

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

+ **Crl.M.A 12713/2010 & CRL.LP No.246/2010**

% **Date of Decision: 09.09.2010**

State

.... Petitioner

Through Mr. Mr. Lovkesh Sawhney,
Additional Standing Counsel

Versus

Tanvir

.... Respondent

Through Nemo

CORAM:

HON'BLE MR. JUSTICE ANIL KUMAR

HON'BLE MR. JUSTICE SURESH KAIT

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | <i>To be referred to the reporter or not?</i> | NO |
| 3. | Whether the judgment should be reported in the Digest? | NO |

ANIL KUMAR, J.

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Crl.M.A No.12713/2010

This is an application seeking condonation of delay of 101 days in filing the leave petition.

For the reasons stated in the application delay is condoned.

CRLP- 246 of 2010

1. The petitioner/State has sought leave to appeal against the judgment dated 24th November, 2009 passed by Additional Sessions Judge in S.C No.29/2009 in FIR No.412/2008 P.S.Seelampur under Section 328/365/366/343/506/376 of I.P.C acquitting the respondent of the charges and setting him at liberty.

2. According to the learned Additional Public Prosecutor the case of the prosecution was that Mehboob, a vegetable vendor lodged a report of her daughter missing since 4 AM on 8th October, 2008. The father of the missing daughter had a suspicion on Tanvir/respondent.

3. The missing daughter, however, came on 11th August, 2008 to the police station and gave her details to SI Shetlander Kumar, PW-10 who took her into custody. She revealed that on 8th October, 2008 she had gone for micturition at about 4 AM when Tanvir took her with him. Later after appellant Tanvir took her, she lived with him as his wife. The statement of the daughter (changed name) Sabina was recorded under Section 161 of the Criminal Procedure Code and was also recorded as Ex.PW-6/B under Section 164 of the Criminal Procedure Code before the Magistrate on 11th August, 2008. Before the Magistrate she stated that she was made to inhale some stupefying substance, resulting in Sabina not exercising her discretion and the respondent thereafter took

her to the house of her sister-in-law (Bhabhi) where she was confined till 11th October, 2008. She was intimidated with the death of her brother, in case she would not allow the appellant Tanvir to have sex with her. According to her Tanvir/respondent had sex with her 3-4 times, against her will.

4. The daughter, Sabina, of Mehboob PW-1, a vegetable vendor was medically examined. Accused/respondent was also medically examined and the charge sheet for offences under Section 328/365/366/343/506 & 376 of IPC was filed to which accused pleaded not guilty. During the trial the prosecution examined Mehboob, father of the prosecutrix and other police witnesses besides Dr.Sumit, PW-9; Dr.Upasana, PW-11. Statement of the accused under Section 313 of the Criminal Procedure Code was also recorded. He revealed that he had been falsely implicated by the prosecutrix Sabina and her father PW-1 as he had declined marriage proposal of Sabina.

5. The Trial Court relying on (1980) (4) SCC 262, Bharwada Bhoginbai Hirjibai, 1983 (3) SCC 217, Chander Prakash Kewal Chand Jain, 1990 (1) SCC 350; Raghbir Singh, 1993 (2) SCC 622; Gurmeet Singh, 1996 (2) SCC 384 and Padam Lal Pradhan, 2000 (10) SCC 112 held that though the conviction can be based on the sole testimony of prosecutrix, however, the testimony should inspire confidence and

should be reliable. The Trial Court considered the statement of the prosecutrix recorded under Section 161 of the Criminal Procedure Code, thereafter the statement recorded on 13th October, 2008 before the Magistrate under Section 164 Cr.P.C, another supplementary statement given by her under Section 161 of the Criminal Procedure Code and the statement deposed before the Court. Considering the contradictions in statements and contradictions with the statements of other witnesses, especially the contradictions which go to the root of the matter. Trial Court has held that her version is neither consistent nor reliable. In the initial statement recorded by the investigating officer of the case, it was stated by her that she was caught hold off by the accused and when she tried to get herself free the accused had caught hold of her neck and he put a cloth on her mouth because of which she became unconscious and gained a little bit of consciousness at about 2 P.M. and gained complete consciousness only during evening hours. The trial Court also relied on the fact that she did not get herself medically examined though she did not say that she did it on account of any threat by the accused. Before the Magistrate under Section 164 Cr.P.C her version changed where she deposed that she was made to inhale some stupefying substance and when she regained consciousness she protested, however, the accused threatened to kill her brother. Before the Magistrate under Section 164 Cr.P.C she did not depose that the accused had caught hold of her hand and then caught

hold of her neck. Before the Court she deposed that she was not allowed to go out of the room till 11th October, 2008 in the house of the sister-in-law (Bhabhi) of the accused. It was deposed by her that there was no bathroom and toilet in that room which fact was found to be utterly improbable. The trial Court also noticed that in the house where the prosecutrix was allegedly confined besides the sister-in-law of the accused, her husband, brother of the accused and one more girl was also residing. Despite that the prosecutrix did not raise any alarm or made any attempt to escape from there. Her statement that her mother had reached the house where she was confined and brought her to the police station also was not corroborated, as in the statement before the Magistrate she had deposed that the accused/respondent had sent her to police station for getting the FIR cancelled.

6. The other inconsistencies relied on by the trial Court for acquitting the respondent/accused are that after recording her statement under Section 161 of the Criminal Procedure Code she was sent with lady constable, Kunti (PW3) for medical examination but she refused to undergo the medical examination. After coming back to police station she was again taken to GTB Hospital for examination on 14th October, 2008 after she agreed for medical examination before the Magistrate on 13th October, 2008. The prosecutrix deposed that she did not disclose the name of accused before the doctor, which is in

contradiction of what is stated by constable (PW3). The statement of Dr.Upasana (PW11) was also relied on deposing that on examination of prosecutrix her hymen was found to be intact and there was no sign of injury and introitus was patulous. According to history given to the doctor in MLC as Ex.PW.11/A, she had gone with some friend on 8th October, 2008 and came back on 11th October, 2008. Before the doctor Upasna, PW-11 she did not complain of any sexual or physical assault and no mark or injury was found on her neck nor her hymen was found to be torn which negates the allegation of the prosecutrix that the accused had sexual intercourse with her on account of the threat by the accused that if she would not agree for sexual intercourse he would instantaneously kill her brother.

7. The trial Court has also considered the fact that if she was confined to one room without any toilet or bathroom from 8th October, 2008 till 11th October, 2008, she must have been taken out to the toilet outside and she could have raised alarm or could have attempted to escape from there. The version of the prosecutrix that the accused had sexual intercourse with her in a house where his sister-in-law, her husband and a girl were residing, was found to be improbable. The prosecution did not prepare the site plan or seize the mattress of the room or other material evidence where the prosecutrix was confined for three days.

8. Discrepancies have also been noticed by the trial Court regarding arrest, as according to constable Attar Singh (PW4) on 13th October, 2008 when he went with SI Shetlander Singh (PW10) to Gali No.12, Shastri Park, Delhi the accused was arrested on being pointed out by the prosecutrix. However, in the chargesheet, Gali No.12, Jhuggi No.C-343, Shastri Park, Delhi has been shown as the address of the complainant. The version of the police official about the arrest is not supported by the prosecutrix. The statement of the police official that on 13th October, 2008 the accused was arrested at the address which was pointed out by the prosecutrix, was also found to be contrary to the statement given by the prosecutrix father that on 11th October, 2008, two days prior to the alleged arrest by the police officials, he went to the police station where accused was present with her daughter. The trial Court has also relied on the fact that the blood samples of the accused and his underwear were sent to FSL which does not substantiate the case of the prosecution. In these circumstances it has been held that the statement of the prosecutrix does not inspire confidence and considering the entire evidence, prosecution has failed to make out the charges against the respondent and acquitted him.

9. It is no more res integra that the High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own

conclusion and findings in place of the findings recorded by the trial Court, if the findings are against the evidence or record or unsustainable or perverse. However, before reversing the finding of trial Court for acquittal, the High Court must consider each ground on which the order of acquittal is based and should record its own reasons for accepting those grounds and not subscribing to the view of the trial Court that the accused is entitled to acquittal.

10. This also cannot be disputed that in reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused which is rather fortified and strengthened by the order of acquittal passed in his favour. Even if on fresh scrutiny and reappraisal of the evidence and perusal of the material on record, if the High Court is of the opinion that another view is possible or which can be reasonably taken, then the view which favours the accused should be adopted and the view taken by the trial Court which had an advantage of looking at the demeanour of witnesses and observing their conduct in the Court is not to be substituted by another view which may be reasonably possible in the opinion of the High Court. Reliance for this can be placed on 2009(1) JCC 482, Prem Kumar v. State of Rajasthan; 2008 (3) JCC 1806, Syed Peda Aowlia v. the Public Prosecutor, High Court of A.P, Hyderabad; Bhagwan Singh and Ors v. State of Madhya Pradesh, 2002

(2) Supreme 567; AIR 1973 SC 2622 Shivaji Sababrao Babade & Anr v. State of Maharashtra; Ramesh Babu Lal Doshi v. State of Gujarat, (1996) 4 Supreme 167; Jaswant Singh v. State of Haryana, 2000 (1) JCC (SC) 140. The Courts have held that 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.

11. The Additional Public Prosecutor has contended that the variations in the statements of the prosecutrix given at different times that is under Section 161 of Criminal Procedure Code, under Section 164 of Criminal Procedure Code before the Magistrate and deposition before the Court are minor and the statement of the prosecutrix can be relied and no improvements have been made. The plea of the learned Additional Public Prosecutor, however, is not acceptable in the facts and circumstances. Prosecutrix has made improvements in her statement. The plea that the accused had sexual intercourse with her 3-4 times against her wishes under the threat that her brother would be killed cannot be accepted. The medical evidence reflects that her hymen is

intact and she had no injury on her private parts. Even her allegation that she was caught by neck and forced to have sexual intercourse cannot be accepted. The petitioner herself first refused to get her medically examined. However, after giving statement before the Magistrate under Section 164 Cr.P.C agreed to undergo medical examination. Her plea that she was confined to a room for three days which did not have any bathroom and a toilet and she did not go out of the room cannot be believed. The house where the prosecutrix was allegedly confined had other occupants. The case of the prosecution is not that the other occupants of the house where the prosecutrix was confined abated the acts of the respondent. The prosecution has not prepared the site plan of the house nor has tried to recover any evidence from the room where the prosecutrix was allegedly confined and where the accused is alleged to have forcibly had sexual intercourse. Regarding the arrest of the accused, the version of the prosecution is not supported by the testimonies of the prosecutrix and her father. The version of the police official is that accused was arrested from an address on pointing out by the prosecutrix on 13th October, 2008 which address is not of the accused but of the complainant. The prosecutrix has denied that the accused was arrested from the house which was pointed out by her. The prosecutrix had rather deposed that the accused had sent her to the police station to cancel the FIR whereas the father of the prosecutrix had categorically deposed that on 11th

October, 2008 when he came to the police station the accused was present with the prosecutrix.

12. The learned Additional Public Prosecutor has raised no other point except that the testimonies of the prosecutrix are consistent and they have only minor variations. This Court also on perusal of the statements made by the prosecutrix does not accept the plea of the learned Additional Public Prosecutor. The learned Additional Public Prosecutor has failed to make out a case that the findings of the trial Court are unsustainable or perverse on any of the grounds. In the circumstances on perusal of the testimonies of the witnesses and the material on the trial Court record, this Court is also of the opinion that the prosecution has failed to make out any such perversity in the judgment of the trial Court which will entitle prosecution/petitioner for leave to appeal against the judgment dated 24th November, 2009 acquitting the respondent of the charges against him. In the circumstances the leave to appeal petition, is without any merit and the leave is declined and the petition is, therefore, dismissed.

ANIL KUMAR, J.

SURESH KAIT, J.

SEPTEMBER 09, 2010

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