

(2015) 02 DEL CK 0013

In the Delhi High Court

Case No : Criminal Leave Petition No. 51/2015

State of NCT of Delhi

APPELLANT

Vs

Rashid

RESPONDENT

Date of Decision : 03-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 157, 161, 378, 378(1)

Penal Code, 1860 (IPC) — Section 376, 376(2)(f)

Protection of Children from Sexual Offences Act, 2012 — Section 4, 6

Citation : (2015) 02 DEL CK 0013

Hon'ble Judges : Sangita Dhingra Sehgal, J.;G.S. Sistani, J.

Bench : Division Bench

Advocate : Sunil Sharma, APP and SI Yash Pal, for the Appellant

Final Decision : Dismissed

Judgement

Crl.M.A 1593/2015

1. Exemption allowed subject to all just exceptions.

Application stands disposed of.

CRL.L.P 51/2015

2. By the present criminal leave petition filed under section 378(1) of the Code of Criminal Procedure, the state seeks leave to appeal against the judgment dated 31.10.2014 passed by the learned ASJ in sessions case No. 56/2013 whereby the respondent (accused before the trial court) was acquitted of the charges punishable under section 376(2)(f) of Indian Penal Code read with section 4 and 6 of the POCSO Act.

3. The relevant facts, as noticed by the trial court are that on 16.12.2012 at about 11:05PM intimation was received from mobile no. 9210300090 that rape has been committed with a girl at House No. X18, DDA Flats, Turkman gate, Delhi. The information was reduced into writing vide DD No. 27(Ex.PW17A).

4. SI Sangeeta (PW18) recorded the statement of the Complainant, father of the victim (Ex.Pw1/A) wherein he stated that on 16.12.2012 he had sent his nephew aged about 9 years and his daughter aged about 6 years to the opposite block to deliver food to his sister and at about 10:45 PM his nephew returned home and informed the complainant that his daughter was caught by one boy in the stairs who pulled down her pyjama and was doing "chera khani" with her. The complainant rushed downstairs and apprehended the said boy at the distance of about 200mts. A call was made to the PCR, FIR was got registered under section 376 IPC read with section 4 of the POCSO Act, victim was medically examined and accused was arrested. On completion of investigation, charge sheet was filed. Thereafter charges against the accused were framed under section 376(2) (f) IPC read with Section 4 and 6 of the POCSO Act.

5. The respondent pleaded not guilty to the charge, upon which the prosecution examined 22 witnesses to bring home the guilt of the respondent.

6. Learned trial court while passing the impugned judgment has observed that intimation of the incident was received by the PCR on 16.12.2012 from mobile no. 9210300090 which was found to be registered in the name Savita Bhasin but as per prosecution case, the call was made by the Fufi of the victim (PW9). During investigation no effort was made to interrogate Savita Bhasin from whose number PCR received the information about the incident and no evidence was adduced to establish that Fufi of the victim (PW9) had any connection with Savita Bhasin. Trial Court further observed that there is a possibility that the name of PW9 as an informant was introduced later on when police failed to find out the alleged Savita Bhasin.

7. It is also noticed by Learned Trial Court that the Investigating Officer, Sangeeta (PW18) recorded the statement of Fufi of victim (PW9) nearly after two and a half months i.e. on 2.3.2013. The version of PW18 that PW9 had gone out of station and hence she could not record her statement does not get any support from PW9 as she deposed in her examination that she went out only in the month of June and this shows that the Investigating Officer, Sangeeta (PW18) has made a false statement in the court that PW9 told her that she was out of station. The Trial Court has relied upon *Paramjit Singh vs State of Punjab 1997 (1) RCR 336*. The relevant para has been reproduced below:

".....the main reason for discarding their evidence is that their statements under section 161 of CrPC came to be recorded on 8th August, 1991 after about four and a half months. No explanation whatsoever was given by the Investigating Officer Gurmeet Singh (PW11) as to why their statements could not be recorded earlier. Both these witnesses were members of the patrolling party and even after knowing that on 22nd March, 1991, Sukhdev Singh left along with the appellants and was admitted in the hospital in an injured condition, they did not come forward to tell about this fact. It is in these circumstances, we do not feel it safe to accept their evidence on this vital circumstances, namely, Sukhdev Singh was last seen alive in the company of appellants."

8. Learned trial court has also pointed out that local police received the intimation from PCR at about 11:05PM and by 11:30 PM, Investigating Officer, Sangeeta (PW18) and SI Ram Niwas (PW19) were at the spot along with their staff but surprisingly Investigating Officer, Sangeeta (PW18) had taken five hours in recording the statement of complainant (PW1) despite the fact that complainant was very much present at the spot. Also the contents of rukka are contrary to the deposition of PW18 and there is no document on record to establish that when the copy of FIR was sent to the Illaqa Magistrate or to the concerned court in terms of section 157 of the Code of Criminal Procedure.

9. Learned Trial Court further observed that biological samples of victim and accused were taken and sent to FSL for analysis. As per FSL report, no semen/vaginal epithelial cells were found on Ex.F1 and F2 (filter paper described to contain finger wash of right and left hand of the accused) and no such cell was found on Ex.F3 (filter paper described to contain penis wash for vaginal cells) and Ex.G1 and G2 (jeans pant and t-shirt of the accused) which disproves the prosecution version that accused had inserted his finger in the vagina of the victim.

10. It has also been noticed by the Learned Trial Court that at the time of incident, Victim (PW6) and cousin of victim (PW7) were present but victim (PW6) failed to identify the accused and the testimony of PW6 is not helpful. Also cousin of victim (PW7) identified the accused during trial but he deposed that entire incident had taken place within a minute. So it's quite improbable that he would be in a position to recognize the features of the accused properly since there was no electric pole near the place of occurrence and there was darkness at the place of incident.

11. In the background learned counsel for the state submits that the trial court has passed the impugned judgment on hypothetical presumptions, conjectures and surmises and the order is perverse and lacks legality. Counsel further submits that the learned trial court failed to appreciate the evidence led by the prosecution witnesses and wrongly acquitted the respondent.

12. Learned counsel for state further argued that no doubt victim (PW6) failed to identify the accused during trial, but there is sufficient evidence and material on record to bring home the offences charged against the respondent.

13. Regarding cousin of victim (PW7), learned counsel for the state submits that PW7 identified the accused in court and deposed that he had seen the accused commit the offence on the victim which duly proves the case of the prosecution regarding commission of the offence. Also the testimony of PW7 is fully corroborated by Complainant (PW1) and brother of complainant (PW10) which clearly nails the accused person in the case and the accused person ought to have been convicted.

14. With regard to deficiencies in the prosecution matter, particularly in the testimony of Investigating Officer (PW18), learned counsel for state submits that

lapses on the part of PW18 are insufficient to discard the entire prosecution case and minor lacunas in the investigation should not affect the case of the prosecution adversely.

15. Learned counsel for state also submits that there is no delay in registration of FIR and if there is any delay, same is not fatal to the prosecution case.

16. We have heard the counsel for the petitioner and also carefully perused the impugned judgment dated 31.10.2014. In our view, trial court has given good and valid reasons to disbelieve the prosecution case. Regarding the delay in registration of FIR, it can be said that Investigating Officer, Sangeeta (PW18) had taken about 5 hours in recording the statement of complainant (PW1) and the plea taken by PW18 to justify the lapse on her part that she was busy in medical examination of the victim and recorded the statement only after returning from hospital is false because as per the MLC (Ex.PW14/A), victim reached the hospital at about 12:26AM which means that the statement of complainant(PW1) was recorded by PW18 prior to reaching the hospital. Thus there is an inordinate and unexplained delay in registration of FIR and also in recording of the statement of witnesses u/s 161 Code of Criminal Procedure. Also there is a delay in sending the copy of FIR to Illaqa Magistrate u/s 157 Code of Criminal Procedure. Hence in our opinion, trial court has rightly rejected the case of the prosecution on the point of delay in FIR.

17. In addition there is an important contradiction in the testimony of Investigating Officer, Sangeeta (PW18). Initially she deposed that she was busy in the medical examination of the victim and could not record the statement of the complainant (PW1) prior to 3AM but in cross examination when the attention was drawn towards the rukka (Ex.PW18/A) she admitted that she had recorded the statement of complainant prior to going to hospital which casts a reasonable doubt over the prosecution case.

18. It is the admitted case of prosecution that PW6(Victim) and PW7(Cousin of victim) were present at the spot of incident but the testimony of PW6 was rightly discarded as she failed to identify the accused. Also the testimony of PW7 is insufficient to prove the identity of the accused as there was complete darkness at the place of incident and PW7 admitted in his cross examination that the entire incident had taken place within the period of one minute. Thus PW7 had no sufficient time to notice the features of the culprit. Hence prosecution had failed to adduce any other cogent evidence to prove the identity of the accused.

19. Regarding medical evidence, the FSL report is not helpful to connect the accused with the alleged crime because if accused had inserted his penis there would have been some semen cell on the underwear/pant of the accused and some vaginal cell would have been found in the penis wash but no such evidence was found. Thus there is a possibility that accused might not be the person who committed the offence.

20. In the case of Sarwan Singh Vs. The State of Punjab, , it was held that in

criminal cases mere suspicion, however, strong, cannot take place of proof.

21. The Apex Court in *Govindaraju @ Govinda Vs. State by Srirampuram P.S. and Another*, court has discussed in detail the scope and power of the appellate court and reiterated that the presumption of innocence of an accused is reinforced by the order of acquittal. Relevant portion of the judgment reads as under:

11. Besides the rules regarding appreciation of evidence, the Court has to keep in mind certain significant principles of law under the Indian Criminal Jurisprudence, i.e. right to fair trial and presumption of innocence, which are the twin essentials of administration of criminal justice. A person is presumed to be innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefits of such presumption which could be interfered with by the courts only for compelling reasons and not merely because another view was possible on appreciation of evidence. The element of perversity should be traceable in the findings recorded by the Court, either of law or of appreciation of evidence.

12. The Legislature in its wisdom, unlike an appeal by an accused in the case of conviction, introduced the concept of leave to appeal in terms of Section 378 Cr.P.C. This is an indication that appeal from acquittal is placed at a somewhat different footing than a normal appeal. But once leave is granted, then there is hardly any difference between a normal appeal and an appeal against acquittal. The concept of leave to appeal under Section 378 Cr.P.C. has been introduced as an additional stage between the order of acquittal and consideration of the judgment by the appellate Court on merits as in the case of a regular appeal. Sub-section (3) of Section 378 clearly provides that no appeal to the High Court under sub-sections (1) or (2) shall be entertained except with the leave of the High Court. This legislative intent of attaching a definite value to the judgment of acquittal cannot be ignored by the Courts.

13. Under the scheme of the Cr.P.C., acquittal confers rights on an accused that of a free citizen. A benefit that has accrued to an accused by the judgment of acquittal can be taken away and he can be convicted on appeal, only when the judgment of the trial court is perverse on facts or law. Upon examination of the evidence before it, the Appellate Court should be fully convinced that the findings returned by the trial court are really erroneous and contrary to the settled principles of criminal law."

22. While deciding the present leave to appeal, the aforesaid principles culled out by the Apex Court are to be kept in view. In the present case the investigation conducted by Investigating Officer, Sangeeta (PW18) is tainted. There is no compliance of section 157 of Code of Criminal Procedure and there is inordinate delay in recording the statements of witnesses u/s 161 of Code of Criminal Procedure by PW18. Also the explanation given by PW18 for lapses on her part is unconvincing, untrustworthy and has no sanctity. Further, there is no

evidence on record to establish that the accused was the person who committed the alleged sexual act with the victim. Hence in our opinion trial court has rightly rejected the case of the prosecution as it failed to bring home the guilt of the accused beyond the shadow of all reasonable doubts.

23. For the reasons stated above, the judgment of acquittal recorded by the trial court does not call for any interference. The Leave Petition is meritless, the same is accordingly dismissed.