

(2016) 02 DEL CK 0178

In the Delhi High Court

Case No : Criminal Leave Petition No. 774/2014

State

APPELLANT

Vs

Raj Kumar Kashyap

RESPONDENT

Date of Decision : 23-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, Section 164, Section 313,
Section 378(3), Section 482
Limitation Act, 1963 — Section 5
Penal Code, 1860 (IPC) — Section 363, Section 376

Citation : (2016) 02 DEL CK 0178

Hon'ble Judges : G.S. Sistani and Sangita Dhingra Sehgal, JJ.

Bench : Division Bench

Advocate : Aasha Tiwari, APP and Jagdeep Singh, SI, for the Appellant;

Final Decision : Dismissed

Judgement

Sangita Dhingra Sehgal, J.—Crl. M. A. 18383/2015 (Delay in filing)

1. This is an application under Section 5 of Limitation Act read with Section 482 of the Code of Criminal Procedure filed by the State seeking condonation of delay of 7 days in filing the present leave to appeal petition.

2. Heard. For the reasons stated in the application, delay in filing the present leave to appeal petition is condoned.

3. Application stands disposed of.

Crl. M. A. 18384/2015 (Delay in re-filing)

4. This is an application under Section 482 of the Code of Criminal Procedure filed by the State seeking condonation of delay of 3 days in re-filing the present leave to appeal petition.

5. Heard. Delay in re-filing the present leave to appeal petition is condoned.

6. Application stands disposed of.

Crl. LP No. 774/2014

7. The present leave to appeal has been filed by the State under Section 378(3) of the Code of Criminal Procedure being aggrieved by the impugned judgment dated 05.06.2015 passed by Learned Additional Sessions Judge, Fast Track Court, Shahdara, Karkardooma, Delhi thereby acquitting the respondent.

8. Assailing the impugned judgment, the learned counsel for the State contended that the judgment passed by the Trial Court is based on conjectures and surmises contrary to law and the proved facts; that the learned Trial Court erred in not appreciating the testimony of the prosecutrix in the right perspective and acquitted the respondent on the basis of minor contradictions; that the Trial Court erred in finding the testimony of the prosecutrix unreliable and coming to the erroneous conclusion that the prosecutrix went with the respondent on her own; that the sole testimony of the prosecutrix is sufficient to convict the accused without any further corroboration; that the prosecutrix was less than 18 years of age on the date of alleged occurrence and her consent was immaterial; that the learned trial court has overlooked the report "freshly hymen-torn" in the MLC of the prosecutrix; that the case of prosecution is based on the sound circumstantial evidence and could not be brushed aside during the cross examination of the witnesses; that since the age of victim was about 17 years at the time of occurrence, the accused is also liable to be convicted under POCSO Act, 2012; that for the above reasons, the Additional Public Prosecutor for the State strongly urged for grant of leave to appeal to challenge the impugned judgment of acquittal.

9. Before delving into the merits of the present leave to appeal, we deem it appropriate to re-produce the facts as noticed by the Trial court, which are as under;-

"On 20.07.2009, complainant Dinesh Sharma (PW-7) came at the Police Station and gave statement that his daughter "N" (name withheld), aged about 17 years, student of class 12th, had left for school at 7.00 am on 16.07.2009 but did not return back. He suspected that accused Raj Kumar Kashyap @ Pappu enticed away his daughter. Upon this, FIR was registered under Section 363 IPC. On 21.07.2009, "N" herself came at PS Geeta Colony and gave a statement that since last about one year, she has been receiving fits. She obtained treatment from various private doctors, but without any result. Someone from the neighborhood told her father about a "Tantrik" Raj Kumar Kashyap @ Pappu at Kailash Nagar, Gandhi Nagar. Her parents took her to him for treatment. Accused Raj Kumar Kashyap gave her a Tabeez and Bhabhuti and did some Tantar-Mantar. He asked her parents to regularly bring her for treatment on every Thursday and Saturday. Accused used to do Pooja after taking her in a separate room and gave her Bhabhuti to eat. On occasion, she also visited Raj Kumar Kashyap alone and followed his instructions. Accused used to go to Kaliyar Sharif for putting Chadar.

On 15.07.2009, on the pretext of going to school, she reached at a place Sakoli, as per the instructions of the accused. Accused met her in a Maruti car and took her towards Haridwar. On the way, she also saw the associates of accused on foot. During night time at a deserted place, accused raped her four times in the car after threatening her. On 20.07.2009, accused sent her back to Delhi with some person whereupon she came to the police station. The prosecutrix was got medically examined from SDN Hospital. Exhibits were seized. Section 376 IPC was added. Statement of prosecutrix was also recorded under Section 164 Cr. PC on 22.07.2009 wherein she stated that she had voluntarily gone to Haridwar alone after leaving her house and was not enticed by anybody. Accused was arrested on 23.07.2009 from his house on the identification of the complainant. He was also got medically examined. During investigation, IO collected the school record and birth certificate from the prosecutrix. Exhibits were sent to FSL."

10. In order to bring home the charges against the accused, the prosecution examined 12 witnesses in all. Statement of accused was recorded under Section 313 of the Code of Criminal Procedure wherein he reiterated his innocence and false implication in the instant case. He also examined 6 witnesses in his defence.

11. After considering the testimonies of material prosecution witnesses especially the prosecutrix and her father, disbelieving the testimony of the prosecutrix, observing that it was not gospel truth, the accused was acquitted vide impugned judgment dated 05.06.2015 for the charged offences.

12. We have heard learned counsel for the State and also examined the material available on record.

13. It is true that conviction in a case of rape can be based on the solitary testimony of the prosecutrix provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. In Md. Ali Vs. State of U.P. reported in , (2015) 7 SCC 272, the Hon"ble Apex Court has held that :

22. Be it noted, there can be no iota of doubt that on the basis of the sole testimony of the prosecutrix, if it is unimpeachable and beyond reproach, a conviction can be based. In the case at hand, the learned trial Judge as well as the High Court have persuaded themselves away with this principle without appreciating the acceptability and reliability of the testimony of the witness. In fact, it would not be inappropriate to say that whatever the analysis in the impugned judgment, it would only indicate an impropriety of approach. The prosecutrix has deposed that she was taken from one place to the other and remained at various houses for almost two months. The only explanation given by her is that she was threatened by the accused persons. It is not in her testimony that she was confined to one place. In fact, it has been borne out from the material on record that she had travelled from place to place and she was ravished number of times. Under these circumstances, the medical evidence

gains significance, for the examining doctor has categorically deposed that there are no injuries on the private parts. The delay in FIR, the non-examination of the witnesses, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. True it is, the grammar of law permits the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one, when a Court, on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not unrepachable, there is requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony. As the present case would show, her testimony does not inspire confidence, and the circumstantial evidence remotely do not lend any support to the same. In the absence of both, we are compelled to hold that the learned trial Judge has erroneously convicted the accused-Appellants for the alleged offences and the High Court has fallen into error, without re-appreciating the material on record, by giving the stamp of approval to the same.

14. In *Krishan Kumar Malik Vs. State* : , (2011) 7 SCC 130, the Hon"ble Supreme Court has held that:

"31. No doubt, it is true that to hold an accused guilty for commission of an offence of rape, the solitary evidence of prosecutrix is sufficient provided the same inspires confidence and appears to be absolutely trustworthy, unblemished and should be of sterling quality. But, in the case in hand, the evidence of the prosecutrix, showing several lacunae, have already been projected hereinabove, would go to show that her evidence does not fall in that category and cannot be relied upon to hold the Appellant guilty of the said offences. Indeed there are several significant variations in material facts in her Section 164 statement, Section 161 statement (Code of Criminal Procedure), FIR and deposition in Court."

32. Thus, it was necessary to get her evidence corroborated independently, which they could have done either by examination of Ritu, her sister or Bimla Devi, who were present in the house at the time of her alleged abduction. Record shows that Bimla Devi though cited as a witness was not examined and later given up by the public prosecutor on the ground that she has been won over by the Appellant."

15. To note the inconsistencies, embellishments and exaggeration, it is necessary to highlight the salient features of the statement of the prosecutrix recorded under Section 161 of Code of Criminal Procedure and thereafter during her examination under Section 164 of Code of Criminal Procedure before learned Metropolitan Magistrate. The third statement on oath before the Court was recorded by learned Additional Sessions Judge while conducting trial for the

offences punishable under Sections 363/376 of the Indian Penal Code. Careful scrutiny of the statement of the prosecutrix recorded under Section 161 of Code of Criminal Procedure, statement under Section 164 of Code of Criminal Procedure and her statement recorded before the Court are also necessary. The different versions are extracted hereunder:-

16. Prosecutrix in her statement recorded under Section 161 of Code of Criminal Procedure stated that:

"xxxxxxx Mere Mammi Papa mujhe Kailash Nagar makaan 509/1969 Gali No. 4 Gandhi Nagar Delhi me ilaaj ke liye le gaye janha par Raj Kumar Kashyap @ Pappu ne mujhe pahnene ke liye tabiz diya bhabhuti khane ko di aur jantar mantar maare mere papa mujhe Brahastivaar (Pratyek) aur Shanivaar (Pratyek) ko Baba Raja Kumar Kashyap @ Pappuke paas le jaane ve tantrik mujhe alag kamre mein le jaakar aage bethkar paath puja karta tha aur mere sir mein bhi bhahuti laga deta tha tatha kuch khane ko detha tha to mujhe thoda aaraam aane laga toh mein bhi kabhi kabhi Pappu @ Raj Kumar Kashyap ke paas akeli chali jaati thi aur jaise Pappu kehta mein vaise hi karti thi. Pappu tantrik praytek saal Kaaledar Sharif chadar chadane ke liye Baba ki Majaar par jaata hai toh mujhe Pappu tantrik ne batlaya ki hum 15/07/09 to paidal chalenge aur tum bhi aa jana agar nahi aayi to tum phir se pehle ki tarah hi bimaar ho jaogi to mein dinaank 16/07/09 ko school jaane ke bahane Pappu tantrik ke duara bataaye gaye sthaan Sakoti panhoochi aur vanha par Pappu tantrik apni maruti car mein mujhe mila aur Haridwar ki taraf le gaya aur raaste mein Pappu tantrik ke aur saathi bhi paidal jaate hue mile janha par bhi raat hoti Pappu tantrik mujhe apni car mein bethakar jabardasti dara dhamka kar sunsaan jagah par le jaata aur mujhe maarta pit ta aur meri marzi ke khilaaf mere saath jabardasti sambhog karta aur mere saath lagataar chaar baar dara dhamkakar meri marzi ke khilaf Pappu tantrik ne balaatkar kiya aur dinank 20/07/09 ko Pappu tantrik ne mujhe kisi ke saath Delhi bhej diya."

17. Prosecutrix in her statement recorded under Section 164 of Code of Criminal Procedure stated that

"16.07.09 ko mein apni marzi se apna ghar chodkar Haridwar (xxxx) gayi thi. Mein akeli gayi thi. Mere ko kisi ne bhi behlaya ya phuslaya nahi."

18. Prosecutrix appeared in the witness box as PW1 and deposed that she was suffering from respiratory problem like asthma. She was getting her treatment from Makkar Hospital, Laxmi Nagar and when the problem did not cure, Dinesh, a resident of the same vicinity told her parents about one Tantrik who could cure her problem. She further deposed that

"Next day my parents took me to the house of accused present in Court today (correctly identified) i.e. Gali No. 4, Kailash Nagar, Gandhi Nagar. Accused was sitting in a room on a "Singhasan" made up of "Gaddi". Accused was wearing number of "Malas". A "Diya" was burning in a small wooden temple lying in that room. Accused gave me a glass of water mixed with "Vibhuti" (like ash of

agarbatti) to drink. I drank it. Thereafter accused gave me a "PAN" (Beetle leaf). I ate it. My condition deteriorated "Main Sunn Ho Gai". Accused told my parents to bring me every Thursday regularly as he performs "Pooja" in his house. I remained ill as suddenly I used to get unconscious. As per me I used to get unconscious as my eyes used to get closed and body used to become inactive but as per doctors I did not use to get unconscious and I was suffering from hypertension.

Next thursday I along with my parents went to the house of accused. Accused again gave me a glass of water mixed with "Vibhuti" (like ash of agarbatti) to drink. I drank it. Thereafter accused gave me a "PAN" (beetle leaf). I ate it. Accused asked my parents to go out as in their absence he will treat me. Accused told me that he wants to marry me. He told me that if I refused to marry him he will make me mad with his "Tantrik Vidhya". He further told me that he will get my only 8 years old brother kidnapped from his goons. He further told me that to do whatever he wants to do otherwise he will get my father killed. My father runs factory in Gurdwara Gali, Gandhi Nagar. From there I returned back to my house and did not tell anything to my parents. Thereafter, accused started coming to my school and at my tuition and started threatening me. One day accused gave me a mobile phone make MTS containing SIM card and asked me to carry it otherwise he will execute the threats given by him to me. I do not remember the SIM card number now. Since, I was scared, I kept the phone with me. One day accused made a call to me on this mobile phone and asked me to come at Bhajanpura at a "Dargah". I reached Bhajanpura at "Dargah" and accused met me there. He again gave me a glass of water mixed with "Vibhuti" and PAN. I drank and ate it. Dargah was a small room. Accused asked me to sit over there and told me that after sometime I can go to my house. I sat there and lost consciousness. When I regained my consciousness I found myself in my house. Accused with his three "Chelas" (disciples) was also present there. I told my father all the facts. I did not tell my father that I had gone there being called by the accused since accused had told me not tell it to anyone otherwise he will execute his threats. I got normal. I keep on receiving calls of accused on the mobile phone given by him to

me. He often used to ask me if I am ready to marry him. He also used to ask that I should get my parents ready for marriage with him and otherwise he will kill my father and my brother. Since, I was scared I did not tell anything to my parents.

Accused kept on calling me regularly. Almost one moth prior to 15.07.09 accused told me that he take "Chaddar" with his disciples to Kaler Sharif near Roorki, Uttrakhand and asked me to come with him. I refused to accompany him but he gave me threats as given by him earlier. He regularly used to call me asking me to accompany him to Kaler Sharif and threatening to execute his threats if I did not agree. I did not tell all this to my family members as I was scared. On 15.07.09 I along with my parents went to the house of accused. There were

40-50 persons present in the house. Accused with his 40-50 persons left his house in a procession with "Chaddar" for going to Kaler Sharif. Me and my parents returned to our house. In the evening, I received a call from the accused directing me to come with his man next day from school to Kaler Sharif but I refused. But he threatened to execute the threats given by him earlier. On 16.07.09 at 7:30 a.m. I reached at my school. Accused had told me the place when (sic) his man will be standing. At the same place I found a man standing. That man identified me and gave a signal by waiving his hand. I went near him. I refused to accompany me (sic) but he extended the same threats as accused used to give

me. Thereafter, I went with him on a two-wheeler scooter. After 2-3 hours while moving on the road. Accused along with 20-30 associates met us on the road. It was "Kawar" season and the entire road was jammed. There were huge rush of "Kawarias". Two Maruti 800 vehicle containing various articles required for day to day purposes were moving with group of accused and his associates. Accused and his associates were wearing orange dresses. They were going to Kaler Sharif but carrying banners of "Kawarias" with the purpose of promoting Hindu-Muslim unity. I told accused that I want to go back to my house and asked him that why he is doing all this with me and my entire career was ahead of me. Accused told me to do whatever he wants me to do otherwise he will kill me here and my father and brother in Delhi. I kept quiet and keep on walking with the accused.

I kept on walking with accused throughout the night requesting him to drop me at my house but he used to repeat the same threats. On 17.07.09 throughout day I kept on walking with accused and his associates. Because of continuous walking my feet got injured and I also developed allergy on my feet. On the intervening night of 17/18.07.09 accused asked me to go and sleep in the car. I went to the car to sleep. It was Meerut road. Accused also came in the car. He took the car from there, since his associates were sleeping there, to at some distance. Thereafter without my consent accused raped me. I keep on refusing but he keep on repeating his threats to kill me and my father and brother. Accused repeated the same act in the car on the intervening night of 18/19 and 19/20, in the same manner. On 20.07.09 accused received a phone call from ASI Satwinder. Accused told me to tell ASI Satwinder that I had come with him as my father used to beat me. I told the same things to ASI Satwinder. ASI Satwinder asked the accused to send me back to Delhi but accused kept on insisting that he will not send me back as I had come with my volition. Thereafter accused send me in a car with three persons directing them to take me to his house at Kailash Nagar and thereafter to leave me in the PS in the morning. Accused threatened me if I gave any statement against him and his family or get myself medically examined he will kill my father and my brother. I was brought in the house of accused. There wife of accused, Pawan Kapoor and Sunil Jain met me. Pawan Kapoor and Sunil Jain are the disciples of accused. They all told me not to get my medical examination to GTB Hospital.

19. Prosecutrix admitted in cross examination that her statement was recorded under Section 164 of Code of Criminal Procedure on 22.07.2009 by the Metropolitan Magistrate without any threat wherein she had stated that she was not enticed by any person and she went to Haridwar leaving her house as per her own wish. This statement is contradictory to her statement recorded under Section 161 of Code of Criminal Procedure.

20. The prosecutrix admitted in her cross examination that the letter dated 31.07.2009 Ex.PW1/DZ was written by her under her signatures wherein she had stated that "16.07.2009 ko apni marzi se apna ghar chodkar subah 7:30 baje gayi thi. 16.07.2009 to raat 2:00 baje mera mere mata-pita se jhagda hua. Unhone mujhe Haridwar ke paas Kaliyar le jaane se mana kiya isliye mein khud paidal chali gayi. Muhe kisi ne behlaya phuslaya nahi. Vanha mujhe Rajkumar urf Pappu S/o Chander Bali mile jinhone mere papa ko kaha hi apni beti ko le jao magar woh nahi aaye unhone kaha woh bus me aa rahe hain sabke saath baad mein le jaaunga. Magar unhone baad mein report ki jo jhuti hai. Rajkumar urf Pappu galat nahi. Usne mere saath kuch galat nahi kiya. Yeh mein apne pure hosh hawash mein keh rahi hoon. Inhone mere saath kuch galat nahi kiya aur main 21.07.2009 ko sahi salamat wapas aa gayi. Rajkumar urf Pappu nirdosh hai unhone kuch galat nahi ki. Mere papa ne jhuti aur galat report likhwayi. Kripya karke Rajkumar urf Pappu ko chod diya jaaye. Yeh bahoot ache insaan hain. Galat nahi hai. "

21. PW7 Dinesh Kumar Sharma, father of the prosecutrix and also the complainant deposed that on 16.07.2009, prosecutrix went to school but did not return and enquiries from the school revealed that she did not attend the school that day whereafter he made several calls to the accused to know the whereabouts of his daughter who expressed his ignorance. On 17.07.2009 morning, he received a telephone call from the prosecutrix that she was in Meerut, safe and sound. The accused was also informed about the prosecutrix in Meerut but at about 3.00 pm, accused made a threatening call to him saying that if he informed anyone about the whereabouts of the prosecutrix "Tere Dono Bachchon Pe Kafan Daal Diye Jaayenge". He pleaded with the accused not to do anything and on 17.07.2009 made a call to one Sunil Jain requesting him to look for his daughter who expressed his inability. PW7 deposed that he again made calls to accused as well as to Sunil Jain but they did not respond whereafter he lodged an FIR. He further deposed that on 21.07.2009, the police informed him that his daughter has been recovered.

22. The testimony of the father of the prosecutrix when examined threadbare clearly reveals that his testimony contains embellishment and improvements in comparison to the FIR lodged by him. The prosecutrix went missing on 16.07.2009. Though PW7 had come to know that the prosecutrix was with the accused who had also threatened to harm his other children, he failed to make any complaint that his daughter had been kidnapped. It is highly improbable that if the father had been aware of the kidnapping of his daughter on 17.07.2009, he

would file a complaint at such a belated stage i.e. on 20.07.2009. Had his daughter been kidnapped, the normal conduct of a father in such circumstance would first be to lodge a complaint.

23. The medical examination of the prosecutrix was conducted at Swami Dayanand Hospital on 21.07.2009. Prosecutrix stated that initially, she was hesitant to disclose her history but on being insisted by the doctor, she told him that she cannot tell the entire story but she had been raped. However, as per MLC report, she gave the following history before the doctor:-

"As per victim, she ran away from home after quarrel with her parents on 16.07.2009 to Haridwar. On her way, she was accompanied by some Baba (named Pappu), who was treating her for epilepsy. She lived with him for four days. Then she was brought home by some people on 20.07.2009 at 11.00 pm. According to her, nothing has happened with her".

24. There are contradictions and serious inconsistencies in the statements of prosecutrix at different stages and the same do not inspire confidence to nail the accused. The evidence as a whole including testimonies of prosecutrix and her father coupled with the MLC report clearly indicate that the story of prosecutrix regarding sexual intercourse on different occasions under threat is concocted and not believable.

25. Prosecution has built its case on the basis that prosecutrix was less than 18 years at the time of incident and was therefore not even in a position to give consent to accused to take her away from the custody of her parents but if the minor knowing the nature and consequences of the act leaves her father's protection and voluntarily joins the accused, the accused cannot be said to have taken her away from her lawful guardian. Though the prosecutrix was minor but she was a student of 12th standard and mature enough to understand her welfare.

26. The law with regard to the grant of leave is well settled by a catena of judgments. Leave to Appeal can be granted only where it is shown that the conclusions arrived at by the Trial Court are perverse or there is misapplication of law or any legal principle. The High Court cannot entertain a petition merely because another view is possible or that another view is more conceivable. In *Arulvelu and Anr. vs. State* : , 2009 (10) SCC 206, while referring with approval the earlier judgment in *Ghurey Lal Vs. State of Uttar Pradesh* : , (2008) 10 SCC 450, the Supreme Court reiterated the principles which must be kept in mind by the High Court while entertaining an Appeal against acquittal. The principles are:

"1. The accused is presumed to be innocent until proven guilty. The accused possessed this presumption when he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.

2. The power of reviewing evidence is wide and the appellate court can re-appreciate the entire evidence on record. It can review the trial court's

conclusion with respect to both facts and law, but the Appellate Court must give due weight and consideration to the decision of the trial court.

3. The appellate court should always keep in mind that the trial court had the distinct advantage of watching the demeanour of the witnesses. The trial court is in a better position to evaluate the credibility of the witnesses.

4. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so.

5. If two reasonable or possible views can be reached - one that leads to acquittal, the other to conviction - the High Courts/appellate courts must rule in favour of the accused".

27. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and the prosecution has to prove a charge beyond reasonable doubt. The accused has a right to fair trial and the presumption of innocence is in favour of the accused.

28. Having regard to the principles laid down by the Apex Court in the case of Ghurey Lal (Supra), we do not find that there is any illegality or perversity in the reasoning given by the learned trial court in disbelieving the case of the prosecution. This court cannot lose track of the settled law that interference is called for only when there are substantial and compelling reasons for doing so.

29. In view of the aforesaid facts, we do not find any infirmity in the impugned judgment passed by learned trial court. We also find no reasons to take a different view than the view taken by the learned trial Court. Consequently, leave to appeal stands dismissed.