

(2019) 03 DEL CK 0255

In the Delhi High Court

Case No : Criminal Leave Petition No. 209 Of 2019, Civil Miscellaneous
Application No. 5748 Of 2019

State APPELLANT

Vs

Nadeem RESPONDENT

Date of Decision : 18-03-2019

Acts Referred:

Limitation Act, 1963 — Section 5
Protection Of Children From Sexual Offences Act, 2012 — Section 6
Indian Penal Code, 1860 — Section 363, 376
Code Of Criminal Procedure, 1973 — Section 164

Citation : (2019) 4 AD(Delhi) 37 : (2019) 2 JCC 1017

Hon'ble Judges : Siddharth Mridul, J;Manoj Kumar Ohri, J

Bench : Division Bench

Advocate : Ravi Nayak

Final Decision : Dismissed

Judgement

Siddharth Mridul, J

CRL.M.A. 5747/2019 (by the petitioner for condonation of delay of 13 days in filing the accompanying petition)

1. The present application under Section 5 of the Limitation Act, 1963, instituted on behalf of the applicant/State, seeks condonation of delay of 13 days in filing the accompanying leave petition.
2. Having heard learned counsel appearing on behalf of the applicant/State and for the reasons stated in the application, the same is allowed. The delay of 13 days in filing the accompanying petition is condoned.
3. The application is disposed of accordingly.

CRL. L.P. 209/2019

1. There can be no manner of doubt that a conviction for an offence of

aggravated, penetrated sexual assault within the meaning of Section 6 of the Protection of Children from Sexual Offences (for short 'POCSO') Act, 2012, read with Section 376 of the Indian Penal Code, 1860, can be sustained on the sole deposition of the prosecutrix. However, it is equally well established that, the testimony of the prosecutrix must be credit worthy and inspire confidence. [Ref. "State (GNCT of Delhi) vs. Vicky @ Karan & Anr." CrI.L.P. 418/2018, judgment delivered on 07.12.2018].

2. The present petition seeking leave to appeal assails judgment and order dated 15.11.2018, in Session Case No.28071/2016, arising out of FIR No.746/2015 (hereinafter referred to as the 'subject FIR') under Sections 363/376 Indian Penal Code, 1860, read with Section 6 of POCSO Act, 2012, registered at Police Station I.P. Estate; whereby the trial court having returned the finding that the deposition of the prosecutrix (PW-7) is far from reliable and trustworthy, has declined to base the conviction of the accused (hereinafter referred to as the 'respondent') thereupon.

3. Mr. Ravi Nayak, learned APP appearing on behalf of the State, by inviting our attention to the statement of the prosecutrix, PW-7 under the provision of Section 164 Cr.P.C.; wherein she has deposed that the respondent had applied a handkerchief laced with a sedative on her face, as well as, the relevant recording in the MLC to the effect that hymen of the prosecutrix was found to be torn, (by PW-2 Dr. Reena in her report Ex. PW-2/A), would urge that the present is a fit case for grant of leave to appeal.

4. We find ourselves unable to agree with the submissions made on behalf of the State, for the reasons elaborated hereunder:-

1.) The complainant in the present case, PW-5 who is father of the prosecutrix, PW-7 did not support the case of the prosecution, and turned 'hostile', completely eroding the substratum of the case made by them against the respondent.

2.) The said testimony is considered by the trial court in the following manner:-

46. It is further relevant to note that after the Complainant PW5 testified that on 01.12.2015, his daughter i.e. victim was missing from his house, he got registered FIR Ex. PW-5/A at PS I.P. Estate. He further deposed that he had gone to PS I.P. Estate for lodging the missing report in the absence of his wife and when his wife returned home, she told him that 'OD' along with Nadeem and his family members had gone to the village of Nadeem for tour purpose for 2-3 days. He further stated that he again went to the PS I.P. Estate to inform the police officials about the same, but they sent him by saying 'ab kuch nahi hoga'. The aforesaid testimony of the father of victim himself, i.e. Complainant PW5 completely demolishes the case of the Prosecution that victim was kidnapped by the Accused.

3.) The deposition of the prosecutrix, PW-7 is riddled with contradictions and

does not inspire confidence as elaborated by the trial court in the following words:-

"33. To prove the said allegations against the Accused, Prosecution placed much reliance on the deposition of the Prosecutrix, who was examined as PW7. Upon stepping into the witness box, she deposed that sometime ago when she was outside her house, one boy namely Nadeem, who used to work at a meat shop near her house and who was known to her, came and told her that her father is calling her. He made her smell one handkerchief and she lost her consciousness after smelling the same. She regained consciousness after 1-2 hours. He deposed that Accused brought her to Hapur. She also deposed that she also realized when she was regaining some consciousness that she has been taken there in one auto rickshaw. Before taking her to Hapur, he also took her to R.K. Puram and Rampur.

34. PW7 further deposed that Accused did 'galat kaam' with her at R.K. Puram, Rampur and Hapur. Upon being questioned as to what did she mean by 'galat kaam', the witness replied 'usne apna peshab karne wala meri peshab dani me dala'. Prosecutrix deposed that Accused kept her in Hapur for 4-5 days in house of his friend after which he took her to Rampur and kept her in the house of his Khala for 10-12 days. In R.K. Puram, he kept her in a rented room for one day. She deposed that her family members lodged a complaint. While she was living in Rampur, she happened to get hold of mobile phone of Khala of Accused and she made a call to her father and informed him that she is in Rampur. But Accused heard her talking on phone. He snatched the phone from her and also broke its SIM. Police reached at house of Khala of Accused and she was brought back. She deposed that she remembers the mobile number of her father. Police brought her to PS and made enquiries from her and she stated the true facts to the police. Nadeem was also brought to Delhi by the police. Parents of Accused Nadeem had also reached there and they also returned to Delhi with them. Her statement under Section 164 Cr.P.C. was also recorded by Ld. MM. Same is Ex.PW7/A. She deposed that about 10-12 times. Accused did 'galat kaam' with her. She deposed that when Accused took her to the house of his Khala, he told his Khala that he wanted to marry her. She deposed that she knows the name of owner of the shop where Accused Nadeem used to work, but she cannot recollect his name now. She deposed that she did not call the owner of the said shop when Accused had taken her with him. She deposed that she was medically examined and her clothes were seized by the doctor. PW7 correctly identified the Accused present in Court. She also identified case property i.e. her clothes which were seized during her medical examination. Same are Ex.P1 (colly) and Ex.P2.

35. Ld. Addl. PP cross-examined the witness on certain material points. She admitted that at the time of incident, she was aged about 16 years and that it was on 01.12.2015 at about 2:45 PM when Accused Nadeem told her that her father is calling. She further admitted that at that time, she was going to purchase vegetable and Accused Nadeem gave her his handkerchief and told her

to clean her nose with it. Prosecutrix also admitted that Accused Nadeem has shown her a movie at R. K. Puram, but she denied the suggestion that Accused Nadeem also took her to Meerut or that he kept her at Meerut for 10-11 days at house of his friend. PW-7/Prosecutrix further admitted that Accused took her to the house of his 'fufa' at Hapur and that they remained there for about 20-21 days and she called the employer of Accused Nadeem namely Shoaib from Hapur and asked him to give the number of his father, but he did not give her the same.

36. On the basis of her deposition, Prosecution argued that the allegations against the Accused stand duly proved on record.

37. On the other hand, Ld Defence Counsel submitted that the testimony of the Prosecutrix PW-7 is full of contradictions, improvement and embellishments and she be termed as a reliable witness.

38. I have considered the rival submissions and gone through the record. At the outset, it would be relevant to note that it is the case of the Prosecution that after allegedly kidnapping the victim, Accused took her to Hapur by auto. Before that he had taken her to R. K. Puram where he and Prosecutrix roamed around and watched movie. Thereafter, Accused took her to Meerut where he kept her for 10-12 days and at Meerut Accused forcibly established physical relations with her 20-3 times. Thereafter, he took her to Hapur to the house of his Phufa and again raped her 6-7 times.

39. When the victim PW-7 stepped into the witness book, she testified that Accused called her on 01.12.2015 at about 2:45 PM by saying that her father is calling her. He gave her handkerchief and after smelling the same, she became unconscious. She further deposed that Accused thereafter, took her to R.K. Puram where he showed her movie.

40. At this juncture, it would be relevant to pause and ponder as to why the victim, who was allegedly kidnaped by Accused by making her unconscious by smelling a handkerchief allegedly laced with an intoxicant, would watch movie with Accused at movie theatre? Why the victim, who has been alleged kidnaped in the aforesaid manner, would not make any attempt to escape or raise an alarm and would watch entire movie with the Accused at movie theatre? Surprisingly, in her cross-examination, the victim even deposed that "initially Accused, myself and one friend went to watch movie, later the said friend made a call and called three more friends there". She further deposed that after watching movie, Accused took her around R. K. Puram for roaming throughout the night. This conduct of the Prosecutrix seems to be wholly unnatural and unbelievable and in view of her allegation that she has been kidnapped by Accused after making her unconscious by making her smell a handkerchief, alleged laced with intoxicant. Further, testimony of the Prosecutrix is that from R.K. Puram, Accused took her to Hapur. In her cross examination in chief, she deposed that she was taken to Hapur in one auto rickshaw, but in her cross examination, she stated that she was taken to Hapur by bus.

41. Be that as it may, it emerges from her testimony that in her cross-examination, she also deposed that she stayed for one night at a rented room in R. K. Puram and the Accused paid rent of Rs.1000/- in her presence. But in her cross-examination, she was unable to tell the name of the friend of Accused who had come to R. K. Puram. She was also unable to tell the name of the landlord or the address of the house where they had stayed at R. K. Puram, as deposed by her in her cross-examination. On the contrary, IO/SI Rakesh Tyagi deposed in his cross-examination that he did not visit R. K. Puram as victim and Accused had not stayed there. There is thus apparently contradictions in the version of the victim and IO regarding her allegations of staying at R. K. Puram.

42. As per the deposition of the victim, Accused took her to the house of his friend at Hapur and kept there for 4-5 days. In her entire examination in chief, she made no statement regarding making any complaint against the Accused to the said friend of Accused at whose house she was compelled to live at Hapur. Moreover, though initially she stated that she stayed in the house of friend of Accused at Hapur, upon being cross-examined by Id. Prosecutor, she testified that Accused had taken her to the house of his 'fufa' at Hapur and that they remained there for 20-21 days. Her version again changed in the cross-examination where she stated that she met fufa of Accused at Hapur and also deposed that she did not make any complaint against the Accused to his fufa.

43. It is difficult to believe that a person who has been kidnapped and raped would not even whisper anything against the perpetrator of the offence to anyone and would continue to roam around at different places with him.

44. In her examination in chief, victim had also de posed that she was raped by Accused at Rampur where she stayed in the house of Khala of Accused for 10-12 days. In her cross-examination, however, she deposed that "we did not stay in Rampur as no one was present at that house and we returned to Hapur on the same day and remained there for 10-12 days".

45. It is also pertinent to mention that as per the Prosecution case, the Accused had also allegedly taken the victim to Meerut where he kept her for 10-11 days in the house of his friend. However, when the victim PW-7 was cross-examined by Id. APP for the State, she denied this suggestion that Accused took her to Meerut or that he kept her there for 10-11 days at the house of his friend.

47. From the deposition of the victim read as a whole, it is more than apparent that she cannot be termed as a reliable and trustworthy witness. Not only her version before the court kept changing, but her claim that she was raped by the Accused at different places becomes difficult to accept in view of the fact that admittedly there is nothing on record to show that she ever tried to raise an alarm or escape at any point of time despite the fact that she was allegedly kidnapped by the Accused by intoxicating her. In her examination in chief, she did not even whisper that she had been threatened by the Accused in any manner and it is only when she was cross-examined by the Defence that she

voluntarily added that Accused had threatened her. However, despite the same, there is not an iota of evidence to show as to when said alleged threat was extended to her by the Accused. Moreover, there is nothing on record to believe that the said threat continued to operate during the period 01.12.2015 to 19.12.2015."

4.) A plain reading of the paragraphs extracted, hereinabove, leaves no manner of doubt that the testimony of the Prosecutrix belies the prosecution's case in toto. The same is contradictory in material particulars, and does not have a ring of truth in it. In our view, therefore, the same is neither reliable nor creditworthy.

5. It would also be relevant to observe that, there is no scientific evidence on record to corroborate the case of the prosecution qua the commission of offence of sexual assault by the respondent upon the prosecutrix.

6. It is settled law that the Appellate Court may only interfere in an appeal against acquittal when there are substantial and compelling reasons to do so. [Ref: "Muralidhar and Ors. Versus State of Karnataka reported at (2014) 5 SCC 730].

7. In State (Govt. of NCT of Delhi) vs. Kuldeep @ Kallu & Anr. CrI. L.P. 478/2018 reported as 2019 (1) JCC 298 (Del.), wherein Division Bench of this Hon'ble Court stated that:-

"It is a settled law that while deciding a leave to appeal petition filed by the State, in case two views are possible, the High Court must not grant leave, if the trial court has taken one of the plausible views, in contrast thereto in an appeal filed against acquittal. Upon re-appraisal of evidence and relevant material placed on record, in case the High Court reaches a conclusion that another view can reasonably be taken, then the view, which favours the accused, should be adopted unless the High Court arrives at a definite conclusion that the findings recorded by the trial court are perverse, the High Court would not substitute its own views on a totally different perspective."

8. Having heard the learned counsel appearing on behalf of the parties and perused the impugned judgment as well as perused the evidence and relevant material on record, we are of the considered view that the finding arrived at by the Trial Court cannot be said to be perverse.

9. For the foregoing reasons, we find no warrant to interfere with the findings arrived at by the trial court, in arriving at the conclusion that, the prosecutrix cannot be said to be a reliable witness and that, therefore, it would be wholly unsafe to base conviction of the respondent on her deposition.

10. The present petition for leave to appeal is accordingly dismissed. The pending application also stands disposed of.