

(2019) 10 DEL CK 0360

In the Delhi High Court

Case No : Criminal Leave Petition No. 466 Of 201

State (Govt. Of Nct Of Delhi)

APPELLANT

Vs

Mukesh

RESPONDENT

Date of Decision : 24-10-2019

Acts Referred:

Protection of Children from Sexual Offences Act, — Section 4, 29, 30
Indian Penal Code, 1860 — Section 376(2)(i), 452, 506
Code Of Criminal Procedure, 1973 — Section 164, 378, 386

Citation : (2019) 10 DEL CK 0360

Hon'ble Judges : Manmohan, J; Sangita Dhingra Sehgal, J

Bench : Division Bench

Advocate : Rajat Katyal, Vagisha Kochar

Final Decision : Dismissed

Judgement

Manmohan, J

1. Present criminal leave petition has been filed on behalf of the State challenging the judgment and order of acquittal dated 25th February, 2019 passed by Additional Sessions Judge (North-West)-01, Special Court, POCSO, Rohini District Courts Delhi, arising out of FIR No.183/2016 registered with Police Station Bharat Nagar. The Trial Court framed charges under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to 'POCSO Act') and alternately under Section 376(2)(i) IPC read with Sections 452/506 IPC.

2. The Trial Court in the impugned judgment while acquitting the respondent-accused has held as under:-

"10. Coming to the main incident, there are material improvements and contradictions in the statement of the victim and her elder sister. The victim is not consistent as submitted by Ld. APP. In the initial statement given to police by victim Ex.PW8/A, victim did not mentioned that she was raped by accused. The

statement to police was given after counseling. In this statement, victim only stated that accused forced himself on her. Her statement is not corroborated by any independent material on record which includes her medical as well as report of the FSL. In the medical examination, there is no injury to the body of the victim of any nature which probably cannot be a case in case of rape. Even the doctor did not give any opinion whether the hymen was freshly torn or old torn and I find force in the submissions of Ld. Defence counsel that in case of any ambiguity the benefit should go to the accused. Further, victim or her sister who allegedly saws the incident, did not raise any alarm at the time of incident. It was a densely populated and congested area and further was a holiday on account of holi and further victim specifically admitted in the cross examination that other public persons were present in the gali. Had there been any scream or alarm raised by the victim or her sister, those public persons or neighbours would have gathered there. Admittedly, IO did not make any efforts to collect any independent evidence to corroborate the statement of the victim. Further, the victim stated that accused tied stole on her mouth when she tried to scream and that stole was removed by her sister from her mouth but the sister did not say anything in this regard and rather stated that victim told her that accused had tied a stole on her mouth. Further, victim specifically stated that she had no acquaintance with the accused prior to this case whereas her sister stated that they knew accused being their neighbour. Further, no such stole was seized by the police. Even the tenants on the first floor did not notice any such movement nor heard the alarm raised by the sister of the victim who stated that she raised alarm when accused was wearing his clothes which must have taken at least few seconds. Further, the FSL result, samples of which were collected on the same day without any bath or changing the clothes was found negative. As per PCR form, the accused was found present when police reached there yet he was not arrested and his arrest memo shows that he was arrested at 4.40 a.m. on the following morning. The prosecution failed to prove that how accused was arrested at 4.40 a.m. in night when he was found present when PCR reached there."

(emphasis supplied)

3. Mr. Rajat Katyal, learned APP for State states that the Trial Court has failed to appreciate that the prosecutrix had fully supported the prosecution's case. He contends that the Trial Court had erroneously come to the conclusion that there were improvements and contradictions in the statements of the Prosecutrix (PW-8) and her elder sister (PW-13).

4. Learned APP for State submits that the Supreme Court in *Rajinder alias Raju vs. State of Himachal Pradesh* (2009) 16 SCC 69 has held that the evidence of a victim of sexual assault stands almost at par with the evidence of an injured witness. He states that the absence of injuries on the private parts of the victim/prosecutrix cannot be construed as evidence of consent and that corroborative evidence is not an imperative component in every case of rape.

5. He further submits that the presumption under Sections 29 and 30 of the POCSO Act is attracted in the present case as the prosecutrix (PW-8) was a minor on the date of the incident and it was for the respondent-accused to prove to the contrary.

6. Per contra, Ms. Vagisha Kochar, learned counsel for the respondent-accused contends that the prosecutrix is not a stellar witness as her statements at different stages of the trial had not been consistent. She further contends that prosecutrix's deposition is not corroborated by the medical evidence on record. She emphasises that neither the hymen tear has been mentioned as fresh nor there is any mention of fresh injuries on the body of the prosecutrix (PW-8). She also states that the elder sister of the prosecutrix (PW-13) had contradicted the date of birth given in the school record as she had deposed that the prosecutrix (PW-8) was born in 2003. She contends that the prosecution had not conclusively proved the age of the victim at the time of the incident. She lastly states that the stole that the respondent-accused had allegedly tied on the mouth of the prosecutrix (PW-8) was not seized by the police.

7. Having heard both parties, this Court is of the view that it is essential to first outline the relevant facts of the present case.

8. In the present case, a statement was given by the prosecutrix (PW-8) to the police on 24th March, 2016 wherein she had stated that at around 4.30 pm on the same day, she had come to her jhuggi after playing holi and when she was changing her clothes after a bath, the respondent-accused was peeping through the ventilator window. The prosecutrix (PW-8) had stated that she then changed her clothes after moving to a corner and when she tried to come out of her jhuggi, the respondent-accused forcibly took her inside and threatened to kill her if she did not remove her clothes. The prosecutrix (PW-8) alleged that the respondent-accused removed her clothes, tied her mouth with a stole and then forced himself upon her. In pursuance to the said statement, FIR No.183/2016 dated 24th March, 2016 was registered with Police Station Bharat Nagar.

9. Perusal of the evidence on record reveals that the prosecutrix (PW-8) was not consistent in her statements with regard to the sexual assault by the respondent-accused. In her initial statement to the police Ex. PW8/A, the prosecutrix (PW-8) did not mention that she was raped by the respondent-accused. In the statement given to the police after counselling, she only stated that the respondent-accused had forced himself upon her. Subsequently, in her statement recorded under Section 164 Cr.P.C. the prosecutrix (PW-8) had stated that respondent-accused was in the process of inserting his private part (Dal raha tha).

10. However, in her testimony before the Trial Court, the prosecutrix (PW-8) had stated that the respondent-accused had inserted his private part (Dal diya). Consequently, the statements of the prosecutrix (PW-8) at different stages of the trial have not been consistent.

11. Further, the statement of the prosecutrix (PW-8) had not been corroborated

by the medical or forensic evidence. The medical report of the prosecutrix (PW-8) merely states that the hymen was torn and the doctor had not opined that the hymen was freshly torn. Moreover, the samples for the FSL report were collected on the same day without the prosecutrix (PW-8) having a bath or changing her clothes and it was stated therein that no semen was detected on any of the clothes that the prosecutrix (PW-8) was wearing at the time of the alleged incident. Consequently, there is no medical or forensic evidence available on record to corroborate the testimony of the prosecutrix (PW-8).

12. As regards the testimony of the prosecutrix (PW-8) that a stole was tied on her mouth by the respondent-accused and was later removed by her elder sister (PW-13), no such stole was seized by the police. Further, the elder sister of the prosecutrix (PW-13) did not mention the stole in her testimony and instead stated that the prosecutrix (PW-8) had mentioned to her that a stole was tied on her mouth.

13. This Court is in agreement with the legal submission of the learned APP for State that conviction in a rape case can be based on the sole testimony of the prosecutrix if the same is consistent, credible and trustworthy. However, in the present case, in view of the inconsistent statements of the prosecutrix (PW-8), it is imperative to look for corroboration. Since there is no corroboration on record, the improvements in the statements of the prosecutrix (PW-8) on material aspects at various stages of the proceedings create a serious doubt about the prosecution's case. Consequently, this Court is of the opinion that the respondent-accused is entitled to the benefit of doubt.

14. It is also settled law that any acquittal order cannot be lightly interfered with by the Appellate Court, though it has wide powers to review the evidence and to come to its own conclusion. The power to grant leave must be exercised with care and caution, because the presumption of innocence is further strengthened by the acquittal of an accused. In similar circumstances, in *State v. Kaishar Ali*, 2019 SCC Online Del 9875, we had held as under:-

"13. The Apex Court in *Ghurey Lal vs. State of Uttar Pradesh*, (2008) 10 SCC 450 has held as under:-

"69. The following principles emerge from the cases above:

1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappraise the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.

2. The accused is presumed 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.

3. Due or proper weight and consideration must be given to the trial court's

decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. 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.

A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

- (i) The trial court's conclusion with regard to the facts is palpably wrong;
- (ii) The trial court's decision was based on an erroneous view of law;
- (iii) The trial court's judgment is likely to result in "grave miscarriage of justice";
- (iv) The entire approach of the trial court in dealing with the evidence was patently illegal;
- (v) The trial court's judgment was manifestly unjust and unreasonable;
- (vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.
- (vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable 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.

71. Had the well-settled principles been followed by the High Court, the accused would have been set free long ago. Though the appellate court's power is wide and extensive, it must be used with great care and caution."

(emphasis supplied)

14. One of us, (Manmohan, J) in *Niraj vs. Ramesh Pratap Singh*, 2012 SCC OnLine Del 3813 has held as under:-

"6. It is also well settled that the Appellate court should reverse an acquittal only for very substantial and compelling reasons. In the event, two views are possible on the evidence adduced before the trial Court and the view taken by the trial Court is a plausible view, the Appellate Court should not interfere and substitute

its own view against the plausible view taken by the trial Court. In fact, the Supreme Court in *Chandrappa & Ors. Vs. State of Karnataka*, (2007) 4 SCC 415 while referring to previous cases laid down the following general principles regarding the powers of appellate court while dealing an appeal against an order of acquittal:-

"42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions', 'glaring mistakes', etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of 'flourishes of language' to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

7. The Supreme Court in a subsequent judgment in *Arulvelu & Anr. Vs. State Represented by the Public Prosecutor & Anr.*, (2009) 10 SCC 206 has held as under:-

"40. Unquestionably, the Appellate Court has power to review and re-appreciate the entire evidence on record. The appellate court would be justified in reversing the judgment of acquittal only if there are substantial and compelling reasons and when the judgment of the trial court is found to be perverse judgment. Interfering in a routine manner where other view is possible is contrary to the settled legal position crystallized by aforementioned judgments of this Court. 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. This fundamental principle must be kept in view while dealing with the judgments of acquittal passed by the trial court."

(emphasis supplied)

15. Consequently, for the foregoing reasons, this Court does not find any reason to interfere with the impugned judgment. Accordingly, the present leave petition is dismissed.