the case was committed to the Sessions Court for trial under Sections 376, 506, 342, 120 B IPC and Section 5(1) (b), (c) of the

ITPA by an order dated 7th October, 2010. By an order dated 3rd February, 2011 of the learned ASJ, Punnu was charged with the offences under Sections 120 B IPC, 376 (2) (g) IPC, 344 IPC, 506 IPC and 5 (1) (c) IPC.

Charge

6. The charge against both Appellants was that during the period about four to five years prior to 11th January, 2003, they entered into a criminal conspiracy at their jhuggis (slum dwellings) at Bapu Dham and thereafter at their quarters in Dhaula Kuan to commit the offence of gang rape of the prosecutrix (PW-1), their niece, who was a minor girl at the relevant time. PW-1 was alleged to have been wrongfully confined, subjected to criminal intimidation and forced into prostitution by the two Appellants. The charge also mentioned that at the aforementioned places and during the aforementioned period, the Appellants "along with others" had committed the offence of gang rape punishable under Section 376 (2) (g) IPC. The other charges against the Appellants were of wrongful confinement punishable under Section 344 IPC, of criminal intimidation of PW-1 threatening her that she would be killed thus committing an offence punishable under Section 506 IPC and also forcing her into prostitution, thereby committing an offence punishable under Section 5 (1) (c) of ITPA.

Background

7. The background to the case is that on 31st May, 2001 an information was given at PS Chanakyapuri at 4.30 pm which was reduced into writing as DD 15A that a young girl was admitted to the RML Hospital having consumed some poisonous substance. This was followed by another DD entry 18 A at 5.55pm on the same day about the police having visited the RML Hospital but being told that the said girl was unfit to give a statement.

8. As far as the present case is concerned, it began with one Dr. Shalini Monga (who was later examined as PW-8) accompanying PW-1 to the National Human Rights Commissions (NHRC) to give a written complaint on 16th December, 2002. The said hand written complaint by PW-8 was to the effect that PW-1, aged 17 years and 10 months, and whose father had passed away was presently staying with her uncle Punnu (A-2) in Dhaula Kuan Part-I. It was stated that A-1 and A-2 who were her guardians were mentally torturing her. It was stated "they are making her work in four houses as a domestic help and giving them all the money. They are also trying to force her into prostitution when she goes back from work." The NHRC was requested to protect the dignity of the girl and save her from further harassment. PW-8 mentioned in her letter that PW-1 was willing to stay with PW-8 at her residence in Dhaula Kuan Part-I . Below the said hand written complaint was the hand written statement of PW-1 in Hindi to the effect that whatever had been written in the said complaint was correct and that she did not wish to stay with her uncle and aunt i.e. A-1 and A-2 and that they were subjecting her to severe harassment. The thumb print impression of PW-1 was affixed below the said statement.

Statement of PW-1 to the police

9. The next development was that while she continued staying with PW-8, PW-1 gave a statement to the police on 11th January, 2003 (Ex.PW-1/1) at Police Post (PP) Dhaula Kuan to Assistant Sub Inspector (ASI) Bal Krishan (PW-17). PW-2 gave her age on that date as 18 ½ years. A non-governmental organization (NGO), Sanchetan Society for Mental Health, located at Vasant Kunj, was contacted by PW-17 as per relevant guidelines. Its Director Dr. Rajat Mitra (PW-4), accompanied by his wife Dr.Nidhi Mitra, a clinical Psychologist, met PW-1 at the PP Dhaula Kuan and gave her counselling. In their presence, the aforementioned statement was recorded. The signatures of both PW-4 and his wife Dr.Nidhi Mitra (not examined) were appended on the said statement along with right thumb impression of PW-1.

10.The statement given by PW-1 on 11th January 2003 was to the effect that the victim was staying at her quarter at Dhaula Kuan for the past year. Five years ago her father had passed away and her mother had left the household long ago when the prosecutrix was a child. While her brother went to stay with her grandfather in her village, she had been staying with her chacha and chachi (paternal uncle and aunt) (A2 & A1 respectively) for the past four - five years having been brought by them from the village to the jhuggis in Bapu Dham in Delhi. According to her, soon after being brought to Delhi, both A-1 and A-2 started misbehaving with her and compelled her to have sex with other men. A-2 would often come in a drunken condition and in the presence of other males, make her dance in a naked condition in the jhuggi and also force her to have sex with them. When she tried to resist, they would threaten to kill her. She alleged that A-1 and A-2 used to collect money from others who committed rape on her. If she protested, they would lock her up in the jhuggi and deprive her of food.

11. PW-1 stated that both A-1 and A-2 were in the business of selling liquor. In a drunken condition, A-2 would play with her body and out of fear she could not disclose this to anyone. She also mentioned that as a result of all of this the harassment became so severe that about one and a half year earlier she tried to commit suicide by consuming some pills. After the jhuggies in Bapu Dham were demolished, A-1 and A-2 along with their children and the prosecutrix moved to the quarters at Dhaula Kuan where again they compelled her to have sexual relations with others and when she refused, she was beaten up by the Appellants. PW-1 specifically mentioned that A-2 again raped her at Dhaula Kuan as well. Subsequently she went to PW-8, but she could not disclose to her the complete facts out of fear. However, she definitely told PW-8 that she was being harassed by A-1 and A-2 and that they were pressurizing her to indulge into prostitution. She mentioned in her statement that she again disclosed all the facts to PW-4 and his wife and disclosed the complete facts to the police. It transpired that on the same day, i.e. 11th January, 2003, A-1 was arrested. However, A-2 went absconding.

12. PW-1 followed up her statement to the police made on 11 th January, 2003 with a statement before the Learned Metropolitan Magistrate under Section 164 Cr PC on 13th January, 2003. This will be discussed at some length later in this judgment.

13. In the investigation that ensued, a charge-sheet was filed against both A- 1 and A-2. A-2 was declared as a Proclaimed Offender (PO).The charge framed against them has already been adverted to.

Defence of A-1

14. 18 prosecution witnesses were examined. In her statement under Section 313 Cr PC, A-1 denied the circumstances against her and stated that on 11th January, 2003 when she went to PP on the asking of the security guards of the colony along with PW-1 and the police arrested her "when I could not pay money demanded by the police officials." She claimed innocence and stated that she had been falsely implicated by PW-8 as she wanted to retain PW-1 as a full time servant, which A-1 had refused. A-1 stated that PW-8 owed her three months salary and when she demanded the same due to the illness of her son, she was falsely implicated. A-1 further volunteered that they would take PW-1 to her native village and houses of other relatives. Her father-in-law (the grandfather of PW-1) and her brother used to visit them in Delhi but PW-1 made no such complaint to them.

15. On behalf of A-1, one Smt. Rani (DW-1) was examined. She happened to be the sister of A-1. DW-1 alleged that PW-1 had initially eloped with a boy named Kailash living in the neighbourhood. A-1 and DW-1 both had asked her not to do so. Thereafter, according to DW-1, the prosecutrix was dropped off by A-1 in the village for 3-4 days but she came back after and again resumed living with A-1. DW-1 further stated that after shifting to Dhaula Kuan, PW-1 started working at the house of PW-8 and developed some relationship with a Chowkidar (watchman), whose name she did not remember. She also alleged that PW-1 had once come from the house of PW-8 under the influence of liquor. That evening A-1 and A-2 and some neighbours had tried to make PW-1 understand and also scolded her. Thereafter, PW-1 went to the house of PW-8 and did not return for about 3-4 days. That was when PW-8 had lodged the initial report against A-1.

The impugned trial Court judgment against A-1

16. The trial Court delivered a judgment on 17th February, 2006 convicting A-1 for the offences under Sections 109 read with 376 (2) (g) IPC and Sections 5(1) (c) of ITPA while acquitting her of the offences under Sections 120-B, 342, and 506 Part II IPC. According to the Trial Court, A-1 "did not react in the manner she should have reacted on seeing the prosecutrix being raped by her husband and being used for prostitution." Rather, A-1 accepted money from the persons to whom the victim was sent for prostitution.

17. The trial Court held that A-1 had entered into a criminal conspiracy with her husband (A-2) for subjecting the victim to gang rape and also abetted the offence of gang rape. However, it was held that A-1 being a female could not have conspired to commit the rape of the victim and so she can be convicted only for abetting the gang rape or rape. It was further held that the evidence of PW-1 to the effect that A-1 and A-2 used to send her for prostitution and also accept money from those persons in consideration was believable and no suggestion to the contrary was given to her and, therefore, the charge under Section 5 (1) (c) of ITPA stood proved. By a separate order on sentence dated 22nd February, 2006, A-1 was sentenced in the manner indicated hereinbefore. A-1 thereafter filed the present appeal. The Court issued notice in it on 3rd August, 2006. Thereafter, by an order dated 29th September 2006, the sentence of the Appellant was suspended upon certain terms.

The initial trial of A-2

18. As far as A-2 is concerned, as already noticed, he was arrested on 29 th April, 2010 and a supplementary charge-sheet qua him was filed by the police on 5th May, 2010. On 16th March, 2011, the prosecutrix PW-1 was to depose in the trial against A-2. However, Rajender Meena, (PW-2), the Investigating Officer (IO) informed the Court that PW-1 was not traceable.

19. The trial Court then proceeded to drop the prosecutrix from the array of PWs. According to the trial Court, the learned APP was unable to point out if there was any other incriminating evidence to connect A-2 with the crime. Therefore, the prosecution evidence was closed and the statement of A-2 under Section 313 Cr PC was dispensed with. The trial Court then proceeded by the said order dated 16th March, 2011 to acquit A-2 of all the offences.

State's appeal

20. Aggrieved by the acquittal of A-2 by the afore-mentioned order, the State filed Criminal Appeal No.523/2012. By its judgment dated 12th September 2012 in State v. Punnu 2012 (VII) AD Del 608, this Court allowed the said appeal, finding that the trial Court had proceeded "in haste and hurry". It was held that no opportunity was given to the prosecution to move any application or make any further attempt to prove and establish the case. This Court was of the view that the trial Court should not have passed the impugned order "without examining and considering, whether conditions stipulated in Section 299 Cr PC and Section 33 of the Evidence Act were satisfied in the present case".

21. Accordingly, the order dated 16th March, 2011 of the trial Court was set aside by this Court and the case was remitted to the learned ASJ to examine it afresh in the light of Section 299 Cr PC and Section 33 of the Indian Evidence Act (IEA). The trial Court was asked to examine whether the conditions of the above two provisions were satisfied. It was held:

> "the statement of the prosecutrix recorded on earlier occasion in the same proceedings on 16.08.2003 and 11.10.2003 can be taken into consideration. Of course, it will be also open to the prosecution to produce the prosecutrix if possible. The Trial Court will also record evidence of other witnesses if deemed necessary and appropriate."

Re-trial of A-2

22. Consequent to the remand of the matter to the trial Court, an order was passed on 8th March, 2013 by the trial Court that the conditions laid down in Section 299 (1) Cr PC stood established and therefore the statement of PW-1 recorded on 16th August, 2004 and 11th October, 2004 in the trial against the co-accused A-1 "can be and would be read in the evidence against the present accused also." This order of the trial Court was not challenged by A- 2 and attained finality.

23. As already noticed, the trial Court by the second impugned judgment dated 10th September, 2013 convicted A-2 for the offences under Sections 120 B IPC, Section 344 IPC, Section 376 IPC, Section 376 (2) (g) IPC, Section 506 IPC and Section 5 (1) (c) of ITPA. By a separate order on

sentence dated 17th September, 2013, the trial court sentenced A-2 in the manner indicated hereinbefore.

No prejudice to A-2

24. One of the first issues raised by learned counsel appearing for A-2 was that serious prejudice was caused to A-2 because PW-1 was not available for cross-examination in his trial. Referring to her cross-examination in the trial of A-1, it was submitted that very few questions were put to her which were specific to A-2. According to learned counsel, all the questions were essentially about the role of A-1. He also submitted that the complaint made to the NHRC was not even found to be confronted and, therefore, a valuable opportunity to bring out the defence of A-2 was lost in the trial against A-1 qua the testimony of PW-1. It is submitted that the failure to challenge the order dated 8th March, 2013 would not come in the way of A-2 assailing the said order even at this stage since according to learned counsel the said order has „merged with the final order of the trial Court in this case, i.e., the judgment dated 10th September, 2013.

25. The Court is unable to accept the above submissions. The fact remains that the order dated 8th March, 2013 has attained finality. It was open to A-2 to have challenged the said order. The trial against him proceeded on the basis of said order . There was no question of "merger" of that order with the subsequent final judgment of the same Court. The doctrine of merger is about the orders of a subordinate Court merging in the order of the superior court when the said order is either affirmed or reversed by the superior Court.

26. In any event, even on merits, the Court finds that the trial Court has not erred in coming to the conclusion that the two essential conditions of Section 299 (1) Cr PC stood proved in the present case. In other words, the trial Court was not in error in concluding that the statements that had been recorded of PW-1 in the trial against A-1 on 16th August and 11th October, 2004 could be read in evidence in the trial against A-2.

Analysis of the evidence of PW-1

27. The case of the prosecution rests essentially on the evidence of PW-1, the victim of rape. Before beginning to analyse her testimony, it will be useful to recall the following words of the Supreme Court in State of Maharashtra v. Chandraprakash Kewalchand Jain AIR 1990 SC 658:

> "It is, however, unfortunate that respect for womanhood in our country is on the decline and cases of molestation and rape are steadily growing. An Indian woman is now required to suffer indignities in different forms, from lewd remarks to eve-teasing, from molestation to rape. Decency and morality in public life can be promoted and protected only if we deal strictly with those who violate the societal norms. The standard of proof to be expected by the Court in such cases must take into account the fact that such crimes are generally committed on the sly and very rarely direct evidence of a person other than the prosecutrix is available. Courts must also realise that ordinarily a woman, more so a young girl, will not stake her

reputation by levelling a false charge concerning her chastity."

28. As already noticed, PW-1 first went before the NHRC with a written complaint which was made on her behalf by PW-8 on 16th December, 2002. In that complaint she mentioned that she was being subjected to harassment by A-1 and A-2 and about their attempting to force her into prostitution. There is no doubt that she did not, in that complaint, mention that she was subjected to rape or gang rape by A-2 acting in conspiracy with A-1.

However, the statement made to the NHRC cannot be treated as PW-1 s „previous statement . In her statement under Section 161 Cr PC at the PP Dhaula Kuan to PW-17, PW-1 specifically adverted to the complaint given to the NHRC and to the fact that in the said complaint, she had not disclosed the complete facts. Therefore, it was not as if PW-1 held back the information that she had given in her earlier complaint to the NHRC or even the contents of that complaint. She appeared to be fully conscious of what she had stated in that complaint and offered an explanation as to why she could not at that stage disclose all the facts to PW-8. In the considered view of the Court what PW-1stated to the police on 11th January, 2003 cannot therefore be said to be an improvement over or in contradiction to what was stated in the complaint made to the NHRC. It was submitted that PW-8 has in her cross-examination created doubts on whether she in fact went to the NHRC with the above complaint. However, in the considered view of the Court, in light of the cogent and consistent testimony of PW-1, this lapse on the part of PW-8 does not affect the prosecution case.

29.The evidence of PW-4 helps the Court to appreciate that the NGO that assisted PW-1by counselling her for nearly three hours was only making sure that she did not contradict herself, was not making a false accusation and that she had a genuine grievance. A reading of the evidence of PW-4 does not persuade the Court to accept the plea of learned counsel appearing for both accused that the said NGO had tutored PW-1into falsely accusing her own uncle of having committed rape on her on more than one occasion. The cross-examination of PW-4 yielded very little for the accused and did nothing to discredit his testimony. There was no need for PW-4, who was a medical practitioner running an NGO, to persuade PW-1to falsely accuse her own uncle and aunt.

30. As already noticed, PW-1 had her statement made before the learned MM under Section 164 Cr PC on 13th January, 2003 just two days after speaking to the police. Ms. Inderjeet Sidhu, learned counsel appearing for A-1, has taken the Court through the said statement in some detail. She pointed out that in this statement before the learned MM while PW-1 maintained all her allegations against A-2, she did not make any specific allegation against A-1.

31. The Court has carefully perused the statement given by PW-1 under Section 164 Cr PC before the learned MM. She does mention in that statement also that four to five years earlier she had been brought from her village by both A-1 and A-2 who had compelled her to do domestic work and were also indulging in the illicit trade of liquor and ganja. She also mentioned about both of them subjecting her to beatings. She then states that two - three years earlier she was subjected to rape. She uses the Hindi word „unhoney'. This word as pointed out by Ms.Sidhu can only refer to A-2 and not A-1. The next sentence states that when she resisted "vey mujhe jaan se maarney ki dhamki dete they". The word „vey could mean both plural and singular. When this statement is read in the

context of the statement made to the police just two days earlier, where the allegations were against both A-1 and A-2, it could be interpreted as if she was referring to not just A-2 but both A-1 and A-2. However, when it is read in the context to the first sentence of this very statement under Section 164 Cr PC, it appears more likely that PW-1 is referring to A-2 in a singular and not A-1 and A-2 together. Ms. Sidhu is right in her submission that the remaining statement under Section 164 Cr PC again makes no specific reference to any act of A- 1 in the singular.

32. However, it is clear that as far as A-2 is concerned, the version of PW-1 in her statement made to the police is fully re-affirmed by her statement before the learned MM under Section 164 Cr PC. What is significant however, is neither in the statement made to the police nor in the statement before the learned MM has PW-1 been able to name or even describe any of the „ others who allegedly committed rape upon her at the instigation of A- 2 and A-1. This is a significant factor as far as the charge under Section 376 (2) (g) IPC is concerned.

33. Turning now to the deposition of PW-1 in Court, the only major improvement that she makes is qua A-1, where in her cross-examination on behalf of A-1 she states "the accused had seen her husband committing rape upon me once but instead of protecting me she gave me beatings". This statement does not figure either in her previous statement to the police or in the statement made under Section 164 Cr PC before the learned MM. PW-1 also claimed in this statement that:

> "I had told the accused two times about the conduct of her husband my uncle that he was repeatedly commiting rape upon me. The accused did not say anything rather she abused me and said "mere pati par jhuta iljam lagati hai". The accused never told me that to save me from the clutches of her husband she would sleep with me in my room."

34. This part of the testimony of PW-1 is also an improvement over her earlier versions as regards the precise role of A-1. However, as far as A-2 is concerned, there is nothing in the deposition of PW-1 that raises any doubt about the truth of her statements.

35. At this stage, it is necessary to recapitulate the legal position as regards appreciation of eye witness testimony. The settled legal position is that the Court must attempt, while appreciating the evidence of a witness, separate the truth from falsehood and not reject an eye witness testimony entirely only because there are some embellishments. In Ugar Ahir v. State of Bihar AIR 1965 SC 277, the Supreme Court held as under:

> "The maxim falsus in uno, falsus in omnibus (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinise the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest."

36. Specific to the testimony of a victim of sexual assault, the Supreme Court in State of Punjab v. Gurmit Singh AIR 1996 SC 1393 explained:

> "We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim; a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

37. Again in Om Prakash v. State of U.P. AIR 2006 SC 2214 it was observed:

> "11. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after staking her own prestige and honour.
>
> .....
>
> 13. A prosecutrix of a sex-offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and

> caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the Court must be conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix. There is no rule of law or practice incorporated in the Indian Evidence Act, 1872 (in short 'Evidence Act') similar to illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the Court is entitled to base a conviction on her evidence unless the same is own to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence."

38. Viewed in light of the legal position explained above, the testimony of PW-1 qua the culpability of A-2 for the offence of rape is consistent, natural and truthful. The Court is unable to agree with the submissions of learned counsel for A-2 that the entire cross-examination of PW-1 was only from the angle of the culpability of A-1 and not A-2. Having carefully perused her deposition and the cross-examination to which she was subjected, it is apparent that she was grilled intensively on the truth of her allegations not only against A-1 but against A-2 as well. To that extent the Court is in agreement with the conclusions reached by the trial Court that no prejudice was being caused to A-2 in the circumstances that PW-1 was not available for cross-examination in the trial against him.

Offence of gang rape

39. At this stage the Court would like to focus on the offence of „gang rape punishable under Section 376 (2) (g) IPC, the relevant portion of which as it stood prior to its amendment with effect from 3rd February 2013 read as under:

> "Section 376 (2) (g) IPC (2)Whoever,-
>
> (g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:
>
> Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

> Explanation 1.--Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section."

40. The question that arises in the present case is whether A-1 can be accused of committing „gang rape „or even abetting the commission of „gang rape . The others who committed rape upon PW-1 were not named or described by her throughout. Therefore, the prosecution was clearly not able to establish who the „others were who had subjected PW-1 to gang rape. What is, however, evident from the consistent version of PW-1 is that she was subjected to rape on more than one occasion by A-2. Her allegation is that A-1 abetted the commission of rape on her by A-2.

41. The offence of gang rape in terms of Section 376 (2) (g) IPC (as it then stood) read with Explanation 1 thereto, requires more than one male to have an intention to commit rape on the victim. In Priya Patel v. State of MP AIR 2006 SC 2639, the Supreme Court was faced with a similar question whether the wife of the accused could be charged with abetting the offence of gang rape. In paragraph 8 of the judgment, the Court analysed the provisions of Section 376 (2) (g) IPC and observed as under:

> "A bare reading of Section 375 makes the position clear that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376 (2) makes certain categories of serious cases of rape as enumerated therein attract more severe punishment. One of them relates to "gang rape". The language of sub-section (2) (g) provides that "whoever commits 'gang rape" shall be punished etc. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within this sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The Explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. "Common intention" is dealt with in Section 34 IPC and provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. "Common intention" denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character, but must be actuated by the same common intention, which is different from same intention or similar intention. The sine qua non for bringing in application of Section 34 IPC that the act must be done in furtherance of the common intention to do a criminal act. The expression "in furtherance of their common intention" as appearing in the Explanation to Section 376(2) relates to intention to commit rape.

A woman cannot be said to have an intention to commit rape. Therefore, the counsel for the appellant is right in her submission that the appellant cannot be prosecuted for alleged commission of the offence punishable under Section 376(2) (g)."

42. What emerges clearly from the above analysis is that a woman cannot be held guilty of committing rape or gang rape under Section 376 (2) (g) IPC. Explanation 1 to Section 376 (2) IPC envisages one or more male person acting "in furtherance of their common intention to rape a woman". A woman cannot, according to the Supreme Court, be said to share a common intention to commit rape on another woman.

43. This being the legal position qua gang rape, in the present case unless it is clearly established by the prosecution that apart from A-2 there was one more man involved, who was named and sent up for trial for the commission of the offence, it would not be safe to conclude that the offence committed was one of gang rape. The prosecution has not been able to prove that A-1 did any act by which it could be said that she shared a common intention with A-2 as far as the commission of rape of PW-1 was concerned, much less as far as the commission of gang rape is concerned. The specific statement in the deposition of PW-1 in the Court about A-1 doing nothing when PW-1 went to her with a complaint of being subjected to rape by A-2 is clearly an improvement as it finds no mention either in the previous statement to the police or even in the statement before the learned MM under Section 164 Cr PC.

44. Further PW-1 stated in her examination in chief that A-2 would force her to drink liquor, perform naked dance in front of other persons and then he and the others would rape her. However, in her cross examination specific to this part of her testimony in chief, she stated: "About 5-6 persons were present besides my uncle when he made me drink liquor and dance in a naked position. I cannot give the names of those persons as I did not know them from before. Those persons had come only on that day. This incident happened only once."

45. Consequently, the Court is unable to agree with the conclusion reached by the trial Court that the offence of gang rape under Section 376 (2) (g) IPC was proved by the prosecution in the present case beyond reasonable doubt. The benefit of this conclusion of the Court enures to both A-1 and A-2. His conviction for the offence of gang rape under Section 376 (2) (g) IPC is held to be not sustainable in law.

Abetment by A-1 not proved

46. As far as A-1 abetting the commission of rape by A-2 on the prosecutrix is concerned, the Court is not satisfied that the prosecution has proved that offence. Accordingly A-1 is acquitted of the offence under Section 109 read with Section 376(2) (g) IPC.

47. Even with regard to PW-1 being forced into prostitution, the Court finds this part of the evidence of PW-1 has not received any independent corroboration. At one point in her cross-examination she clearly states that A-1 never forced her to have sex with A-2. That being the position, whether A-1 could ever have forced her to have sex with other men becomes even more doubtful. This part of the

evidence is not convincingly proved by the prosecution. The Court is therefore, persuaded to grant benefit of doubt to both A-1 and A-2 as far as the offence under Section 5(1) (c) of the ITPA is concerned. Once A-1 is acquitted of the offences with which she has been charged, the acquittal of both A-1 and A-2 for the offence under Section 120-B IPC has to follow.

Guilt of A-2

48. However, as far as A-2 is concerned, the consistent version of PW-1 at all stages clearly points to his guilt in having committed the offence of rape qua PW-1 on more than one occasion. There was a serious lacuna as far as the framing of charges against A-2 for the offence of rape was concerned. He was not separately charged for each count of rape A-2. There is only one omnibus charge against him of committing gang rape under Section 376 (2)

(g) IPC and another separate charge under Section 120 B IPC. The Court is therefore constrained to view the culpability of A-2 only for the offence under Section 376 IPC.

49. Even as regards the fact that PW-1 was less than 18 years at the time she was raped on more than one occasion by A-2, does not appear to attract any aggravated sentence under Section 376 (1) IPC. The aggravated sentence is attracted only when the age of prosecutrix is less than 12 years in terms of Section 376 (2) (f) IPC. It is another matter that as of date the above lacunae in the law has been sought to be rectified by the Parliament. But at the time when the offence in the present case was committed, Section 376 IPC did not provide for an aggravated sentence if the victim was between 12 and 18 years of age. There was a deeming provision only as regards consent in terms of Section 375 IPC.

50. Be that as it may, in the present case, the charge under Section 376 IPC would be of a lesser degree when compared to Section 376 (2) (g) IPC with which the Appellant A-2 was charged. The evidence on record adequately proves his guilt for the offence of rape punishable under section 376 (1) IPC. Consequently, the conviction of A-2 for the offence under Section 376 IPC is upheld.

51. The evidence of PW-2 is sufficient to prove the guilt of A-2 for the offences of criminal intimidation punishable under Sections 506 IPC and wrongful confinement for more than ten days punishable under 344 IPC. His conviction for the said offences is also upheld. A-2 is, for reasons already discussed, however, acquitted of the offences under Sections 120 B IPC and Section 5(1) (c) ITPA.

Sentence

52. Coming now to the question of sentence, one factor that stands out is that A-2 was absconding for a period of nearly 7 years after committing the offence and, therefore, could not be sent up for trial along with A-1. A-2 has offered no satisfactory explanation for his long absence. He has been found guilty of raping on more than one occasion his own niece who came to him for care and protection as a child. He has exploited his fiduciary control over her in what could be termed as a horrible breach of trust.

53. The minimum sentence for the offence under Section 376 (1) IPC as it stood at the relevant time was 7 years. It is stated that he has been in the custody throughout since his arrest on 29th April 2010. Keeping in view all of the above factors the sentence awarded to A-2 by the trial Court is modified to 10 years RI with a fine of Rs.5,000/-and in default of payment of fine to undergo further RI for six months. The sentences awarded by the trial Court to A-2 for the offences under Section 506 IPC and 344 IPC are left unaltered. The sentences are directed to run concurrently.

54. The impugned judgment and order on sentence of the trial Court qua A-2 stand modified accordingly.

Conclusion

55. A-1 is acquitted of the offences with which she was charged. The impugned judgment and order on sentence of the trial Court qua A-1 are hereby set aside. Crl.A. 586/2006 is allowed. The bail bonds and surety bonds furnished by A-1 stand discharged. She shall fulfil the requirements of Sections 437 A Cr PC to the satisfaction of the trial Court at the earliest.

56. A-2 is is acquitted of the offences under Sections 120 B IPC, Section 376 (2) (g) IPC, Section 5 (1) (c) ITPA. He is convicted for the offences under Sections 376, 344 and 506 IPC. For the offence under Section 376 IPC, he is sentenced to 10 years RI with a fine of Rs.5,000/-and in default of payment of fine to undergo further RI for six months. The sentences awarded by the trial Court to A-2 for the offences under Section 506 IPC and 344 IPC are left unaltered. The sentences are directed to run concurrently.

57. The impugned order of conviction and order on sentence of the trial Court qua A-2 stand modified in the manner indicated above. The trial Court record be returned forthwith with a certified copy of this judgment. Crl. A. 1429 of 2013 is disposed of in the above terms.

S.MURALIDHAR, J.

I.S.MEHTA, J.

FEBRUARY 19, 2018 nd/ 'dc'