

(2016) 01 DEL CK 0164

In the Delhi High Court

Case No : CRL.L.P. 708 of 2015 & Crl. L.P. 708/2015

State of NCT of Delhi

APPELLANT

Vs

Umesh Chauhan

RESPONDENT

Date of Decision : 29-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, Section 313, Section 378, Section 417

Penal Code, 1860 (IPC) — Section 304, Section 34, Section 376, Section 376 (2) (n), Section 376(2)(n), Section 502 (2), Section 506 (2)

Citation : (2016) 01 DEL CK 0164

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

Bench : Division Bench

Advocate : Aashaa Tiwari, APP, for the Appellant;

Final Decision : Dismissed

Judgement

G.S. Sistani, J.—CRL. M. A. 16054/2015

1. By the present application, the petitioner seeks condonation of 64 days delay in filing the present leave petition.

2. Heard.

3. Delay in filing the present leave petition is condoned.

4. Application stands disposed of.

CRL.L.P. 708/2015

5. State seeks leave to appeal under Section 378 of the Code of Criminal Procedure against the order dated 16.05.2015 passed by the trial court by which the accused (respondent herein) stands acquitted under Section 376 (2) (n) and Section 502 (2) of the Indian Penal code.

6. The case of the prosecution can be summed up as under :

(i) On 19.08.2013 the prosecutrix was on duty as security guard at DLF Promenade, Vasant Kunj Mall at D-II, Parking Lift No. 5 and 6 from 2 p.m. till 10 p.m.

(ii) After completing her shift she changed her clothes and came out of Mall. When she reached at bus stop the respondent came there in his Innova and offered to drop the prosecutrix at her residence in Masoodpur Dairy.

(iii) The respondent was known to the prosecutrix as the prosecutrix was the neighbour of the fiancée of the respondent. The prosecutrix sat in the car of the respondent but the respondent instead of dropping her to her home took her to Khel Gaon where he used to reside at Servant Quarter No. 576, Khel Gaon, Hauz Khas, New Delhi and the accused repeatedly and forcibly committed rape upon the prosecutrix without her consent and against her will. He also criminally intimidated her and threatened to kill her if she disclosed the incident to anyone.

(iv) On the next day on 20.08.2013 the respondent took the prosecutrix to Anand Vihar ISBT and made her to board a bus to Hardoi. The prosecutrix from there reached the house of her mausi in Malihabad. The prosecutrix called her husband but did not narrate the incident to him out of the fear of the respondent and came back to Delhi with him on 23.08.2013.

(v) On 29.08.2013 the prosecutrix narrated the whole incident to her husband and thereafter a complaint was lodged with PS Vasant Kunj, North and upon complaint FIR under Section 376(2)(n) / 506 (2) of the Indian Penal Code was registered. The prosecutrix was also got medically examined.

7. Ms. Aashaa Tiwari learned APP for the State submits that the trial court has failed to take into consideration the settled law that the statement of the prosecutrix alone can be the basis of convicting the accused for the offence under Section 376 of the Indian Penal Code and would not require any corroboration.

8. It is also contended that there was ample material on record to show that the respondent was responsible for removing the prosecutrix in his Innova Car and taking her to his guest house in the Kothi and repeatedly raped her in the night.

9. Counsel contends that the trial court has erred in holding that the MLC of the prosecutrix did not corroborate with her testimony as the testimony of the prosecutrix if consistent does not require any corroboration.

10. Counsel also submits that the delay of one week in registration of the FIR is not fatal to the facts of the present case as the delay stands properly explained as the prosecutrix has deposed that she was being continuously threatened by the respondent which prevented her from registering the FIR.

11. Counsel also contends that the statement of the prosecutrix was consistent and trustworthy and thus the trial court erred in acquitting the respondent.

12. It is also submitted by the learned counsel that the trial court has lost track

of the fact that the husband of the prosecutrix had immediately lodged the missing report with the police after his wife was missing on 20.08.2013 vide DD No. 7A.

13. Counsel submits that the trial court has ignored vital pieces of evidence which had emerged during the course of trial as also the scientific evidence placed on record. Reliance is placed on the case of State of H.P. Vs. Asha Ram reported in , AIR 2006 (SC) 381 wherein it has been held that the testimony of prosecutrix needs no corroboration and even minor contradictions and discrepancies in the statement of prosecutrix cannot be a ground to ignore the testimony of the prosecutrix. On the same argument, reliance is also placed on the case of Narender Kumar Vs. State (NCT of Delhi) reported in , AIR 2012 SC 2281. Counsel for the State further submits that while relying on Narender Kumar (Supra), the Hon"ble Apex Court has laid stress that the sole testimony of the prosecutrix, more particularly with regard to the cases of rape should be dealt with utmost sensitivity and the court should not get swayed by minor contradictions.

14. We have heard the learned counsel for the State and also carefully examined the judgment of the trial court and examined the testimonies of the witnesses, copies of testimonies were provided by the counsel which are seen and returned.

15. In the present case, PW-1 i.e. the prosecutrix is the material witness. Since her testimony is of utmost importance, we deem it appropriate to reproduce the same :

"In the month of August, 2013 I was employed as a guard at DLF Promenade, Vasant Kunj Mall and I was employed with SLV Company which was providing these jobs, presently I am unemployed.

On 19.08.2013, I was on duty at D-II, Parking lift No. 5 & 6 and I was on duty from 02:00 PM to 10:00 PM. After completing my duty I changed my clothes and I came out of the mall. When I had reached the bus stop accused present in the court today met me and he was present in Innova car. The accused told me "Mami" I should sit in the car and he would drop me at Masoodpur Dairy at also used to call me mami. I sat in the vehicle of the accused and the accused took his vehicle to Khel Gaon where he was residing. The no. of the vehicle was UP 32 and the other numbers I do not remember. I asked the accused as to why he had brought me to Khel Gaon and that he should drop to me to my house. Accused did not drop me at my house. Accused took me to guest house in the kothi and the accused raped me in the night. Accused also threatened me that I should do whatever he wanted me to do otherwise he would kill me. Accused also told me that I should not narrate this incident to anybody.

On the next day in the morning of 20.08.2013 it was raining heavily and the accused came to drop me at Anand Vihar, Bus terminal and he made me board a bus to Hardoi. I reached the house of my mausi in Malihabad which is in Uttar Pradesh. I made a call to my husband. I did not narrate the incident to my

husband and the accused made a call to my husband and told him that I was at the village and that if he would do any proceedings the accused would get me picked up from the village "Uthwa Loonga". On 23.08.2013, I came back to Delhi with my husband.

On 29.08.2013, I narrated the incident to my husband and then a complaint was lodged which is Ex.PW1/A and which has been signed by me at point "A". I had shown the place of incident to the IO on which the site plan was prepared which is Ex.PW1/B signed by me at point "A".

At this stage, a sealed envelope duly sealed with the seal of Court placed on the judicial file is taken out and the same is opened. Statement under Section 164 Cr.PC is shown to the statement at the signatures of the prosecutrix is at point A in three pages and the same is now Ex.PW1/C. I was also taken to the hospital for my medical checkup. I cannot tell the name of the hospital where I was taken. I had put up my thumb impression on the MLC at point A which is now Ex.PW1/D. I have also put my thumb impression at point A on the arrest memo of the accused on Ex.PW1/E. I have also put my signature at point A on the disclosure statement of the accused at point A on Ex.PW1/F. One enrolment form on record is also shown to the witness and she identifies the same to be hers and the same is Ex.PW1/G. The witness correctly identifies the accused present in the Court.

At this stage Id. APP for the State seeks permission to cross examine the witness on some material points.

XXXXXX by Id. APP for the State.

It is correct that when accused met me he offered me to drop me home saying that he was going to meet his fiancée whose house was situated near my residence. It is correct that accused had also snatched my phone and switched it off in order to prevent me to raise alarm. It is correct that the accused had taken me to servant quarter in khel gaon where no one was present as the employer of the accused had gone somewhere. It is correct that during the night accused had sexual relations with me at least 4 to 5 times. It is correct that on reaching my mausi's house at Malihabad my mausi had informed my husband who had brought me to Delhi subsequently. I was taken to AIIMS for my medical examination.

XXXXXX by Ms. Santosh Mishra, Id. Counsel for the accused.

The vehicle for dropping the employees home was not provided for employees working till 10:00 PM shift but it was provided to female employee who was working in shift from 04:00 PM to 01:00 AM

Question : I put it to you that Vibha Singh your colleague met you and asked you that the staff vehicle is waiting outside the mall, why you are not going home with that office vehicle. What do you have to say?

Answer : The vehicle was not provided till 10:00 PM shift.

Question : I put it to you that you told Vibha Singh that your father has come to take you outside the mall and that you would go with him?

Answer : I never stated so to Vibha but I told her that my father will come and I will go with him.

It is incorrect to suggest that Rampal and Kamini had met me and asked me the same question. In fact Rampal and Kamini never met me. I had walked about a distance of 10 minutes when the accused met me. Normally when I was working from 02:00 PM to 10:00 PM shift I used to walk to my house. My house is at a distance of about 30 minutes walk from the mall. I used to carry a mobile phone but I do not remember its number now. I have never called the accused from my mobile phone but the fiancée of the accused had called him from my mobile phone number once earlier. I have stated to the police in my statement that accused had told me "Mami, I will drop you home" confronted with the statement Ex.PW1/A where it is so recorded. My house was at a distance of 20 minutes walk where I was picked up by the accused. Accused had taken the same way as the way to my house but he had not stopped the vehicle. I had raised hue and cry when the accused had not stopped the vehicle but since the vehicle was locked my voice could not have come out. It is correct once I had travelled in the car of the accused previously when then the fiancée of the accused was also accompanying me. I had not told anybody in the bus or on the way Anand Vihar or that I had not made any call to anybody as my SIM was broken by the accused. I have not told my mausi at Malihabad about the incident as I had been threatened by the accused not to disclose about the incident. I have not made my complaint at Malihabad to the police or panchayat about the incident due to the same reason. It is correct that my husband had lodged a missing report with the PS Vasant Kunj (N) and my husband had taken me to the police station. I have given statement to the police Ex.PW- 1/DA which bears my signature at point A. I have read over the statement 23.08.2013 the same has also been signed by the husband.

It is correct that I used to make telephone calls to the accused and used to have conversation with him. I have not made calls to the accused on call details at point A on document mark PW-1/D. From the mall till Khel Gaon could have taken about 10 - 15 minutes by car. It takes about 20 - 25 minutes walk to reach my house from the mall. I had screamed and raised hue and cry in the car. Vol. I had asked the accused that he should drop me at my house but did not do so. There was no guard at the gate to Khel Gaon. I had raised hue and cry [Shor machaya] when I was made to get down from the car. The distance where the accused had stopped the car and the place where he had taken me was about 7 - 10 yards.

Question : I put it to you when you got down from the car with the accused, at that point of time did you tried to run away or to call anybody for your safety?

Answer :Where could I run in the night and I would not even get an auto rickshaw and the accused had threatened me not to raise hue and cry.

Accused did not sleep the whole night and I also did not sleep. It is incorrect to suggest that one friend of the accused was also accompanying him in the vehicle in which he had taken me to Khel Gaon. I had gone once to Bhatnagar Public School and at that time the fiancée of the accused was also with me. I have knowledge that the accused used to go to meet his fiancée at her house. It is incorrect to suggest that I had met the accused for the first time at the house of the fiancée. For the first time I had met the accused when he was standing outside my house and he had seen me as he had come to meet his fiancée it is incorrect to suggest that on the another day when the accused was passing by my house then I had called out to the accused that "Umesh Ji you are not recognizing me" and that "I had called you the previous night". On the day of incident accused had made calls to me two three times and I had also called him once. I do not remember the time of the calls. There was nobody by the name of tuntun (servant) in the room of the accused at Khel Gaon. Vol. I did not have meals that night. The accused also did not have his meals that time. I had been threatened by the accused at that is why I did not tell him that I wanted to go to my house instead of the bus terminal. The accused was accompanied by his prospective father in law when he had taken me to ISBT. I had disclosed about the incident to the prospective father in law of the accused. The father in law of the accused boarded the vehicle on the way towards ISBT but I do not know the name of the place from where he boarded. I have not disclosed this fact to the police. I had not raised hue and cry even after reaching ISBT. Accused Umesh had called for his father in law on phone but I do not know the contents of the conversation. The prospective father in law of the accused knew everything about me as he was my neighbour in Delhi and the ticket to Malihabad (UP) was brought by father in law. My daughter aged about 1 year was with my mother at that time. It is incorrect to suggest that accused had gone to the airport for one hour to see off somebody while I was in his house at Khel Gaon. The accused and his father in law had left ISBT after the bus in which I was travelling had departed from ISBT. I had not disclosed about the incident to the driver, conductor or any other passenger of the bus after the accused had left. I do not remember whether the accused had gone in the morning to repair the tyre of the vehicle before he dropped me to ISBT. I had not disclosed about the incident to my mausi or to any other relative in Malihabad but I had only disclosed to my husband. I had disclosed about the incident to my husband after he had reached Malihabad. I had returned back to Delhi on the next day. It is correct that I had not made complaint to the Police Station regarding the incident on the next day or next day of the day after and I had given in writing that nothing had happened to me. It is correct that the accused had abused my husband on phone after 4 - 5 days. Accused had threatened my husband that he will kill my family members if I had made any complaint anywhere. It is correct that I have lodged this case after the accused had abused my husband on phone. It is incorrect to

suggest that accused had taken me to Mehrauli and got me a suit. It is incorrect to suggest that I was having a love affair with the accused and it is further incorrect to suggest that because of this I used to meet the accused at Bhatnagar Public School and it is incorrect to suggest that because of it I used to have long telephonic conversation with the accused. Accused had asked me to accompany him to the village but I had refused to go with him. I never had conversation with the accused regarding as to where we would sleep in the village. It is incorrect to suggest that I had lodged this false case against the accused due to pressure of my husband or relatives or the police.

At this stage, the counsel for the accused states that she is in possession of a CD containing the recording of the accused and the victim and request to put the same to the witness.

Objected to by Ld. APP for the State.

Request not allowed as the CD pertains to electronic records and the same is required to be proceeded in accordance with law."

16. It is the case of the prosecutrix that she was known to the respondent and she had agreed to accompany him after she finished her duty as a security guard at DLF Promenade, Vasant Kunj Mall at D-II, Parking Lift No. 5 on 19.08.2013, the respondent had agreed to drop her at Masoodpur Dairy at her house as the respondent was going to meet his fiancée whose house was situated near the house of the prosecutrix. Instead of driving to Masoodpur Dairy, the respondent drove to a guest house in the Kothi where he repeatedly raped the prosecutrix in the night and threatened to kill her in case she narrated this incident to anybody. On the next day i.e. 20.08.2013 in the morning, it was raining heavily and the respondent came to drop the prosecutrix at Anand Vihar, Bus Terminal and he made her board a bus to Hardoi and she reached the house of her mausi in Malihabad, Uttar Pradesh from where she made a call to her husband and she had also narrated the entire incident to him.

17. In this case, the statement of the respondent was recorded under Section 313 of the Code of Criminal Procedure besides he also produced one defence witnesses, namely, DW-1 Mohan Singh and the respondent also testified in court as DW-2. The respondent is the prospective son-in-law of DW-1. The respondent was engaged with the daughter of DW-1. Reading of his evidence would show that his daughter and the prosecutrix were both working as security guards in DLF Promenade, Vasant Kunj Mall. The prosecutrix used to visit the room whenever the respondent used to visit them and his daughter had cautioned the prosecutrix not to visit the house of the respondent. The witness also goes on to testify that the prosecutrix used to make phone calls to the respondent, his daughter had cautioned her as well but she did not listen and this witness has also testified that he had received a call from the father of the respondent at about 11 p.m. this witness did not specify the date informing him that the prosecutrix was sitting with the respondent outside Khel Gaon, the official

residence of the employer of the respondent. He testified that he reached there at about 9:00 a.m. on the next day and found that the prosecutrix was sitting on a bench and besides the respondent and one male person who used to prepare food was also present. He had reasoned with the prosecutrix who was insisting that he should marry the respondent. He had advised the prosecutrix to go to her house but she refused to do so and instead she had gone to her mausi's house and thereafter the respondent had taken the prosecutrix to Anand Vihar.

18. DW-2, respondent herein has also testified with regard to his mobile number and the mobile number of the prosecutrix. He testified that the prosecutrix was forcing him to marry her despite she being a married woman and mother of a child.

19. The trial court has acquitted the respondent based on the evidence on record after carefully analysing the same.

20. We find that there is unexplained delay of 10 days in recording of the FIR. We also find the testimony of the prosecutrix to be highly unreliable and unsafe to convict the respondent herein. The evidence would reveal that the husband of the prosecutrix had made a complaint Ex.PW-1/A when his wife, the prosecutrix did not reach home. On 23.08.2013, the prosecutrix had made a statement to the police vide Ex.PW-1/DA which was signed by her at Point A and by her husband at Point B wherein she had stated that she was alright and nothing wrong happened to her. Thereafter, on 29.08.2013 after a gap of one week, the FIR was registered which creates a serious doubt on the testimony of the victim. Further the victim has failed to explain the delay in registering the FIR; this gains further importance as after the complaint made by her husband she made a statement to the police on her return and did not talk after the rape and does not explain the delay. The trial court has noticed that the prosecutrix had given contradictory statements at different places. Prosecutrix in her statement Ex.PW-1/DA had stated to the police that she went to her Mausi's house on her own without telling her husband and no one had taken her anywhere on any pretext. She also stated that she was safe and healthy and no untoward incident was happened against her.

21. In The State of Karnataka Vs. Mapilla P.P. Soopi reported in , AIR 2004 SC 85, the Apex Court while considering an order of acquittal in a case of rape held as under:

"1. The High Court did not accept the evidence of the parents of the victim on the ground that though they came to know of the incident on 23.9.1981 itself the Police complaint was lodged only on the next day evening and the explanation given by the prosecution for the delay was unacceptable.

4. Undue delay in lodging the complaint without acceptable evidence has also contributed to the doubt in the prosecution case. Hence the High Court was justified in allowing the appeal.

5. For the reasons stated above this appeal fails and the same is dismissed."

22. In *Surajpal Singh and Ors. v. The State* reported in , AIR 1952 SC 52, the Hon"ble Supreme Court held as under:

"13. It is well established that in appeal under section 417 of the Criminal Procedure Code, the High Court has full power to review the evidence upon which the order of acquittal was founded, but it is equally well- settled that the presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons."

23. In *Tota Singh and Anr. Vs. State of Punjab* reported in , AIR 1987 SC 108, the Hon"ble Supreme Court made the following observation:

"6.... The jurisdiction of the Appellate Court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower Court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the Court below is such which could not have been possibly arrived at by any Court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the Court below has taken a view which is a plausible one, the Appellate Court cannot legally interfere with an order of acquittal even it is of the opinion that the view taken by the Court below on its consideration of the evidence is erroneous."

24. In *State of Rajasthan Vs. Raja Ram* reported in , AIR 2003 SC 3601 the Hon"ble Supreme Court held as under:

"7. There is no emerge on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence in a case where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference."

25. In a recent case *Govindaraju @ Govinda vs. State by Sriramapuram P.S. and Anr.*, AIR 2012 SC 1292, the Hon"ble Supreme Court discussed the law while dealing with appeals against acquittal in the following words:

"13. When an accused is acquitted of a criminal charge, right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the court. However, this principle must be applied keeping in view the facts and circumstances of a case and the thumb rule is that whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus and the error in appreciation of the evidence is apparent on the face of the record then the court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves.

14. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and it has to prove a charge beyond reasonable doubt. The presumption of innocence and the right to fair trial are twin safeguards available to the accused under our criminal justice system but once the prosecution has proved its case and the evidence led by the prosecution, in conjunction with the chain of events as are stated to have occurred, if, points irresistibly to the conclusion that the accused is guilty then the court can interfere even with the judgment of acquittal. The judgment of acquittal might be based upon misappreciation of evidence or apparent violation of settled canons of criminal jurisprudence.

15. We may now refer to some judgments of this Court on this issue. In *State of M.P. v. Bacchudas*, the Court was concerned with a case where the accused had been found guilty of an offence punishable under Section 304 Part II read with Section 34 Indian Penal Code by the trial court; but had been acquitted by the High Court of Madhya Pradesh. The appeal was dismissed by this Court, stating that the Supreme Court's interference was called for only when there were substantial and compelling reasons for doing so. After referring to earlier judgments, this Court held as under: (SCC pp.138-39, paras 9-10).

9. There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of

the guilty is not less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference.

10. When the conclusions of the High Court in the background of the evidence on record are tested on the touchstone of the principles set out above, the inevitable conclusion is that the High Court's judgment does not suffer from any infirmity to warrant interference."

26. In the light of the aforesaid dictum and for the reasons stated above, we find no merit in this leave to appeal. The same is accordingly dismissed.