

(2017) 07 DEL CK 0045

In the Delhi High Court

Case No : 382 of 2017

STATE (GNCT OF DELHI)

APPELLANT

Vs

MOHD. IRFAN

RESPONDENT

Date of Decision : 13-07-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 313, Section 378(1) - Power to examine the accused - Appeal in case of acquittal
Indian Penal Code, 1860, Sect

Citation : (2017) 07 DEL CK 0045

Hon'ble Judges : G.S.Sistani, P.S. Teji

Bench : DIVISION BENCH

Advocate : Radhika Kolluru

Judgement

Crl. M.A. 10831/2017 (exemption)

1. Exemption allowed, subject to all just exceptions.
2. Application stands disposed of. Crl.M.A. 10873/2017 (delay)
3. This is an application under Section 5 of the Limitation Act filed by the petitioner seeking condonation of 41 days" delay in filing the present leave to appeal.
4. Heard. For the reasons stated in the application, delay of 41 days in filing the leave to appeal is condoned.
5. The application stands disposed of. CRL.L.P. 382/2017
6. The present leave to appeal has been filed by the State under Section 378(1) of the Code of Criminal Procedure, 1973 ("Cr.P.C.") against the order of acquittal dated 17.01.2017. The case of the prosecution as noticed by the Trial Court is as under: "1. The victim, aged about 17 years was working in a hanger manufacturing factory where accused Irfan was also working. On 27.08.2014,

she was on leave but had gone to the said factory to provide lunch to her brother Rubel, who was also working in the same factory. While she was returning back after giving lunch and reached at the Pushta Road, Irfan met her there on a bike and offered to talk to her and further offered to marry her and on that pretext, he took her on his bike to 5th Pushta where they both got down and walked towards the Yamuna river for about 2-3 kilometers towards a jungle. While they were talking, suddenly four boys came out of the bushes out of which one was Farukh, brother of accused Irfan and three were unknown boys out of whom one was having his face covered with a handkerchief. One of the boys placed a knife at the neck of the victim and then all five of them committed rape with the victim turn by turn. They also threatened her not to disclose their acts to anyone or else she would be killed. Accused Irfan then dropped her at Loni on his own motorcycle near the house of her sister. The victim did not tell anyone about the incident out of fear but when he started harassing and threatening her and refused to marry her, she disclosed about the incident to her sister Sultana. Thereafter, the victim alongwith her sister Sultana and her cousin Rajia Begum approached the police at PS New Usmanpur and the victim lodged her complaint on which the present FIR was registered for the offences punishable under Section 376-D/506 IPC and 6/10 POCSO Act. The victim was subjected to medical examination. She was also produced before the Ld. MM where her statement under Section 164 Cr.PC was recorded. Only accused Irfan was arrested and the other accused/offenders could not be arrested due to lack of particulars including Farukh. After completion of investigation, chargesheet was filed against accused Irfan for the said offences."

7. Charges were framed against the accused/respondent for the offences punishable under Section 376-D of the Indian Penal Code, 1860 ("IPC") and alternatively for offences punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 and also under Section 506/34 IPC, to which he pleaded not guilty and claimed trial. To bring home the guilt of the accused, the State examined 10 witnesses. No evidence was led by the defence. The statement of the accused was recorded under Section 313 of the Code of Criminal Procedure.

8. Learned counsel for the State submits that the Trial Court has based the judgment on surmises and conjectures and acquitted the accused without taking into consideration that the prosecution has been able to prove its case beyond any shadow of doubt. Ms.Kolluru further contends that since the victim was a minor, her consent would be meaningless and the learned Trial Court has failed to take into account the presumption of law as per Section 29 of POCSO Act and Section 114-A of the Indian Evidence Act, 1872 in cases of gang rape. Learned counsel submits that the Trial Court has failed to appreciate that gang rape was committed on the victim by the five persons including the accused/respondent Irfan. She was threatened not to inform the guilt of the accused to anyone or else she would be killed. Counsel submits that the delay of four months in making a complaint has been satisfactorily explained and, thus delay in filing the

complaint and registration of FIR cannot be a ground in itself to acquit the accused. Reliance is placed on *State of Himachal Pradesh v. Prem Singh*, 2009 CrL.L.J. 786.

9. Mr.Radhika has also contended that reading of the testimony of the victim would show that her stand has been constant in all the statements made by her from time to time. It is also contended that it was only on the advice of the doctor that no fresh medical examination was conducted as there was a gap of four months and no purpose would have been achieved in such an examination. Learned counsel contends that the Trial Court has ignored the settled position of law that the testimony of the prosecutrix alone can be the basis of conviction without any corroboration as her testimony stands on a higher footing. The learned counsel has also relied upon the judgment in the cases of *State of U.P. v. Munshi*, 2009 CrL.L.J. 393 (SC); *Mohd Imran Khan v. State of Delhi*, (2011) 10 SCC 192; and *O.M. Baby by LR v. State of Kerala*, 2012 CrL.L.J. 3794 (SC). The learned counsel has strenuously urged this Court that on account of fault and insensitive investigation, the benefit should not accrue in favour of the accused persons.

10. We have heard the learned counsel for the appellant and perused the judgment of the Trial Court.

11. The following questions arise for our consideration: (i) Whether the Trial Court erred in holding that the prosecutrix was not a minor on the date of the incident?

(ii) Whether the delay in lodging the FIR was satisfactorily explained by the prosecutrix?

(iii) Whether the sole testimony of the prosecutrix could have been relied upon to convict the accused/respondent herein?

(iv) Whether the Trial Court was correct in doubting the story of the prosecutrix owing to her refusal to undergo internal medical examination?

12. We proceed to analyse issue (i). In respect of ascertaining the age of a victim of crime, the law is well settled. The Supreme Court in *Jarnail Singh v. State of Haryana*, (2013) 7 SCC 263 (paragraph 20) has held that Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 though strictly applicable to a child in conflict with law, would also be applicable to determine the age of a child who is a victim of a crime. Accordingly, Rule 12 (3) is applicable for determining the age of the prosecutrix, which reads as under: "12. Procedure to be followed in determination of Age.-...

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining:-

(a) (i) the matriculation or equivalent certificates, if available; and in the absence

whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence, whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law."(Emphasis Supplied)

13. At the same time, it has been held in *Birad Mal Singhvi v. Anand Purohit*, 1988 Supp SCC 604 (paragraph 15) that an entry relating to date of birth made in a school register is not of much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded. [See also *State (Govt. of NCT of Delhi) v. Charan Singh*, 2017 SCC OnLine Del 8186 (paragraphs 16-21)]

14. We may also notice a judgment of the Punjab and Haryana High Court in *Jaipal Singh v. State of Haryana*, (2003) 2 RCR (Cri) 310 (DB): 2002 SCC OnLine P&H 598 (paragraphs 11 and 12) wherein the Court had disbelieved the school certificate stating the age of the prosecutrix to be 15 years which was conflicting with the age mentioned in the FIR, MLC and as stated by the prosecutrix herself and her father and the entry was not based on any birth certificate but upon a statement from her father and held the prosecutrix to be a major on the date of the incident.

15. The present case is also to be decided on the foregoing principles of law. Ruby Baghel (PW-1), teacher in EDMC Primary School had produced the school records (Ex.PW-1/A - Ex.PW-1/D) of the prosecutrix, as per which the date of birth of the victim was 15.03.2003. The entry was inturn based upon an affidavit dated 23.07.2009 (Ex.PW-1/C) allegedly given by the mother of the prosecutrix. However, the prosecutrix (PW-3) had deposed that her mother had died about 6 years ago and hence, she had passed away before swearing the affidavit. Additionally, the Trial Court noticed a discrepancy in the name of the deponent that the affidavit was sworn by one Sultana, while the prosecutrix deposed that the name of her mother was Jubeda. We may also notice that as per the school records, the age of the prosecutrix would be 11 years, however, the prosecutrix

at every stage alleged to be 17 years" old. Thus, the entries in the school record cannot be said to be based upon any material and are in conflict with the age stated by the prosecutrix herself. Accordingly, the prosecution was unable to prove that the prosecutrix was less than 18 years of age on the date of the incident.

16. Prior to dealing with the contention regarding the delay in lodging FIR, we deem it appropriate to analyse issue (iii). Though there is no quarrel with the proposition that the sole testimony of the prosecutrix can be relied upon to base an order of conviction, however, the same should be of beyond reproach and not leaving any shadow of doubt over her veracity. [State v. Wasim, 2017 SCC OnLine Del 8502 (paragraphs 19-21)]

17. Accordingly, the testimony of the prosecutrix (PW-3) is to be tested on the same yardstick. The prosecutrix (PW-3) deposed that at the time of the incident, she was working in hangar factory situated at Gamri, Bhajanpura, Delhi and the accused/respondent was also working in the factory. In the month of August, 2014 on 26th day, she was on leave and had gone to the factory to supply food to her brother Rubel, who was also working in the factory. On her way back at 5th Pusta, the respondent arrived on his motorbike. The respondent asked the prosecutrix to sit on his bike saying that he had to talk to her on the issue of her marriage. The respondent told her he wanted to marry her and PW-3 sat on his bike. The respondent then drove down Pusta road towards Yamuna river and then halted the bike taking her on foot. They walked for about 10-15 minutes and reached near the jungle. They sat down and started discussing about the marriage. In the meanwhile, four boys came out from the bushes. Out of whom was Farukh, brother of the respondent; while the PW-3 had seen two other boys previously and the third had covered his face. Farukh placed a knife on her neck. Thereafter, the boys and the respondent committed rape upon the prosecutrix and threatened to kill the prosecutrix if she disclosed the incident. After that, the respondent left the prosecutrix on his bike at the house of her sister Suman. PW-3 deposed that she did not disclose the incident to anyone out of fear. Later, the respondent started harassing the prosecutrix and threatened to repeat the incident, if she disclosed it to anyone and also refused to marry the prosecutrix. However, after about one month of the incident, the prosecutrix got fed up and disclosed the incident to her sister Sultana. Thereafter, she came to the police station along with her cousin Seema and brother Ravinder and lodged the report to the police. Police recorded her statement.

18. During cross-examination, the prosecutrix (PW-3) stated that the respondent was known to her for 6 months prior to the date of the incident. She also stated that the respondent had proposed to her for marriage for the first time about a week prior to the incident. She deposed that her family consists of four sisters and one brother. The name of her mother was Zubeda and she died about six years ago. In respect of the request for internal examination before the doctor, PW-3 stated that she did not deny internal examination, but it was the doctor

who suggested that nothing would come out in the internal examination.

19. The testimony of the prosecutrix does not inspire confidence and is on the whole improbable. The whole story is also suggestive of it being a consensual act. We may notice the judgment of the Supreme Court in *Tameezuddin v. State (NCT of Delhi)*, (2009) 15 SCC 566, wherein the Supreme Court found it improbable that the husband of the victim of rape, after coming to know of the incident, would have gracefully told the accused/appellant therein that everything was forgiven and forgotten but had nevertheless lured him to the police station and thus, wanting supporting evidence. The relevant portion of the judgment reads as under: "9. 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. We are of the opinion that the story is indeed improbable.

10. We note from the evidence that PW 1 had narrated the sordid story to PW 2 on his return from the market and he had very gracefully told the appellant that everything was forgiven and forgotten but had nevertheless lured him to the police station. If such statement had indeed been made by PW 2 there would have been no occasion to even go to the police station. Assuming, however, that the appellant was naive and unaware that he was being led deceitfully to the police station, once having reached there he could not have failed to realise his predicament as the trappings of a police station are familiar and distinctive. Even otherwise, the evidence shows that the appellant had been running a kirana shop in this area, and would, thus, have been aware of the location of the police station. In this view of the matter, some supporting evidence was essential for the prosecution's case."(Emphasis Supplied)

[Also see *State (Govt. of NCT of Delhi) v. Mohd. Rihan*, 2017 SCC OnLine 8549 (paragraphs 27 - 29)]

20. In the present case, the prosecutrix never resisted the respondent nor refused to sit on the bike of the respondent. Even after getting off, she walked with the respondent to Yamuna Khadar, where they were sitting when the other four boys attacked. When the other boys left after the incident, the prosecutrix did not raise any alarm nor attempted to flee. She quietly returned back to her sister's house with the respondent on her motorcycle. Even after meeting her sister she did not disclose anything. It is also not believable that after the prosecutrix was gang raped by five persons, her own sister did not find her in an abnormal state. The conduct of the prosecutrix is extremely unbelievable as even if it is assumed that the prosecutrix was lured under the pretext of discussing about marriage, there was no reason for her to stay mum after the other boys had left and she returned on the motorcycle of the respondent, i.e. one of her alleged rapists. Another aspect to be noticed is that the prosecutrix (PW-3) claims to have disclosed the incident to her sister Sultana after about 1 month

from the incident, however, the FIR was registered on 05.12.2014, i.e. after a delay of three months nine days. There is no explanation for waiting for another 2 months prior to approaching the police. This unusual and improbable conduct of the prosecutrix renders relying upon her sole testimony quite dangerous and thus, wanting corroboration.

21. Nothing has come in evidence to support the testimony of the prosecutrix. During the investigation neither the identity of the other 3 boys was established nor was Farukh traced even with the assistance of the respondent. The person in whom the prosecutrix had first confided in, i.e. her sister Sultana, was dropped from the array of witnesses for which also there is no explanation. There is confusion as to who accompanied the prosecutrix to the police station. As per the prosecutrix (PW-3), she was accompanied by her cousin Seema and brother Ravinder; while as per Seema (PW-4) she and Sultana had accompanied the prosecutrix; as per SI Vandana (PW-5), she was accompanied by her two sisters; and as per SI Santosh (PW-10), only PW-3 and Seema had come. Ravinder was not examined as a witness and Sultana was dropped. No support can be drawn from the deposition of PW-4 as she has deposed that she was informed on 05.12.2014 only, i.e. the date of the registration of the FIR and hence, her deposition is merely hearsay. Further, it has also been noticed by the Trial Court in paragraph 17 that even the basic facts relied upon by the prosecution could not be proved like the fact that she was on leave on the day of the incident or had gone to serve lunch to her brother Rubel.

22. In the foregoing background, guilt of the respondent/accused could not have been founded solely in the testimony of the prosecutrix, corroboration was required and none was forthcoming. Hence, we find no infirmity on this count as well.

23. The final aspect to be considered is whether the delay in filing of the FIR was reasonably explained? We think not. As already noticed the incident was alleged to have taken place on 27.08.2014 and the FIR was registered on 05.12.2014, i.e. after about 3 months 9 days. The prosecutrix (PW-3) in this regard deposed as under: "...I did not disclose the incident to anyone out of fear. Later accused Irfan started harassing me and threatened me to repeat the incident, if I disclosed the fact to anyone and also refused to marry me. However, after about one month of the incident after being fed up, I disclosed the above facts to my sister Sultana. Then I came to the police station alongwith my cousin Seema, brother Ravinder and lodged the report to the police. ..."

24. From the foregoing, it is clear that the prosecutrix (PW-3) claimed to have remained mum under fear and after about one month informed the incident to her sister Sultana as "being fed up". Even if that is presumed to be true, there was no reason for her to wait for another two months to approach the police. Such delay has not been explained and hence, casts a doubt upon the whole case of the prosecution. The Apex Court in *Surjan v. State of M.P.*, (2002) 10 SCC 214 found unexplained delay of 10 days in approaching the police without even a

question being put to her to raise a doubt over the case of the prosecution. The relevant portion reads as under: "4. The inordinate delay in lodging the complaint before the police i.e. 10 days, has not even been attempted to be explained. Even when she was examined as a witness in the court, no question was put to her on that long delay. In a case where six indicted persons should be visited with a minimum sentence of 10 years" RI, the court cannot afford to act on the uncorroborated testimony of the prosecutrix unless the said evidence is wholly reliable. Looking at the testimony of PW 1 from all the different angles highlighted above, we are unable to hold that the testimony is wholly reliable. In such a situation, materials for corroborating the testimony of PW 1 could not be obviated. But unfortunately there is none."(Emphasis Supplied)

25. The final contention of Ms.Kolluru was that no adverse inference should have been drawn in respect of the medical examination as the prosecutrix (PW-3) had clarified that she did not deny internal examination "but it was the doctor who suggested that nothing would come out in the internal examination." At the same time, Dr.Neha Chandra (PW-7) has categorically deposed that the "victim did not allow for her internal examination and also did not allow for collection of samples" and hence, we are unable to rely on the testimony of the prosecutrix.

26. Accordingly, we find no ground to interfere in the judgment of the Trial Court. Even otherwise, it is settled law that the appellant court may only interfere in an appeal against acquittal when there are substantial and compelling reasons to do so [See Sheo Swarup v. King-Emperor, AIR 1934 PC 227 (2); M.G. Agarwal v. State of Maharashtra, AIR 1963 SC 200 (paragraph 16 and 17); Tota Singh and Anr. v. State of Punjab, AIR 1987 SC 108: (1987) 2 SCC 529 (paragraph 6); State of Rajasthan v. Raja Ram, (2003) 8 SCC 180 (paragraph 7); Chandrappa v. State of Karnataka, (2007) 4 SCC 415 (paragraph 42); Ghurey Lal v. State of U.P., (2008) 10 SCC 450 (paragraph 73); and Muralidhar @ Gidda v. State of Karnataka, (2014) 5 SCC 730 (paragraph 12)].

27. The leave to appeal is dismissed.