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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 12th August, 2009*

+ **CRL.L.P. 144/2009**

STATE Petitioner
Through: Mr. Amit Sharma, Advocate

versus

BABLOO Respondent
Through: Nemo

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

PRADEEP NANDRAJOG, J. (ORAL)

Crl.M.A.No.9300/2009

There is a delay of 16 days in filing Crl.L.P.144/2009.

For the reasons stated in the application we condone the delay.

Crl.L.P.No.144/2009

1. The respondent has been acquitted of the charge of having committed rape on the prosecutrix Kumari "M".
2. As per the prosecutrix she was raped sometimes in the month of September 2005 and thereafter on 20.12.2005 and 12.1.2006.

3. Medical evidence in the form of MLC Ex.PW-6/A of the prosecutrix showed that hymen was ruptured; there was no evidence of the same being recently ruptured.

4. It is thus apparent that the prosecutrix had been subjected to sexual intercourse in the past and in all probability on more than one occasion.

5. Proceeding on the aforementioned basis, the learned Trial Judge has considered the evidentiary value of the testimony of the prosecutrix who alleged that the respondent was the rapist.

6. The learned Trial Judge has noted the following:-

A. The prosecutrix could not tell the day in the month of September 2005 when she was allegedly raped for the first time. In her cross-examination she disclosed that the time was 2:00 AM i.e. the middle of the night. She stated that her younger brother was in the house. She claimed to have been raped on the roof of the house.

B. The second and the third time when the prosecutrix claimed to be raped it was in the night and the dates were 20.12.2005 and 12.1.2006. She disclosed the place of rape to be the bathroom of her house.

C. The site plan Ex.PW-4/A prepared by the investigating officer pertaining to the residential house of the prosecutrix does not show the location of the bathroom.

7. The conclusions drawn by the learned Trial Judge are

that it is unbelievable that the prosecutrix could be raped in her house in the night when all family members are expected to be present. The argument of learned counsel for the State that the prosecutrix is a minor and hence her consent is immaterial has been deal with by the learned Trial Judge who has held that issue was not of consent or otherwise. The issue was, whether the prosecutrix was raped in the manner she alleged.

8. Seeking leave to appeal the grounds urged are as under:-

“a) That the impugned judgment is bad in Law and against the fact of the case. The opinion formed by the Ld trial Court is unreasonable and hence the impugned judgment is liable to be set aside.

b) That the Ld. Trial Court has ignored the fact that the prosecutrix has fully supported the case who is admittedly minor and hence there is no contradiction or improvement in her evidence.

c) That the Ld. Trial Court ignored the finding that there is corroboration in the M.L.C. as doctor has opined the hymen ruptured.

d) That the Id. Trial Court further erred in acquitting the accused on ground of defective investigation. It is submitted that it is well settled that defective investigation cannot be a ground to let go an accused when there is otherwise direct and sufficient evidence to bring home his guilt.

e) That the Ld. Trial Court erred in acquitting the accused on the ground that the testimony of prosecutrix was not reliable and unbelievable. However, the Ld. Trial Court completely ignored the fact that the accused could not bring anything on record to show that the prosecutrix, a minor had any reason to falsely implacable the accused and for that reason to face the risk of ostracism in society.

f) That the Ld. Trial Court erred in considering delay of 8 days as crucial. It is submitted that in rape cases delay cannot be the ground to acquit the accused. Moreover in the present case the victim was a minor and explanation has been shown by the prosecutrix in her cross-examination.

g) That the Ld. Trial Court has gravely erred and ignored the cross examination of PW-6 doctor in Gyne Departments of AIIMS. It is further submitted that the PW-6 on examination of prosecutrix found her hymen ruptured and in the history of MLC it was clearly recorded that the prosecutrix had been subjected to sexual assault three times.

h) That the Ld. Trial Court failed to appreciate that the evidence on record leads to only one conclusion i.e. the Accused is guilty of the committing the offence of rape.”

9. The grounds are as vague as vagueness can be.

10. It is unfortunate, that there is no application of mind while drafting the petition seeking leave to appeal. The evidence discussed by the learned Trial Judge and the conclusions arrived at have not even been attempted to be touched upon.

11. We expect some application of mind when petitions seeking leave to appeal are filed.

12. Be that as it may, we have perused the testimony of the prosecutrix.

13. Apart from the infirmities/deficiencies noted by the learned Trial Judge we may note that the prosecutrix, when questioned about the dimensions of the toilet in which she was

allegedly raped has stated as under:-

“Q: Is it correct that bathroom is of the size of 3 feet x 3 feet?

A. It is correct. “

14. We note that the aforementioned question and answer is followed by a note by the learned Trial Judge that the witness is not able to say exactly what 3 feet is but approximately refers to the distance.

15. Unfortunately, the learned Trial Judge has not brought out clearly as to what was the error in the approximate size deposed to by the prosecutrix.

16. The prosecutrix was aged 15 years when she deposed. She was not a child of tender age to not understand what 3 feet meant.

17. It is apparent that the prosecutrix is a shaky witness.

18. Learned counsel for the appellant can hardly dispute the premise, that based on common course of events and human conduct, that family members are presumed to be present in their house in night time.

19. If this be so, it is highly doubtful that somebody could have forcibly raped the prosecutrix in her house when her family members were present.

20. Pertaining to the prosecutrix being raped in the bathroom, we find no infirmity with the view taken by the learned Trial Judge that in the absence of the site plan showing

the exact location of the bathroom it would be difficult for a Court to critically evaluate the evidence and indeed the investigating officer has done a sloppy job. How did the outsider access, un-noticed the bathroom?

21. Even otherwise, it would be difficult to accept that a girl in her teens can be raped in a bathroom size whereof is 3 feet x 3 feet. Even if the prosecutrix was wrong in her approximations, taking the size of the toilet to be 4 feet x 4 feet, it would be difficult to commit rape in such a small area.

22. As noted above, the prosecutrix claimed to have been raped on the aforesaid dates in the nights. Her family members were present in the house; so are they expected to be. Assuming she was overcome by fear and did not yell, it is unbelievable that her family members would not have noticed her mental and physical condition when she came out of the toilet after being raped.

23. The theory of being raped in the roof in the middle of the night of September 2005 appears most unnatural for the reason other family members would certainly have been distracted if a daughter of the family was molested in the roof of the house as claimed by the prosecutrix.

24. It appears to be a case where the prosecutrix has been having sex by consent with somebody and has falsely implicated the respondent.

25. We note that the respondent has taken a consistent defence of false implication due to prior financial dealings between his father and the father of the prosecutrix.

26. The view taken by the learned Trial Judge cannot be called as a perverse view. It cannot be said that the view is not a probable view.

27. It is settled law that if on the evidence before it, view taken by the learned Trial Judge is a probable view, the appellate Court would not interfere in the finding returned.

28. No case is made out to grant leave to appeal.

29. The petition is dismissed.

PRADEEP NANDRAJOG, J.

INDERMEET KAUR, J.

AUGUST 12, 2009
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